

## METHODS OF WARFARE

# Interview with General Sir Rupert Smith\*

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### ***Is there a change in the paradigm of war?***

Yes, I believe that in recent decades we have lived through a shift in the paradigm of war. What has happened is that in the past, in what I call “industrial war”, you sought to win a trial of strength and thereby break the will of your opponent, to finally dictate the result, the political outcome you wished to achieve.

In our new paradigm, which I call “war amongst the people”, you seek to change the intentions or capture the will of your opponent and the people amongst which you operate, to win the clash of wills and thereby win the trial of strength. The essential difference is that military force is no longer used to decide the political dispute, but rather to create a condition in which a strategic result is achieved. We are now in a world of continual confrontation and conflicts in which

\* The interview was conducted on 7 January 2007 in London by Toni Pfanner (Editor-in-Chief of the International Review of the Red Cross).

the military endeavour to support the achievement of the desired outcome by other means.

***So you imply that the war/peace dichotomy is not relevant any more?***

Instead of a world in which peace is understood to be an absence of war and where we move in a linear process of peace–crisis–war–resolution–peace, we are in a world of continuous confrontation. The opponents in confrontation seek to influence each, including with military acts. To be effective, these acts must be coherent with and allied to the other measures that affect intentions so as to gain advantage in the confrontation.

***You said that the period of “industrial war” is shifting towards a “war amongst people”. Is there still a potential that industrial wars will nevertheless occur?***

I am not saying that you won’t get big fights. The Yom Kippur War was an example of war amongst the people in that the Egyptian President Sadat was trying to alter the basis of the confrontation over the Sinai. It was still a big conflict with a lot of casualties. However, you’ve got to remember that there are weapons that can kill large quantities of people – WMD. The point about weapons of mass destruction is that mass destruction and “industrial war” largely ended when one could destroy faster than one could build. These weapons have been used since the end of the Second World War, not to impose one’s will by force but to change the will of the opponent. We talk of the deterrent effect; we’re aiming at changing minds.

The new wars take place amongst the people as opposed to “between blocs of people”, as occurred for instance in the Second World War. I am not saying that people were not killed in that war; they were, in their millions. But there was a clear division as to which side everybody belonged to and whether they were in uniform or not. This is not the case in “wars amongst the people”. The people are part of the terrain of your battlefield.

***But don’t traditional wars still happen in many parts of the world?***

Armed forces, of both states and non-state entities, undoubtedly abound all around the world, as do military confrontations and armed conflicts. However, the event known as “war” is nowadays especially directed against non-combatants; war as a battle in a field between men and machinery, war as a massive deciding event in a dispute in international affairs, such wars no longer exist. Take the example of the United States, a state with the largest and best-equipped military forces in the world, which is unable to dictate the desired outcome as it did in the two world wars. In the present conflicts, military forces with great potential to exert power are unable to do so to advantage when challenged by forces that are by the same standards ill-equipped and disorganized.

***Military victory is not the desired outcome?***

The ends to which wars are conducted have changed from the hard, simple, destructive objectives of “industrial war” to the softer and more malleable

objectives of changing intentions, to deter, or to establish a safe and secure environment. In “industrial war” the opponents seek to resolve the political confrontation that was its cause directly, by military force. In “war amongst the people”, military force does not resolve the confrontation in this way. The forceful acts only contribute – positively or negatively – to the efforts of one or the other side to win the clash of wills and thus decide the confrontation.

***You distinguish between confrontation and conflict.***

I use the words confrontation and conflict at risk, as these two expressions tend to be used in journalistic circumstances as synonyms. They aren't. Confrontations occur all day. In everyday life they are the basis of all politics. They occur when two or more groups of people have a different outcome in mind. There may be a confrontation between two parties over an issue; one or other party may be persuaded by argument or have other reasons to adopt the other party's position or desired outcome. However, if one or other party will not agree and will not follow a set of rules or abide by the law, then they may adopt conflict as a course of action. In “industrial war” the conflict was intended to win the trial of strength so as to impose one's will. In “war amongst the people” the object of the conflict is to create a condition, to change intentions, so that the opponent adopts the desired outcome to the confrontation.

***And the conflict involves violence ...***

The conflict is always violent and the intention is always lethal or destructive, but it is important to understand that the objective of the military act is to support the achievement of the confrontational objective of getting the opponent to change his mind. Threats of the use of force as a demonstration, as deterrence, are contributory to sending the message to get you to change your mind.

Let us take the situation, for example, on the Lebanon/Israel border in July/August 2006. There was a confrontation between Hezbollah and Israel, a political, cultural and religious confrontation. Up until that point when the open fighting broke out, the level of conflict was very low, sporadic and mostly centred on the border. After the abduction of the Israeli soldiers, the conflict started and it became regional, or certainly threatened to be regional. However, in the end, the armed conflict was not to be decisive. It re-established the terms of the confrontation.

***The use of force remains a means to influence that confrontation?***

At the start of the conflict, the Israelis declared that the purpose of their military operations was the destruction of Hezbollah and the defeat of the rocket attacks. Now these are hard industrial objectives, and within two or three days they stopped pursuing them because they realized that, first, it wasn't achievable, and second, it wasn't actually what they were trying to do with their armed forces. They were trying to re-establish a confrontational position to their own advantage. And their rhetoric started to shift over the next three or four weeks to things like re-establishing the deterrent effect of the Israeli Defence Force, establishing a

negotiating position to get their soldiers back, making the Lebanese government responsible for policing its own borders, etc. Now, those are all conditional mind/intention-changing objectives: confrontational objectives, not conflictual objectives.

In the conduct of hostilities, whether you are on the confrontational or the conflict side, you have to understand where confrontation and conflict fit together. The more you can assure that the logic between them flows and connects, the more successful your military acts will be for the purpose of achieving your objective in the confrontation. This objective determines how the hostilities are conducted.

***You were Divisional Commander during the Gulf War and lived through the different stages of confrontations and conflicts, including an “industrial war” in the initial hostilities.***

We can start the story in 1990, when Kuwait was occupied by Iraq and a coalition was formed under US leadership to conduct a theatre-level confrontation, which we called “Desert Shield”. And that was to change the intention of the Iraqis and deter further possible ventures to the south.

Then followed “Desert Sword”, another confrontation, trying with this threat and about two months of heavy diplomacy to get Saddam Hussein to retire voluntarily from Kuwait. It failed and became a conflict, a campaign with the objective to destroy the Republican Guard and liberate Kuwait. These were hard objectives. In that sense, it was a conflict that looked like an industrial war.

But there was no way of translating it into a strategic success of winning the confrontation. We subsequently remained in confrontation with sanctions and no-fly zones, and every now and then Saddam Hussein initiated a battle by locking a tracking radar onto a bomber. In 2002 we started to ramp up another confrontation and the deployment of forces with operation “Iraqi Freedom”. Once again this became a conflict when he failed to bow to our demands. The operation quickly achieved its military objectives, but again we failed to translate the military campaign’s success into a strategic confrontational success. We sank down to a whole series of tactical events which we are incapable of linking to the achievement of our confrontational goal of winning the will of the Iraqi people. Here is an example of a complete dislocation between the military activity and the political activity.

***In the “war amongst the people” scenario the opponents want to influence the people.***

The objective *is* the will of the people. Tactically, the opponent often operates according to the tenets of the guerrilla, and the terrorist depends on the people for concealment, for support, both moral and physical, and for information. One seeks to provoke an over-reaction so as to paint the opponent in the colours of the tyrant and oppressor and thereby gain sympathy, support and credibility for one’s cause. Moreover, besides provocation there is the propaganda of the deed, which establishes one’s importance to be taken seriously and be treated on equal terms.

These conflicts take place amongst the people in another sense, through the media: we fight in every living room in the world as well as on the streets and fields of a conflict zone. And, finally, the opponent seeks to erode the will of the people by the never-ending conflict.

***The time factor is therefore important.***

“Wars among people” tend to be timeless. In “industrial wars” we fought to win as quickly as possible because we had turned the whole society over to fighting those wars and the whole industry to running the war effort. You do not do that in “wars amongst the people”. These are a continuous effort, and it is particularly in the non-state groupings’ interest not to fight to a timetable. They will wait and have another go at a time that suits them. Another of the reasons they are timeless is that the military objectives are not strategically decisive, with the result that you have to hold your position by military means, whether it is a demilitarized zone, a blue line or whatever, until such time as you might find the political solution. Incidentally, the international community is still in Korea, still in Cyprus, still in Lebanon, and the story of Israel is a continuous story of conflict.

***The will to fight seems to be quickly eroded in democratic societies.***

A characteristic of these kinds of war is that we fight so as not to lose the force. Nobody wants to bring home more body bags than absolutely necessary. You do not want to be seen wasting lives in this theatre. This is mainly because in these modern operations, the outcome is not meant to be definitive – and therefore the operation has to be sustained, open-ended. You don’t want to reduce your ability to sustain these long-term operations.

***Communication plays a major role in influencing this will.***

We still see war within the inter-state industrial model because the media usually depicts it from the perspective of the conventional military forces sent in by nation-states. Moreover, because the media have little time or space to convey information – a minute or three on screen or on air, a few inches in the daily press – they must work with cognitive images and jargon in order to be appealing to and understood by their audiences. These images and jargon are all of individuals and situations involving conventional armies in industrial war. In itself, this has now created a new loop, since much of the audience and even segments of the media realize that there is a dissonance between what is being shown and experienced and what is being explained – the former clearly being other forms of war, the latter being desperate attempts to use the framework of inter-state war to interpret “war amongst the people”.

Taking an example from our daily TV news flashes from Iraq, we see heavily armed soldiers patrolling in tanks through streets full of women and children; or else we see ragged civilian men and children attacking heavily armed soldiers in tanks. The pictures clash with our cognitive senses, and the interpretation then laid on them by the reporter or studio commentator – attempting to explain the military actions of the soldiers – confuses us further. A

new reality is being restructured into an old paradigm, for the most part unsuccessfully. The effect of the media is that by and large, everything is visible to an audience to a greater or lesser degree and you are now operating literally in a theatre of war. Command has to be understood in that sense, because you are acting out a drama in front of an audience, an audience which in part it is your objective to influence.

***In the present Iraq war, the initial idea propagated was “winning the hearts and minds of the Iraqi people”, which now tends to be heard much less often.***

The origins of the idea in the phrase have long been detached from the original event, so we must make sure we understand what is being meant. In large measure, the strategic objective *is* to win the hearts and minds of the people. In other words this isn't a supporting activity of your tactical battle. It is the purpose of what you are doing. So arriving afterwards to paint a school or deliver toothpaste isn't helping if you've blown the school away in the first place.

***What happens in the case of an occupation? The invading forces were sometimes received as liberators, but the occupying forces alienated at least part of the population.***

I'm assuming that in the examples you have in mind, the troops arrived by force. So let's not talk about being invited in or coming in by multinational or international mandate. The armed forces may win a fight or may occupy, and break and destroy the hostile forces. They have appeared to achieve the strategic and theatre-level objectives. The occupied may well greet you, but it doesn't mean that it is genuine or that everybody believes their greetings. It doesn't mean to say that your welcome will last for very long because, to use an old English idiom, “Guests and fish go off after three days”.

For example, even if the occupation of Lebanon by Syria wasn't wholly resisted (although admittedly the occupation of Lebanon by Syria wasn't done by force); because it actually brought peace it was a better situation than they had before. There has to be a reason for you to stay there, unless you are going to coerce the reason. You then go right back into a confrontation, but if the will of the occupied population is not broken and it refuses to co-operate, the strategic and theatre initiative is handed to the occupied.

Within the idea of confrontation and conflict, the opponent is both a military and a political being, meaning that focusing on and overcoming the resistance of the one without reference to the other will not lead to the desired strategic outcome. With this in mind, the analysis and planning should have started with the understanding of the strategic objectives – to take the example of Iraq, the will of the Iraqi people and their leader, and the necessary measures to win it over, or at least keep it neutral.

This means that the proper process should have been to start to define the successful outcome of the occupation before the occupation actually commenced – before the invasion. The lead agency for this planning should therefore not have

been the military specifically, but rather those responsible for reaching the desired outcome and conducting the occupation.

***Non-state actors are increasingly participating in such conflicts.***

Both confrontations and conflicts are conducted by multinational groupings or non-state groupings. Either because they are done under a multi-national alliance – in which I would include the UN but also NATO and the European Union – or under a coalition such as that led by America in Iraq, or even under some rather less formal coalitions where you have military forces in the theatre co-operating closely with the non-governmental aid agencies and so forth. You also find some rather more dangerous informal alliances where you have external groups of forces operating with one or other of the internal factions in the theatre you are operating in. The Northern Alliance in Afghanistan in 2001–2 with the US Coalition, or the Kosovo Liberation Army (KLA) in Kosovo in 1999 with NATO, are examples of these rather more dangerous informal alliances.

In addition, states operate against groups that are not states, whether they are Hamas, Hezbollah, the Taliban or the Irish Republican Army (IRA). And these non-state actors, together with these rather softer malleable objectives, make it extremely difficult to form strategies, to direct strategy, to define what winning is and so forth. Finally, we still have to find new ways to use the facilities and equipment that we purchased for other purposes a few years before.

Incidentally, the theatre or operational level is more and more important because of these alliances. They are frequently formed in the theatre – the geographical area containing in its military and political totality an objective the achievement of which alters the strategic situation to advantage. These collaborative confrontations run into the conflictual confrontations. They can exist even with the ICRC: the ICRC and the military have common objectives with regard to a number of things. We are having a collaborative confrontation; our objectives, our outcomes can coincide if there is sufficient commonality. We are then working together right on the edge of ICRC principles of neutrality. Both parties have to be very conscious of how far they can go and both can only operate within the tolerance of that collaborative confrontation.

***Non-state actors have advantages because they can circumvent the weaknesses that states have, they can provoke the state in order to repress drastically and alienate parts of the population without winning military battles. How do states have to respond? In the case of Northern Ireland, do they respond at the tactical level? So you have to look at the longer term goals?***

You do not play to their game even if it's to your disadvantage in the short term. You can win every fight and lose the war. The Americans and the British have not lost a single fight in the present conflict in Iraq. Why can't they aggregate those wins into a victory? Answer: these military successes are dislocated from a political purpose.

The objectives are always intentions. You asked about Northern Ireland. In Northern Ireland we arrived at a decision very early on that we would only have conflict when initiated by the terrorist, because we, the military, were in support of the police or civil power rather than acting in our own right. Attacks were always initiated by the opponents, sometimes tactically to our disadvantage, but we did not go out to start a conflict.

***How does this change in the paradigm of war influence the conduct of hostilities on the ground? Is there still a possibility of distinguishing between combatants and civilians?***

In this area our interpretations and understandings have to change. First of all, the people amongst which you fight are part of your objective at the confrontational level. The more you can isolate them from the actual combatant, the more you can get them to abstain from assisting the combatant or even gain their tacit approval for what you are doing.

Second, the population is important to the opponent, for concealment, for moral and material support and for political legitimacy; the people are his objective too. At times you may think that they, the people, may be very close to and almost – if not completely – allied to your principal opponent. For example, for all sorts of religious, cultural and ethnic reasons the Shiite population of southern Lebanon is culturally well disposed to Hezbollah when faced by the Israelis. So to suppose that you can do more than achieve their neutrality in this matter would be absurd, but you should nevertheless understand that they are part of your objective.

In Lebanon, the confrontational objective of the Israelis was, in particular, the Shiite population. At the very least you wish them not to support attacks on you. They themselves cannot be the object of an armed attack unless you are supposing that you are going to bomb them into submission, or carry out some “stalinesque” ethnic cleansing or whatever. If you are not going to do that, you need to understand that the military measures you take are to bring them to change their intentions to your advantage. This may well involve the use of military force, but your targets will be those to change intentions.

***This is obviously difficult.***

Yes, as at the same time the population is being used by your true opponent to shield him, to supply him, to give him political legitimacy, to give him information and so forth. They are very much part of his alliance. In this confrontation you are trying to win them from your opponent to a greater or lesser degree in order to isolate the opponent. If you want an example, this is what the West did to the Warsaw Pact to win the Cold War, which was a confrontation; it never became a conflict. It was the revolt of the people of the Warsaw Pact satellite states, and then the revolt of the people of Russia against their government, that marked the end of the cold war, not a military adventure at all. So it can be done.

***So you should try to distinguish between combatants and civilian population during hostilities?***

Your objective is to capture the population's intentions, and the more you treat all the people as your enemy, the more all the people will be your enemy. This is why I talk about this change of logic, because in the purely military logic they're supporting the opponent: they must be part of the enemy, but they are not, they are part of your confrontational objective.

The strategies of provocation and propaganda seek to break or dislocate the political approach from the military approach. Thus if you operate so that your measures during conflict are treating all these people as enemies or even as combatants, you are dislocating your confrontational approach from the military act. You are acting on behalf of your enemy; you are even co-operating with him, because that is what your opponent is aiming at with his strategy.

In Lebanon, Hezbollah and the Shiite population and Hezbollah and the Lebanese government are in a collaborative confrontation, and every time you act in such a way as to dislocate your military acts in conflict from those to win the confrontation, you are strengthening your opponent. When I talk about this dislocation of the military act, the whole point of the strategies of deed, provocation and erosion of will is to get you to act to the advantage of the opponent's confrontation.

***During a conflict, it is difficult to strike the balance between confrontational and conflict objectives.***

Yes, it is difficult to do this because each set of objectives is found in a different logic: the logic of the confrontation and that of the conflict. Nevertheless this has to be done. I think the trick is to seek your opponent's logic junction and attack that.

# A la guerre comme à la guerre:<sup>\*</sup> patterns of armed conflict, humanitarian law responses and new challenges<sup>†</sup>

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## **Abstract**

*Continuous transformation of armed conflict since the adoption in 1864 of the first international humanitarian law treaty compels international humanitarian law to adapt accordingly. These adaptations, through either customary law or new multilateral treaties, always have been towards greater protection, greater reach. As for treaty practice, international humanitarian law historically has been substantially revised every twenty-five to thirty years. This article links those revisions to specific conflicts which laid bare deficiencies in the existing law. What follows is thus a chronicle of conflicts with their most critical humanitarian issues. From this emerges a picture of the changing face of armed conflict since the middle of the nineteenth century. The article also considers recent challenges to international humanitarian law and speculates on possible responses.*

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\* French proverb, meaning that one has to go to war with the means available, and adapt to the circumstances.

† I dedicate this article to my friend, neighbour and colleague, physics professor Michael Wiescher, with whom I had the pleasure of co-teaching a course on nuclear warfare. An earlier version of this article is forthcoming in Jan Wouters and Sten Verhoeven (eds.), *Armed Conflicts and the Law*, 2007.

## Introduction

International humanitarian law (IHL), like most law, tends to develop *in response* to occurrences. Tracing the general principles of IHL – military necessity, humanity, proportionality and distinction – to particular events is impossible. Such is not the case with specific prohibitions or obligations stemming from them. This article sets out to identify historic events that decisively impacted upon the development of modern treaty-based IHL.<sup>1</sup> Historically, IHL has been substantially revised every twenty-five to thirty years by major new multilateral treaties. Explaining the historical context of these treaties and the rationale behind them is the principal goal of this paper. The evolution of customary IHL or a substantive analysis of IHL, on the other hand, is beyond its scope.<sup>2</sup> A recent *magnum opus* emphasizes the role of custom in responding to challenges to IHL.<sup>3</sup>

The overview here chronicles eleven armed conflicts spanning the development of modern treaty-based IHL, from its inception after the battle of Solferino of 1859 to its current application to the so-called global war on terror. For each conflict the most important humanitarian issue(s) and IHL response(s) are identified. Additionally, it seeks to detect unanswered challenges posed by more recent armed conflicts. As already stated, it is devoted almost exclusively to multilateral treaties, that is, international legal rules generated by the explicit consent of states. Other IHL sources, such as national legislation (e.g. military codes) and decisions of domestic and international tribunals – elements that are important to the formation of international custom – receive minimal consideration.

- 1 The continuous transformation of war – by whom war is fought, how war is fought, and why war is fought – has been described by military historians John Keegan and Martin van Creveld, by political scientist Mary Kaldor, and by writer-academic-politician Michael Ignatieff. This article owes much to their work. Sir John Keegan is the author of numerous books on the history of war, including *The Face of Battle*, Viking Books, New York, 1976, *The Second World War*, Penguin, New York, 1989, *A History of Warfare*, 1993, and *The First World War*, Alfred A. Knopf Inc., Westminster, Maryland, 1998; from van Creveld I consulted *The Transformation of War*, Free Press, New York, 1991, from Kaldor *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 1999, and from Ignatieff *The Warriors' Honor: Ethnic War and the Modern Conscience*, Metropolitan Books, New York, 1997, and *Virtual War: Kosovo and Beyond*, Metropolitan Books, New York, 2000. Another important source has been the online treaty database of the International Committee of the Red Cross (ICRC), available with comments at <<http://www.icrc.org>> (last visited 27 November 2006). Extremely useful for studying the changing face of global violence and posing major challenges to conventional wisdom is *Human Security Report 2005: War and Peace in the 21st Century*, produced by the Human Security Centre of the University of British Columbia, Canada.
- 2 See e.g. Leslie Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester University Press, New York, 1993; Michael Howard, George Andreopoulos and Mark Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven, 1994; Marco Sassoli and Antoine Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, Geneva, 1999; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn, ICRC, Geneva, 2001; Anthony Rogers, *Law on the Battlefield*, 2nd edn, Manchester University Press, Manchester and New York, 2004.
- 3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Cambridge, 2005.

Although some of the armed conflicts discussed below are poles apart, it should be noted that contemporary IHL knows only two categories: international armed conflict and non-international armed conflict.<sup>4</sup> Political scientists and (military) historians use additional categories or labels, some of which are considered below because they help us better understand the humanitarian issues and challenges posed over time by armed conflict.

## On wars small and big, old and new

Military historians like to distinguish between *small* and *big* wars. What do they mean? The distinction refers in essence to the various military endeavours of (former) empires such as France, Great Britain,<sup>5</sup> Russia or the United States.<sup>6</sup> Writing from an American perspective, Max Boot discerns at least four types of small wars: punitive (to punish attacks on American citizens or property), protective (to safeguard American citizens or property), pacification (to occupy foreign territory) and profiteering (to grab trade or territorial concession).<sup>7</sup> The *Small Wars Manual* of the US Marine Corps (1940) offers the following definition:

As applied to the United States, small wars are operations undertaken under executive authority, wherein military force is combined with diplomatic pressure in the internal or external affairs of another state whose government is unstable, inadequate, or unsatisfactory for the preservation of life and of such interests as are determined by the foreign policy of our Nation.<sup>8</sup>

How do small wars differ from the United States' big conventional wars such as the War of Independence, the Civil War, the First and Second World Wars, the Korean War and the Gulf War (1991)? The manual states that "In a major war, the mission assigned to the armed forces is usually unequivocal – defeat and destruction of the hostile forces." Big wars usually have clear battle lines separating the combatants. And there is usually a clear beginning and end. "This is seldom true in small wars", the manual continues. In these encounters, US forces

4 In the Middle Ages, Western Christendom distinguished between *bellum romanum* and *bellum hostile* (Michael Howard, "Constraints on warfare", in Howard et al., above note 2, pp. 2–5). The former could be waged against "outsiders, infidels, and barbarians". No holds were barred and all those designated as enemy, whether bearing arms or not, could be indiscriminately slaughtered. Within Christendom, however, *bellum hostile* – war characterized by constraints – was the norm. The applicability of what is now called IHL depended on who the enemy was. This self-serving distinction may seem archaic in the 21st century, but later in this article it will be shown that "terrorists" are often characterized as today's "outsiders, infidels, and barbarians."

5 For Britain see e.g. Hew Strachan (ed.), *Big Wars and Small Wars*, Routledge, London, 2006; see also <<http://www.britains-smallwars.com/>> (last visited 27 November 2006).

6 A very interesting read is Walter Laqueur, *Guerrilla: A Historical and Critical Study*, Weidenfeld & Nicolson, London, 1977, ch. 2: "Small wars and big armies".

7 Max Boot, *Savage Wars of Peace: Small Wars and the Rise of American Power*, Basic Books, New York, 2002, pp. xv–xvi.

8 All quotes from the *Manual* are taken from Boot, *ibid.*, p. 284. The *Small Wars Manual* (492 pp.) is available from the website of the Air War College: <<http://www.au.af.mil/au/awc/awcgate/swm/index.htm>> (last visited 27 November 2006).

have a more ambiguous mission, “to establish and maintain law and order by supporting or replacing the civil government in countries or areas in which the interests of the United States have been placed in jeopardy”. Small wars are messier, lesser conflicts: the adversary skirmishes, snipes, ambushes and sets off booby traps; often there is no clear distinction between combatants and non-combatants. As Bruce Berkowitz notes, “It’s tough to think of any small war that ended with a triumphal parade, partly because few small wars are popular, and partly because it is often hard to tell if the war is really over. Small wars can drag on indefinitely.”<sup>9</sup>

In *New and Old Wars: Organized Violence in a Global Era* (1999), Mary Kaldor argues that during the 1980s and 1990s a new type of organized violence has developed, especially in Africa and eastern Europe. Old wars were an activity of the centralized, “rationalized”, hierarchically ordered, territorialized modern state. As that type of state gives way to new types of polity emerging out of new global processes, so war as currently conceived is, she claims, becoming an anachronism. The new wars, she observes, involve a blurring of the distinctions between war, organized crime and large-scale violations of human rights, between internal and external, public and private, military and civil, and ultimately between war and peace itself.<sup>10</sup>

Kaldor contrasts the new wars with earlier wars in terms of how they are financed, their goals and their methods.<sup>11</sup> Only her argument regarding methods will be considered here, because financing and goals do not concern IHL. First, she observes, today’s ratio of civilian to military casualties (8:1) is almost the reverse of what it was a century ago.<sup>12</sup> Behaviour that was once proscribed by IHL, such as atrocities against non-combatants, sieges and destruction of historic monuments, now constitutes an essential component of the strategies of the new mode of warfare. Second, she notes, “In contrast to the vertically organized hierarchal units that were typical of “old wars”, the units that fight the new wars include a disparate range of different types of groups such as paramilitary units, local warlords, criminal gangs, police forces, mercenary groups and also regular armies including breakaway units of regular armies.” “In organizational terms, they are highly decentralized and they operate through a mixture of confrontation and co-operation even when on opposing sides.”<sup>13</sup>

This article will later discuss the principal humanitarian issues raised by these new wars. As Kaldor contends, old wars were an activity of the centralized, “rationalized”, hierarchically ordered, territorialized state, a polity which reached

9 Bruce Berkowitz, *The New Face of War: How War will be Fought in the 21st Century*, The Free Press, New York, 2003, pp. 102–3.

10 Kaldor, above note 1, ch. 1. See along the same lines Carolyn Nordstrom, *Shadows of War: Violence, Power, and International Profiteering in the Twenty-First Century*, University of California Press, Berkeley, 2004.

11 Kaldor, above note 1, pp. 6–12.

12 These figures are contested in *Human Security Report 2005*, above note 1, p. 75 (“The myth of civilian war deaths”).

13 Kaldor, above note 1, p. 8.

its zenith in the nineteenth century. The adoption of the very first IHL convention can be traced back to one of the greatest battles of that century: the battle of Solferino of 1859.

## War as a tournament: Solferino

A most graphic and literary eyewitness account of battle is *A Memory of Solferino* (1862) by Henry Dunant.<sup>14</sup> While on a business mission to northern Italy this Swiss notable chanced to witness at Solferino the battle between the allied armies of Napoleon III and King Victor Emmanuel II of Sardinia and the army of the Austrian emperor Franz Joseph:

On that memorable twenty-fourth of June [1859], more than 300,000 men stood facing each other; the battle line was five leagues long, and the fighting continued for more than fifteen hours ... Among all the troops which are to take part in the battle, the French Guard affords a truly imposing sight. The day is dazzlingly clear, and the brilliant Italian sunlight glistens on the shining armour of Dragoons and Guides, Lancers and Cuirassiers ... What tragic, dramatic scenes of every kind, what moving catastrophes were enacted! In the First African Light Infantry Regiment, besides Lieutenant-Colonel Laurans des Ondes who fell suddenly, mortally wounded, Second Lieutenant de Salignac Fenelon, only twenty-two years old, broke an Austrian square, and paid with his life for his brilliant exploit. Colonel de Maleville, at the farm of Casa Nova, found himself outnumbered and his battalion's ammunition gone. Seizing the regiment's flag, he rushed forward in the face of terrific fire from the enemy, shouting: "Every man who loves this flag, follow me!" His soldiers, weak with hunger and exhaustion, charged behind him with lowered bayonets. A bullet broke de Maleville's leg, but in spite of cruel suffering he got a man to hold him on his horse and remained in command ... When the sun came up on the twenty-fifth, it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield; corpses were strewn over roads, ditches, ravines, thickets and fields; the approaches of Solferino were literally thick with dead.<sup>15</sup>

*A Memory of Solferino* is more than just an eyewitness account of one of the bloodiest battles of the nineteenth century. Dunant also made proposals for the future, in an appeal aimed at preventing a repetition of the horrific suffering of some 40,000 wounded lying in agony for days. He began a campaign that was eventually to result in the establishment of the International Red Cross and the adoption in 1864 of the first international humanitarian law treaty, the Geneva

14 Original title: *Un souvenir de Solf erino*; English translation published in 1986 by the ICRC, by courtesy of the American Red Cross; both the French and English version are available from the ICRC website. Page references are to the English printed version.

15 *Ibid.*, pp. 16–41.

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The roots of modern IHL are thus traceable to the mid-nineteenth century, and it was one person's actions rather than popular indignation or governmental initiative that sparked its development.

Until then all the treaties concerning the protection of war victims were circumstantial and binding only for the signing parties. These agreements were purely military-designed and based on strictly binding mutual obligations, and they were in force only for a specific armed conflict. The 1864 Geneva Convention laid the foundations for contemporary humanitarian law, characterized by standing written rules of universal scope to protect the victims of conflicts and multilateral in nature, open to all states.

Modern war theory dates back to the same period, with the publication in 1832 of Carl von Clausewitz's great work *Vom Kriege* (On war). Clausewitz's ideas were rooted in the reality that ever since the Peace of Westphalia of 1648, war had been waged overwhelmingly by *states*.<sup>16</sup> Westphalia had ended the Thirty Years War and ushered in the modern international system based on the nation-state. Prior to that, wars in Europe had been fought by diverse social entities: barbarian tribes, the Church, feudal barons, free cities, even private individuals. By the nineteenth century, however, war was seen as something that could be waged only by the state: *governments* made war, their instrument for doing so consisted of *armies*, and the *people* were excluded from it as far as possible.<sup>17</sup> Hence the central idea of what van Creveld calls "trinitarian war" is that the military constitute a separate legal entity which, alone among the organs of the state, is entitled to wage war.<sup>18</sup>

The promulgation in 1863 of the Lieber Code (see below), and in 1864 of the original Geneva Convention, heralded the era of "civilized" warfare between sovereign "civilized" nations, that is, nations that engage in ordered diplomacy, enter freely into legally binding treaties and govern effectively within their territory. Therefore, and despite the universal aspirations of the emerging international humanitarian law, the coming colonial wars against "savages" in the so-called "Scramble for Africa" (1884–1914) were waged with little restraint. Sure enough, "Exterminate all the brutes!" was to become one of the most famous sentences in European colonial literature.<sup>19</sup>

Civilized warfare went hand in hand with an unrestricted *jus ad bellum*, even among "civilized" nations. "The law of nations allows every sovereign government to make war upon another sovereign state",<sup>20</sup> and war was a

16 For a critique of Clausewitz, see Keegan (1993), above note 1, pp. 3–60.

17 Van Creveld, above note 1, p. 39.

18 *Ibid.*, p. 35.

19 Joseph Conrad, *Heart of Darkness*, Penguin Modern Classics, Harmondsworth, 1973 (1902), p. 71. For an inquiry into the origin and meaning of this one phrase see Sven Lindqvist, 'Exterminate all the Brutes' – *One Man's Odyssey into the Heart of Darkness and the Origins of European Genocide*, The New Press, New York, 1996 (English translation; original Swedish 1992).

20 Article 67 of the Lieber Code (see below).

legitimate “means to obtain great ends of state”.<sup>21</sup> It was only around the turn of the century that international law began to regulate – and limit – the right to use force in international relations.

The 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was a direct response to Henry Dunant’s appeal. Laid down in that convention and maintained by subsequent Geneva Conventions were the obligations of (i) providing relief to the wounded without any distinction as to nationality, (ii) respecting the neutrality (inviolability) of medical personnel and medical establishments and units, and (iii) respecting the distinctive sign of the red cross on a white background.

During this same period Abraham Lincoln, the president of the United States, promulgated the Instructions for the Government of Armies of the United States in the Field (or Lieber Code, after its author Professor Francis Lieber).<sup>22</sup> Prepared during the American Civil War,<sup>23</sup> the Code represents the first attempt to codify the laws of war. Although it is binding only on the forces of the United States, it largely corresponds to the laws and customs of war existing at that time. The Code formed the basis for the project of an international convention on the laws of war submitted to the Brussels Conference in 1874 and led to the adoption of the 1899 and 1907 Hague Conventions on land warfare.

Although it originated in the American Civil War, the Code primarily applies to (trinitarian) war between states. While the final section does deal with insurrection, civil war and rebellion, it was not incorporated into the said 1874 draft international convention. Not until after the Second World War was international regulation of armed conflict other than war between sovereign states introduced.

The first formal treaty regulating weaponry – the Declaration [of St Petersburg] Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight – stemmed from the invention, in 1863, by Russian military authorities of a bullet which exploded on contact with hard substances and whose primary object was to blow up ammunition wagons. In 1867 the projectile was modified so as to explode on contact with a soft substance. When used against human beings it was no more effective than an ordinary rifle bullet; it could put just one adversary *hors de combat*. Because of its design, however, it caused particularly serious wounds and would as such have been an inhuman instrument of war.<sup>24</sup> The St Petersburg Declaration of 1868, which has the force of law, led to the adoption at the Hague Peace Conferences of 1899 and 1907 of prohibitory

21 Ibid., Article 30.

22 The text of the Lieber Code is available on the ICRC website, <http://www.icrc.org> (last visited 1 December 2006).

23 Though President Lincoln never recognized the Confederate States’ claim to independence or sovereignty he did de facto recognize their belligerency and ordered that Confederates be treated as belligerents in war-related matters (e.g. affording prisoner-of-war status). The United States was thus willing to treat its own civil war for IHL purposes as if it were an international armed conflict. See Yair Lootsteen, “The concept of belligerency in international law”, *Military Law Review*, No. 166, 2000, p. 109, at pp. 114–15.

24 Kalshoven and Zegveld, above note 2), p. 20.

declarations on expanding (or “dum-dum”) bullets and on the use of asphyxiating gases.

## Great war: the First World War

The idealistic turn-of-the-century Hague movement came to an abrupt end with the outbreak in 1914 of the First World War. What was so exceptional about it for it to be called the Great War or the “war to end all wars”?

It was the first large-scale industrialized conflict, and it gave birth to the concept of total war. Industrialized warfare added a new dimension to fighting: men now battled machines; combat became anonymous; new weapons of mass destruction, such as poison gas, were used for the first time; and problems of supply assumed unprecedented proportions. At sea, submarines produced a new kind of combat that was particularly cruel when used without restriction. Put together, new technology, mass warfare, and the surprising strength of national economies created a terrible impasse. Neither side could win a rapid victory, and thus the war continued. Under these circumstances, everything depended on the integration of armies in the field, navies at sea, and citizens on the home front. More than ever before, whole nations became integrated fighting units. This tendency underlay the idea of total war, although its theoretical fine-tuning took place only in the 1920s and 1930s.<sup>25</sup>

Early in the First World War civilized warfare gave way to total warfare, though the percentage of civilian casualties directly caused by the war (5 per cent) remained far below that of the Second World War (close to 50 per cent). From an international legal point of view, however, *jus ad bellum* restrictions adopted after the war are more important than the IHL responses. First the Covenant of the League of Nations (1919) and later, explicitly, the Kellogg-Briand Pact (1928)<sup>26</sup> condemned recourse to war for the solution of international controversies. No longer did the law of nations allow every sovereign government “to obtain [through war] great ends of state”, as provided for in the Lieber Code.<sup>27</sup> Moreover, it was intended that within the framework of the League the world would disarm and the arms trade be brought under control. Under these circumstances the development of IHL took second place to *jus ad bellum* restrictions and disarmament.

There were nonetheless some developments in IHL in response to the war. The use by both sides of various chemical agents (such as chlorine, phosgene and mustard gas) became one of the most feared, and longest remembered, horrors of

25 Roger Chickering and Stig Förster (eds.), *Great War, Total War. Combat and Mobilization on the Western Front, 1914–1918*, Cambridge University Press, Cambridge, 2000, pp. 6–7.

26 Also known as the Pact of Paris.

27 See note 24 above.

the war. The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was adopted at the conference for the supervision of the international trade in arms and ammunition, held in Geneva under the auspices of the League of Nations in 1925. This by-product of the conference (also known as the Geneva Gas Protocol) turned out to be its only positive result.

Another major humanitarian issue of the First World War was the unprecedented number of prisoners of war (POWs). The Hague Regulations of 1899 and 1907 contained provisions concerning the treatment of POWs, but the war had revealed their deficiencies and lack of precision. The existing regulations did not, for example, provide for neutral inspection of prison camps, for the notification of prisoners' names or for correspondence with prisoners. Under ICRC auspices, the Convention relative to the Treatment of Prisoners of War was adopted in 1929. The most important innovations consisted in the prohibition of reprisals and collective penalties, the organization of prisoners' work, the designation, by the prisoners, of representatives and the control exercised by Protecting Powers.

In response to the experience of the First World War, the earlier Geneva Convention on the wounded and sick of armies in the field was also overhauled. The 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field contained provisions concerning the protection of medical aircraft and the use of the distinctive emblem in time of peace. Furthermore, the emblems of the red crescent and of the red lion and sun were recognized for countries already using those signs in place of the red cross. The provisions on repatriation of the seriously wounded and seriously sick prisoners were transferred to the convention on prisoners of war.

Far from marking the end of all wars, the Treaty of Versailles (also dubbed the *Diktat von Versailles*<sup>28</sup>) and unfinished business sowed the seeds of a truly total war barely twenty years later. These seeds began to sprout in the prelude to the Second World War – the Spanish Civil War.

## Passionate war:<sup>29</sup> the Spanish Civil War

Hitherto, international humanitarian law had been concerned only with *international* armed conflict, that is, war – whether declared or not – between (absolute) sovereign states.<sup>30</sup> As such IHL was ill-prepared for the approaching age

28 The Treaty of Versailles, which ended the First World War, imposed responsibility for the conflict on Germany. This entailed the loss of German territories and payments of huge reparations, which led to resentment among many Germans and undermined their acceptance of the new post-war regimes. The widespread dissatisfaction was used by Adolf Hitler, who denounced the treaty as a *diktat* (a decree/settlement imposed by the victorious nations).

29 Expression borrowed from Peter Wyden, *The Passionate War: The Narrative History of the Spanish Civil War, 1936–1939*, Simon & Schuster, New York, 1983.

30 But see note 22 and related text above on the Lieber Code, the American Civil War and the recognition of belligerency.

of eroding sovereignty in which many challenges were to come from without and *within*. The Spanish Civil War (1936–9) was a watershed in that it defied the prevailing legal notions of war.<sup>31</sup>

History calls it the Spanish Civil War, but it was no more a Spanish war or a civil war than the Vietnam war was a struggle between North and South Vietnam. In Spain the world was choosing sides for the years to come. The Republican *causa* stood against Hitler, the priests, the landowners, the military caste, the privileged. The opposing Nationalist *movimiento*, led by General Francisco Franco, lined up against Marxism, the labor unions, the land-hungry, the blasphemers. It was a holy war for both sides; the Great Divide of our age; the overture to fascism, the concentration camps, World War II. It was the rehearsal for Stuka dive-bombers, Molotov cocktails, total war against civilians. Never before had defenceless cities been set on fire by air raids. It was a war of protest. It brought to Republican Spain the most passionate young ideologues from fifty-five countries, some 50,000 dropouts of a committed time, including more than 3,000 American volunteers ... Stalin helped them with 1,000 pilots, with planes, tanks and more than 2,000 “advisers”. To the other side, Hitler contributed an entire air force with some 10,000 pilots and weapons specialists so that “Bolshevism will not take over Europe”. Mussolini, proclaiming victory “absolutely indispensable” to fascism, volunteered 75,000 Italian troops. More than 500,000 people died, 130,000 of them by execution.<sup>32</sup>

The Spanish Civil War (and the Second World War thereafter) provided compelling evidence of the need for the continuous adaptation of IHL in order to meet the challenges of the changing character of warfare. When the Geneva law on the protection of victims of armed conflict was updated and consolidated in 1949 (see below), states adopted for the first time a provision applicable to internal armed conflicts. It appears in each of the four new Geneva Conventions, and is known as “Article 3 common to the Geneva Conventions”. This mini-convention within a convention removes “armed conflict not of an international character” from the exclusive jurisdiction of the state concerned: all belligerent parties have the duty of treating humanely persons who take no direct part in hostilities or who have ceased to fight; summary executions are prohibited; and judicial guarantees necessary for a fair trial must be granted.

One of the novel elements that complicated the legal situation presented by the Spanish Civil War was the participation of foreign volunteers, of whom about 35,000 belonged to the (communist) International Brigades.<sup>33</sup> A similar situation was to occur half a century later in countries such as Afghanistan, Algeria, Bosnia and Herzegovina, Chechnya, Iraq and the Philippines, to which the

31 Antonio Cassese calls the Spanish Civil War a conflict *tertium genus*: “The Spanish Civil War and customary law”, in Antonio Cassese (ed.), *Current Problems of International Law*, Oxford University Press, Oxford and New York, 1975, pp. 287–317.

32 Wyden, above note 29, pp. 19–20.

33 *Ibid.*, pp. 982–4.

“Islamist International” dispatched thousands of mujahidin to fight against infidels.<sup>34</sup>

## Total war: the Second World War

The waging of war in increasingly urbanized and industrialized societies and the conversion of national economies to war economies challenged another fundamental IHL principle, namely the distinction between civilians and combatants, and between civilian and military objects.

In a war economy much of the civilian infrastructure became targets for attack. The battlefield, no longer limited and clearly defined as at Solferino, was everywhere and was occupied by civilians and soldiers alike. As victims of war, the former were not merely collateral damage: Nazi ideology targeted certain groups *as such*, and the Allied powers resorted to “strategic bombing” of civilian population centres to break the enemy’s morale (“coercive warfare”).<sup>35</sup> As a result, close to 50 per cent of the casualties in the Second World War were civilians and major historical cities were reduced to rubble, albeit the aforementioned Declaration of St Petersburg had established the principle that “the only legitimate object which States should endeavour to accomplish during war is to weaken *the military forces* of the enemy” (emphasis added).

The immediate legal response to the horrors of the Second World War was the prosecution of the major German and Japanese war criminals before the International Military Tribunals of Nuremberg and Tokyo, as well as thousands of domestic trials for war crimes and crimes against humanity. The statutes of the International Military Tribunals and the body of Second World War jurisprudence constitute an important contribution to the development of IHL.

The war sealed the fate of the first multilateral security organization, the League of Nations. Its successor, the United Nations, was given a mandate that prominently includes the promotion of human rights. This and the subsequent shift in conflict trends to non-international armed conflict have led over time to a convergence of IHL and the new international human rights law, or between “the law of Geneva” and “the law of The Hague” on the one hand and “the law of New York” on the other. It is no coincidence that the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the first UN treaty addressing a humanitarian issue, applies in time of peace *and* of war.

As stated in the previous section, the Second World War prompted an overhaul of the Geneva law on the protection of victims of international armed conflicts. In 1949, four new conventions were adopted under ICRC auspices: on

34 Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1997, pp. 272–91. See also the case of Enver Hadzihasanovic and Amir Kubura (IT-01-47) before the International Criminal Tribunal for the former Yugoslavia. Part V (over 150 pages) of the judgment of 15 March 2005 exclusively deals with the question of the presence of foreign Muslim combatants or mujahidin in central Bosnia in 1992 and 1993.

35 See Bert Röling, “The significance of the laws of war”, in Cassese, above note 31, pp. 143–4.

the sick and wounded on land; on the wounded, sick and shipwrecked members of the armed forces at sea; on prisoners of war; and on civilian victims – this last group had previously not been covered as such by the law of armed conflict. The events of the Second World War had shown the disastrous consequences of the absence of a specific convention for the protection of civilians in wartime, and the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) takes account of some of those experiences. So-called “carpet bombing” of civilian areas, however, was not to be specifically outlawed until the adoption in 1977 of an additional protocol to the four Geneva Conventions of 1949 (see below).

During the Second World War millions of combatants were taken prisoner under widely varying circumstances and experienced treatment that ranged from excellent to barbaric. The 1949 Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) continued the concept expressed in earlier treaties that prisoners were to be removed from the combat zone and humanely treated, without loss of citizenship. The Convention broadened the term “prisoner of war” to include not only members of the regular armed forces who have fallen into the power of the enemy but also militia forces, volunteers, irregulars and members of resistance movements – if they form part of the armed forces, and subject to certain conditions – as well as persons who accompany the armed forces without actually being members thereof, such as war correspondents, civilian supply contractors and members of labour service units. The various forms of protection to which prisoners of war are entitled under the Convention remain with them throughout their captivity and cannot be taken from them by their captor or renounced by the prisoners themselves. Further provisions stipulate that during a conflict prisoners may be repatriated or handed over to a neutral nation for custody, and that at the end of hostilities all prisoners must be released and repatriated without delay, except those held for trial or serving sentences imposed by judicial processes.

Aerial bombardment in the Second World War caused unparalleled destruction of the cultural heritage. Adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) places such property under international protection. The great humanitarian issues of the Second World War – the extraordinarily high civilian death toll, the Holocaust, the inhumane treatment of prisoners of war and the large-scale destruction of cultural property – were thus addressed by IHL.

But what IHL conspicuously failed to deal with was the use of the atomic bomb. Whereas states have outlawed the production, stockpiling and use of biological<sup>36</sup> and chemical<sup>37</sup> weapons, they have merely focused on the

36 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972). Available at <http://disarmament.un.org/wmd/bwc/fifth/documents.htm> (last visited 23 January 2007).

37 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993). Available at [http://www.opcw.org/html/db/cwc/eng/cwc\\_menu.html](http://www.opcw.org/html/db/cwc/eng/cwc_menu.html) (last visited 23 January 2007).

*non-proliferation* of nuclear arms and not on a total ban.<sup>38</sup> Attempts by the anti-nuclear movement to litigate the issue have yielded limited results. The 1996 Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons is inconclusive.<sup>39</sup>

## Decolonization war: Algeria

As pointed out above, the mandate of the United Nations prominently includes the promotion of human rights. The UN Charter and the 1966 UN Covenants on human rights<sup>40</sup> also refer to the “self-determination of peoples”, and Chapter XI of the Charter contains a demand for decolonization. Not surprisingly, a salient feature of the post-1945 era of armed conflict has been decolonization, often by means of national liberation wars.<sup>41</sup>

The Algerian War of Independence (1954–62), more than any other event, contributed to the extension of IHL to non-international armed conflicts. From the initial stages of the conflict, the insurgent Algerian Front de libération nationale (FLN) tried to reach an agreement with the French government concerning the applicability of Article 3 common to the Geneva Conventions of 1949. France resolutely refused to regard the conflict as anything other than an internal one – it considered Algeria to be an integral part of France – in which domestic law and order provisions were applicable.<sup>42</sup> In 1958 the ICRC, in accordance with Article 3 entitling it to offer its services to parties to conflict, presented a draft by which both parties would pledge to comply with the provisions of that article. The French government, however, maintained until the end, despite its 500,000 troops on Algerian soil, that the whole situation did not qualify as an “armed conflict not of an international character” within the meaning of Article 3.<sup>43</sup>

38 The most important instruments in this respect are the Treaty on the Non-Proliferation of Nuclear Weapons (1968) and the Declaration of the UN Security Council, meeting at the level of heads of state on 31 January 1992, that “the proliferation of all weapons of mass destruction constitutes a threat to international peace and security.” (UN Doc S/23500).

39 The Court held 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. However, 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. (Paragraph 105.E)

40 Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force Mar. 23, 1976 and Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

41 See extensively George Andreopoulos, “The age of national liberation movements”, in Howard et al., above note 2, pp. 191–225.

42 Ibid., p. 202.

43 Ibid., p. 204.

The Algerian War was primarily a *guerrilla* war (Spanish for “small war”, but the term refers to the tactics employed, not to the scale of combat).<sup>44</sup> A French veteran of the conflict, Roger Trinquier, became a major theorist of guerrilla warfare.<sup>45</sup> His *Modern Warfare: A French View of Counterinsurgency*<sup>46</sup> captures its fundamentals:

Since the end of World War II, a new form of warfare has been born. Called at times either *subversive warfare* or *revolutionary warfare*, it differs fundamentally from the wars of the past in that victory is not expected from the clash of two armies on a field of battle. This confrontation, which in times past saw the annihilation of an enemy army in one or more battles, no longer occurs. Warfare is now an interlocking system of actions – political, economic, psychological, military – that aims at the *overthrow of the established authority in a country and its replacement by another regime*. To achieve this end, the aggressor tries to exploit the internal tensions of the country attacked – ideological, social, religious, economic – any conflict liable to have a profound influence on the population to be conquered. Moreover, in view of the present-day interdependence of nations, any residual grievance within a population, no matter how localized and lacking in scope, will surely be brought by determined adversaries into the framework of the great world conflict. From a localized conflict of secondary origin and importance, they will always attempt sooner or later to bring about a generalized conflict. ... We know that the *sine qua non* of victory in *modern warfare* is the unconditional support of a population. According to Mao Tse-tung, it is as essential to the combatant as water to the fish. Such support may be spontaneous, although that is quite rare and probably a temporary condition. If it doesn't exist, it must be secured by every possible means, the most effective of which is *terrorism*. ... Terrorism in the service of a clandestine organization devoted to manipulating the population is a recent development. After being used in Morocco in 1954, it reached its full development in Algiers in December, 1956, and January, 1957. The resultant surprise gave our adversaries an essential advantage, which may have been decisive. In effect, a hundred organized terrorists were all that was necessary to cause us to give up the game quickly to the Moroccans. In *modern warfare*, we are not actually grappling with an army organized along traditional lines, but with a few armed elements acting clandestinely within a population manipulated by a special organization.<sup>47</sup>

44 According to Walter Laqueur the term *guerrilla* originated in Spain during the war against the invading army of Napoleon Bonaparte (1808–13): Laqueur, above note 6, pp. 21–41.

45 Other important works on guerrilla warfare are Laqueur, above note 6, and Mao Tse-tung, *Yu Chi Chan (Guerrilla Warfare)*, International Publishers, New York, published in English with an introduction by Samuel Griffith, 1961.

46 Original French title: *La Guerre Moderne: Une vision française de la contre-insurrection* (1961); English translation with an introduction by Bernard Fall available online at <<http://www-cgsc.army.mil/carl/resources/csi/trinquier/trinquier.asp>> (last visited 1 December 2006).

47 Quotes taken from *ibid.*, online English version (no pagination, emphasis in original).

The main vehicle of insurgency warfare is the *civilian soldier*, a notion that encapsulates not only the inextricable link between the fighter and the population on whose behalf the struggle is waged, but the fighter's categorical refusal to be reduced to a single identity.<sup>48</sup> The ability of the guerrilla fighter to melt into the population makes one of the most fundamental IHL principles untenable, namely the distinction between combatants and non-combatants.<sup>49</sup>

On the other hand, the inability to make that distinction (owing to the guerrilla's refusal to accept a single identity) coupled with the inability to force a decisive encounter (owing to the guerrilla's strategy of choosing the time and place of engagement) was often to generate levels of frustration among their opponents that resulted in questionable rules of engagement or outright brutalities.<sup>50</sup> In the Algerian War torture and (counter-)terrorism were some of the main instruments employed to break up the insurgency's support network.<sup>51</sup>

What was the impact of wars of decolonization on IHL? In 1973 a new majority in the UN General Assembly (mostly made up of former colonies) proclaimed the basic principles of the legal status of combatants struggling against colonial and racist regimes for the right to self-determination.<sup>52</sup> The ICRC, for its part, convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which met in Geneva from 1974 to 1977. The Conference resulted in the adoption of two Additional Protocols to the 1949 Conventions.

Protocol I<sup>53</sup> deals with the protection of victims of international conflicts. One of its main innovations is the provision in Article 1.4 that armed conflicts in which peoples are fighting against "colonial domination and alien occupation and against racist regimes" are to be considered international conflicts. To its supporters this was an acknowledgement of the failure of traditional international law to address the needs of colonized peoples. Critics of national liberation movements point to the illegality of the whole strategy of guerrilla warfare, the blurring of the combatant/non-combatant distinction and the resultant impossible burden on their opponents.<sup>54</sup>

Protocol II<sup>55</sup> aims to protect the victims of certain high-intensity internal armed conflicts, defined as those occurring between the armed forces of a

48 Andreopolous, above note 41, p. 193.

49 Ibid., p. 195.

50 Ibid. A Prussian officer serving with the French in the Napoleonic war against Spain recorded in his diary an observation that reflects the frustrations of regular soldiers fighting against guerrillas: "Wherever we arrived, they disappeared, whenever we left, they arrived – they were everywhere and nowhere, they had no tangible centre which could be attacked" (quoted in Laqueur, above note 6, pp. 40–1).

51 Andreopolous, above note 41, pp. 205–7.

52 Resolution 3103 (XXVIII) of 12 December 1973.

53 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

54 Andreopolous, above note 41, p. 212.

55 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

government and dissidents or other organized groups which exercise such control over part of its territory as to be able to implement the Protocol. The Protocol does not apply to internal disturbances and tensions in the form of riots or other isolated and sporadic acts of violence.

## Identity wars: the Balkans and Rwanda

When the Berlin Wall began to crumble in 1989, the American political philosopher Francis Fukuyama developed the controversial theory in his article “The end of history”<sup>56</sup> that the end of the cold war signalled the end of the progression of human history: “What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”<sup>57</sup> One manifestation of the end of history, according to Fukuyama, would be a decline, or perhaps even the end, of armed conflict, at least among certain types of nation-state. Only in the last chapters in his book did he recognize the possibility of rising ethnic and nationalist violence “since those are impulses incompletely played out”.<sup>58</sup>

As it happens, Yugoslavia violently disintegrated in the course of the following years. “Identity wars” came to replace ideological conflict. Some, such as Samuel Huntington, explain them in terms of ancient conflicts between civilizations. In places like Iraq, Afghanistan, the Balkans and Chechnya he sees “fault-line wars”.<sup>59</sup> A more common, though not uncontroversial,<sup>60</sup> explanation stresses the ethnic dimension of post-cold war conflicts, especially in Africa.

While the end of the cold war did not usher in world peace, it brought about circumstances in the UN Security Council conducive to the creation of ad hoc international criminal tribunals to prosecute serious violations of IHL committed in the identity wars in the former Yugoslavia and Rwanda. This in turn led to a dramatic surge in interest in IHL, which in turn spurred the establishment of more international and mixed war crimes tribunals, namely the Special Court for Sierra Leone (SCSL), the Serious Crimes Panels in the District Court of Dili (East Timor), the “Regulation 64” Panels in the Courts of Kosovo, and the

56 *The National Interest*, No. 16, summer 1989, pp. 3–18. See also his book, *The End of History and the Last Man*, Avon Books, New York, 1992.

57 Fukuyama, *End of History*, above note 56, p. 4.

58 *Ibid.*, pp. 14–15 and 18.

59 Huntington, above note 34, ch. 10.

60 E.g. David Lake and Donald Rothchild (eds.), *The International Spread of Ethnic Conflict*, Praeger Publishers, New York, 1998. For a critique of ethnicity as a blanket explanation of wars outside the Western ken, see Ann Hironaka, *Neverending Wars: The International Community, Weak States, and the Perpetuation of Civil War*, Harvard University Press, Cambridge, Mass., 2005, ch. 4. Filip Reyntjens, an expert on Rwanda, convincingly challenges the reduction of the conflicts in Rwanda and Burundi to ethnicity in *Rwanda: Trois jours qui ont fait basculer l’histoire*, Institut Africaine-CEDAF (l’Harmattan), Paris, 1995, conclusions.

Extraordinary Chambers in the Courts of Cambodia. In particular, the establishment of the International Criminal Court by the adoption of the Rome Statute in July 1998 and its entry into force in 2002 marked a considerable breakthrough in ensuring the prosecution of persons accused of war crimes in both international and non-international armed conflicts.

Among the most significant contributions of these tribunals are the abandonment of the nexus requirement between crimes against humanity and armed conflict; the international criminalization of breaches of Article 3 common to the Geneva Conventions and of Protocol II; the extension to private citizens of criminal responsibility for grave breaches of the Geneva Conventions; the application of IHL outside the narrow geographical context of the actual theatre of combat operations; the shift from (military) command responsibility to (civilian) superior responsibility; the extension of the notion of complicity beyond aiding and abetting to include “those who otherwise assist”, without requiring a direct or substantial contribution to the commission of the crime; and the international criminalization of sexual violence beyond rape.

### Neverending wars:<sup>61</sup> Angola, Burundi, Congo ...

In post-Westphalian Europe the state's role was to confiscate weaponry from the militias and retinues of the medieval warrior barons and to secure for a single authority the monopoly over the legitimate use of force.<sup>62</sup> Decolonization, however, for all its gains, left in place many weak states, particularly in Africa.<sup>63</sup> Exacerbating the situation is the emergence of a global market in small arms – old Kalashnikovs for the most part – which has undermined the state's (supposed) monopoly on the means of violence.<sup>64</sup> The result is a situation of *no peace – no war* in which “[w]ar breaks out from time to time, like a midsummer riot in a jail. It spreads unaccountably, like a fashion”.<sup>65</sup>

*Postmodern war*, as Ignatieff calls it, has obvious humanitarian consequences: “[I]f the state loses control of war ... – if war becomes the preserve of private armies, gangsters, and paramilitaries – then the distinction between battle and barbarism may disappear”.<sup>66</sup> One of the direst humanitarian problems today is that of child soldiers, caused, *inter alia*, by a combination of

61 I have borrowed the term “neverending wars” (and its spelling) from Hironaka, above note 60.

62 Ignatieff, *Warrior's Honor*, above note 1, p. 160.

63 For an analysis see Hironaka, above note 60, and Kaldor, above note 1.

64 A video documentary on this subject is *Small Arms and Failed States* (1999, 29 min.) produced by the US *Defense Monitor*.

65 Paul Richards, “New war: an ethnographic approach”, in Paul Richards (ed.), *No Peace. No War: An Anthropology of Contemporary Armed Conflicts*, Ohio University Press and James Currey, Athens, Ga., 2005, pp. 2–3. See also Nordstrom, above note 10, ch. 12, “The time of not-war-not-peace”.

66 Ignatieff, *Warrior's Honor*, above note 1, p. 158. For a similar account of the wars in Angola and Mozambique see Nordstrom, above note 10). For video material see *Small Arms and Failed States* (*op. cit.* note 68).

cheap light weapons and what Samuel Huntington calls the “youth bulges”<sup>67</sup> in those societies. In Sri Lanka for example, the Tamil Tigers have been accused of waging an “under-age war” by relying on what amounts to a “children’s army”.<sup>68</sup>

Drawing a parallel with the Thirty Years War in pre-Westphalian Europe, some have suggested that (post-colonial) Africa is in its Seventy or perhaps even Hundred Years War. Consider, for example, Angola, which after a fourteen-year-long war of independence lapsed into thirty years of civil war; or the eastern Congo where Africa’s Great War was fought from 1996 – the fall of the Mobutu regime – until 2003; or the continuing “diamond wars” in west Africa. In *The Coming of Anarchy* Robert Kaplan depicts endemic warfare in a failed state:

There is no other place on the planet where political maps are so deceptive – where, in fact, they tell such lies – as in West Africa. Start with Sierra Leone. According to the map, it is a nation-state of defined borders, with a government in control of its territory. In truth the Sierra Leonian government, run by a twenty-seven-year-old army captain, Valentine Strasser, controls Freetown by day and by day also controls part of the rural interior. In the government’s territory the national army is an unruly rabble threatening drivers and passengers at most checkpoints. In the other part of the country units of two separate armies from the war in Liberia have taken up residence, as has an army of Sierra Leonian rebels. The government force fighting the rebels is full of renegade commanders who have aligned themselves with disaffected village chiefs. A pre-modern formlessness governs the battlefield, evoking the wars in medieval Europe prior to the 1648 Peace of Westphalia, which ushered in the era of organized nation-states.<sup>69</sup>

The return of ragged armies and warlords brings to full circle the development described in this article. Constraining such chaotic violence arguably is beyond humanitarian law, beyond aid or emergency relief, and beyond peacekeeping. As Ignatieff – and others<sup>70</sup> – put it: “[T]hese societies need states”.<sup>71</sup> “[T]he police and armies of the nation-state remain the only available institutions we have ever developed with the capacity to control and channel large-scale human violence”.<sup>72</sup> The civil war in Iraq following the US invasion in 2003 underscores this view: an authoritarian, even criminal, state is perhaps better than no state at all.

67 Huntington, above note 34, p. 259.

68 *The Economist*, 5 August 1995, No. 32 (quoted in Huntington, *ibid.* ).

69 Published in *The Atlantic Monthly*, February 1994; quotations taken from the online edition available at <<http://www.theatlantic.com/doc/prem/199402/anarchy>> (last visited 1 December 2006). Kaplan covers the same theme in a book: *The End of the Earth: A Journey at the Dawn of the 21st Century*, Papermac, London, 1997. For case studies on failed states see Robert Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Brookings Institution Press Washington, DC, 2003.

70 E.g. Kaldor, above note 1, p. 10; Jeremy Rabkin, *The Case for Sovereignty*, AEI Press, Washington, DC, 2004, p. 19.

71 Ignatieff, *Warrior’s Honor*, above note 1, p. 106.

72 *Ibid.*, p. 160.

Two sorts of legal initiatives, however, try to curb violent conflict in the weak states. The first addresses the problem of child soldiers, the second the Kalashnikov culture. IHL prohibits the recruitment and direct participation in hostilities of children under the age of fifteen years.<sup>73</sup> Under the Rome Statute of the ICC, the recruitment and use of children under the age of fifteen years in hostilities is recognized as an international crime, both in international and non-international armed conflicts. It is noteworthy that the first person arrested on behalf of the International Criminal Court has been charged with conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities in the eastern Congo.<sup>74</sup> The issue has also been dealt with in international human rights law, namely the Convention on the Rights of the Child<sup>75</sup> and its Optional Protocol on the involvement of children in armed conflict. The latter raises the minimum age to eighteen and extends the prohibition on the recruitment or use of underage persons to armed groups.

As for the scourge of the proliferation of small arms, a remarkable success – on paper at least – is the [Ottawa] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction (1997).<sup>76</sup> Following this accomplishment the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.<sup>77</sup>

The International Court of Justice (ICJ) has also been called on to help tame the violence in a region where the state has virtually disappeared. In *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)* the Court found that Uganda, “by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian

73 Article 77 of Protocol I (note 53 above); Article 4.3(c) of Protocol II (note 55 above) also prohibits their indirect participation.

74 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, arrest warrant of 10 February 2006, available at <[http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_French.pdf)> (last visited 1 December 2006).

75 In Article 38, states Parties undertaketo respect and to ensure respect for relevant rules of international humanitarian law;to ensure that children under 15 do not take a direct part in hostilities;to refrain from recruiting those under 15 and give priority to the oldest among those under 18;in accordance with international humanitarian law, to ensure protection and care of children affected by armed conflict.

76 Richard Price, in “Reversing the gun sights: transnational civil society targets land mines”, analyses the campaign that led to the total international ban on anti-personnel mines. See *International Organization*, No. 52, 1998, pp. 613–44.

77 More information can be found at UN website <<http://disarmament2.un.org/cab/salw.html>> (last visited 1 December 2006). For a non-governmental source see International Action Network on Small Arms (IANSA) at <<http://www.iansa.org>> (last visited 1 December 2006).

law”, and that Uganda, “by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law”.<sup>78</sup>

As argued earlier, however, to curb the endemic warfare plaguing weak states may well be beyond treaties, programmes or, for that matter, ICJ decisions. Such societies find themselves in a veritable catch-22 situation: a state is needed to reclaim (or finally establish) the monopoly on the use of force and to enforce the law, but all nation- and institution-building efforts are doomed as long as there is no peace.

*Jus ad bellum* considerations are usually extraneous to discussions on civil war. Yet a thought-provoking study suggests a link between the sacrosanct norm of respect for territorial integrity (prohibition on territorial aggression and non-recognition of secession) and the perpetuation of civil war in certain parts of the world. That norm, the argument goes, prevents the formation of strong states and artificially keeps alive unviable ones. “The recently independent states have not experienced the kind of interstate warfare that forced the European states to either develop their domestic capabilities or be weeded out by more powerful neighbors.”<sup>79</sup> The deceptively simple Hobbesian solution – “let them fight it out” or “give war a chance” – clashes, however, with contemporary ideologies of human rights and humanitarianism.<sup>80</sup>

## Virtual war: NATO’s Kosovo “campaign”

On the other end of the scale of contemporary armed conflict stands what Ignatieff – writing about seventy-eight consecutive days of NATO missile strikes against Serbia to stop the bloodshed in Kosovo – aptly calls *virtual war*. Another commentator used the expression *zero-casualty warfare* in the Kosovo context.<sup>81</sup> This is how Ignatieff put it:

The Kosovo conflict looked and sounded like a war: jets took off, buildings were destroyed and people died. For the civilians and soldiers killed in air strikes and the Kosovar Albanians murdered by Serbian police and paramilitaries the war was as real – and as fraught with horror – as war can be. For the citizens of the NATO countries, on the other hand, the war was

78 Respectively §3 and §4 of the operative paragraph of the judgment of 19 December 2005.

79 Hironaka, above note 60, p. 17.

80 I should point out that this is *not* something Hironaka suggests. It is, however, advocated by Edward Luttwak in a provocative article “Give war a chance”, *Foreign Affairs*, Vol. 78, No. 4, 1999, pp. 36–44.

81 Anthony Rogers “Zero-casualty warfare”, *International Review of the Red Cross*, No. 837, 2000, pp. 165–81 (available at the ICRC website <<http://icrc.org>> (last visited 1 December 2006)).

virtual. ... Although the war galvanized opinion across the planet, the number of people who actually went to war was small: 1500 members of the NATO air-crews and thirty thousand technicians, support staff and office staff from headquarters. On the opposite side were the air-defense specialists of Serbia, numbering less than a thousand, and forty thousand soldiers, dug into redoubts and bunkers in Kosovo and Serbia. Face to face combat occurred rarely and then only between KLA guerrillas and Serbian forces on the Kosovo-Albanian border. ... The Kosovo campaign achieved its objectives without a single NATO combat fatality. From a military standpoint, this is an unprecedented achievement. From an ethical standpoint, it transforms the expectations that govern the morality of war. The tacit contract of combat throughout the ages has always assumed a basic equality of moral risk: kill or be killed.<sup>82</sup>

The issue of equality of risk was at least as acute in two US-led “operations” against Iraq. Operation Desert Storm (1991) and Operation Iraqi Freedom (2003)<sup>83</sup> combined claimed fewer than 300 Allied casualties (through hostile action), whereas some 100,000 Iraqi troops reportedly died in Desert Storm alone, not to mention the many times larger number of wounded. Strictly speaking, though, IHL is not concerned with inequality of risk on the battlefield, even when it stands at roughly 1:1,000, as long as the force used (i) is necessary to achieve as quickly as possible the partial or complete submission of the adversary; (ii) is no greater than needed to achieve this; and (iii) is not otherwise prohibited.<sup>84</sup>

Conversely, the *privatization* of traditionally military tasks by the most powerful nation on earth does have IHL implications.<sup>85</sup> Private security has long been a feature of daily life in the United States. Now the industry is increasingly becoming involved in US military operations abroad.<sup>86</sup> Up to 10 per cent of the US occupation force in Iraq consists of private military contractors (PMCs), or hired guns, so to speak. Veterans of the wars in the Balkans, Central America, and southern Africa help US troops to “spread freedom and democracy”. PMCs are

82 Ignatieff, *Virtual War*, above note 1, “Introduction”. The issue of blatant inequality of risk is at least a century old. For example, in the battle of Omdurman (1889), one of the greatest battles of the “scramble for Africa” (1885–1914), the entire Sudanese army of some 20,000 was annihilated within hours, while the British lost only 48 men. In the words of Winston Churchill, Omdurman was “the most signal triumph ever gained by the arms of science over barbarians”. Winston Churchill, *The River War: An Account of the Reconquest of the Sudan*, 1899, p. 300.

83 I only consider the casualties between the start of Operation *Iraqi Freedom* on 19 March 2003 and the end of major combat operations announced by President Bush on 1 May 2003.

84 These are the basic elements that make up the concept of military necessity. See US Air Force, *Air Force Pamphlet* (AFP) 110–31, “International law: the conduct of armed conflict and air operations”, 1976, pp. 1–6.

85 An up-to-date comprehensive bibliography on private security and military companies and the implications for IHL can be found at <<http://www.iilj.org/pmcbibliographicalreferences.htm>> (compiled by James Cockayne and Chia Lehnardt) (last visited 1 December 2006), and at <[http://www.dv.admin.ch/sub\\_dipl/g/home/thema/psc/fid/biblio.ContentPar.0002.UpFile.tmp/dc\\_060116\\_longbiblio\\_e.pdf](http://www.dv.admin.ch/sub_dipl/g/home/thema/psc/fid/biblio.ContentPar.0002.UpFile.tmp/dc_060116_longbiblio_e.pdf)> (last visited 1 December 2006).

86 See e.g. Ted Koppel, “These guns for hire”, *New York Times*, 24 May 2006 (opinion page).

reportedly involved in the operation of detention facilities and the interrogation of prisoners.<sup>87</sup> Outsourcing such tasks to private for-profit entities raises the question of the accountability of these companies and their employees. After the return of warlords in failed states (see above), the privatization of classic military responsibilities in Iraq and elsewhere is another example of warfare in the post-Westphalian age coming full circle. Recognizing that this phenomenon is only likely to increase in importance in the future, the Swiss government, in conjunction with the International Committee of the Red Cross, has launched an initiative which aims to clarify and strengthen the responsibility of states for the actions of private security and military companies.<sup>88</sup>

### War without borders: “global war on terror”

“There was a before-9/11 and an after-9/11”, the director of the CIA’s counterterrorist unit was reported to have told the US Congress in 2002. “After 9/11, the gloves came off.” The US Department of Defense, for its part, proclaimed an open-ended global war:

The United States is a nation engaged in what will be a long war. Since the attacks of Sept. 11, 2001, our nation has fought a global war against violent extremists who use terrorism as their weapon of choice, and who seek to destroy our free way of life. Our enemies seek weapons of mass destruction and, if they are successful, will likely attempt to use them in their conflict with free people everywhere. Currently, the struggle is centered in Iraq and Afghanistan, but we will need to be prepared and arrange to successfully defend our nation and its interests around the globe for years to come. ... The long war ... includes many operations characterized by irregular warfare – operations in which the enemy is not a regular military force of a nation-state. ... Today, efforts large and small on five continents demonstrate the importance of being able to work with and through partners, to operate clandestinely and to sustain a persistent but low-visibility presence. Such efforts represent an application of the indirect approach to the long war.<sup>89</sup>

The so-called “global war on terror” (GWOT)<sup>90</sup> represents a shift by the United States from a criminal justice approach to terrorism<sup>91</sup> to a war

87 Julian Borger, “Outsourcing warfare”, *Amnesty International Magazine*, summer 2004, available at <[http://www.amnestyusa.org/magazine/summer\\_2004/outourcing\\_warfare/](http://www.amnestyusa.org/magazine/summer_2004/outourcing_warfare/)> (last visited 1 December 2006).

88 For preliminary reports see [http://www.dv.admin.ch/content/sub\\_dipl/e/home/thema/psc.html](http://www.dv.admin.ch/content/sub_dipl/e/home/thema/psc.html) (last visited 1 December 2006).

89 From the *Quadrennial Defense Review* by the United States Department of Defense, 6 February 2006, pp. v, 11.

90 This is one of the expressions used by the US government to brand the conflict. Other names are “global struggle against violent extremism” and “the long war”.

91 E.g. the Lockerbie case in which the United States strove to obtain the suspects’ extradition from Libya; another example is the trial in the United States of a number of militant Islamist conspirators for their part in the 1993 World Trade Center car bombing.

paradigm,<sup>92</sup> thereby obscuring important differences between armed conflicts covered by the laws of war (and terrorist acts committed in the course of those armed conflicts) and terrorist acts committed independently of armed conflict,<sup>93</sup> as well as the fact that terror is a *tactic*, not an enemy. Basic IHL assumptions – that armed conflict takes certain narrowly definable forms, that wars have a beginning and an end, and that there are enemy states, allied states and neutral states – are ignored in several ways.

First, the war on terror can take any form: domestic eavesdropping, freezing assets, criminal prosecution, abduction, rendition, secret detention, torture, covert or indirect actions, targeted killing, full-scale military invasion – nothing is excluded *a priori*. Second, as the name indicates, that global war knows no borders: mountains in Afghanistan, a village across the border in Pakistan, the streets of Milan<sup>94</sup> – the battlefield can be anywhere. Third, it concerns all nations. As President Bush put it, “Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”<sup>95</sup> Fourth, it involves the entire security apparatus: the military, secret services, the police, special operations forces, even bounty hunters and PMCs. Finally, the war on terror “will not end until every terrorist group of global reach has been found, stopped and defeated”.<sup>96</sup> It is thus a global war in every sense, seemingly restrained minimally by IHL, human rights law, *jus ad bellum*<sup>97</sup> and international law *tout court*.

Commenting on the “indirect approach to the long war”, that is, working with and through partners and operating clandestinely,<sup>98</sup> RAND Corporation senior analyst Bruce Berkowitz observes that US operations begin to resemble those of its adversaries. “In direct action, soldiers wear insignia when they fight. This is the important distinction between covert action and direct action. It is a key difference between using innovative military tactics to eliminate terrorists, rather than acting like terrorists to eliminate terrorists. Direct action complies with international law.”<sup>99</sup> As American journalist Sidney Harris once put it, “Enemies (as well as lovers) come to resemble each other over a period of time.”

92 The shift was officially proclaimed by President George W. Bush on 13 November 2001 in his military order regarding the “Detention, treatment, and trial of certain non-citizens in the war against terrorism”, available at <<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>> (last visited 1 December 2006).

93 David Wippman, “Do new wars call for new laws?”, in David Wippman and Matthew Evangelista (eds.), *New War, New Laws? Applying the Laws of War in 21st Century Conflicts*, Transnational Publishers, Ardsley, NY, 2005, p. 4.

94 “Italy seeks arrests in kidnapping case”, *New York Times*, 24 December 2005, Section A, p. 5, col. 4.

95 Address to a Joint Session of Congress and the American People, 20 September 2001, available at <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>> (last visited 1 December 2006).

96 *Ibid.*

97 I am referring to the concept of pre-emptive action as formulated in the National Security Strategy of the United States of America (17 September 2002), available at <<http://www.whitehouse.gov/nsc/nssall.html>> (last visited 1 December 2006).

98 See the excerpt from the US *Quadrennial Defense Review*, above note 89.

99 Berkowitz, above note 9, ch. 12.

The UN Commission on Human Rights,<sup>100</sup> the UN Committee against Torture,<sup>101</sup> the UN Human Rights Committee,<sup>102</sup> the ICRC<sup>103</sup> and the Inter-American Commission on Human Rights<sup>104</sup> have criticized the lack of respect for IHL (where applicable) and human rights law in the operations of the global war on terror. The US response so far has been either to challenge the factual findings, question the applicability of IHL or human rights law in the prosecution of that war to the situations in question, or say that it abides by IHL or acts consistently with the principles thereof.<sup>105</sup>

One cannot fail to notice the parallels between the US-led global war on terror and the anti-terrorism policy of one of its closest allies, Israel. As a matter of fact, the former may be considered the continuation – on a much larger scale – of the latter’s long-standing practice of relentlessly pursuing its enemies by all possible means and wherever they may be.<sup>106</sup> Compare also the responses of both countries to criticism of disrespect for IHL and human rights law in the prosecution of that war and in the ongoing occupation of Palestinian territory, the next conflict discussed here.

## Occupation – annexation war: Gaza and the West Bank

It lasted less than a week and had all the ingredients of trinitarian inter-state war on which IHL is premised – the Six-Day War of June 1967 in which Israel captured territory from its neighbours Egypt, Jordan and Syria. Since then Israel has occupied the Gaza Strip,<sup>107</sup> the West Bank and East Jerusalem, home to

100 United Nations Economic and Social Council (Commission on Human Rights), Situation of detainees at Guantánamo Bay (15 February 2006), E/CN.4/2006/120, available at <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16\\_02\\_06\\_un\\_guantanamo.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf)> (last visited 1 December 2006).

101 CAT/C/USA/CO/2, 18 May 2006 (advance unedited version), available at <<http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>> (last visited 1 December 2006).

102 Human Rights Committee, eighty-seventh session, 10–28 July 2006 (advance unedited version), available at <[http://indianlaw.org/UN\\_HR\\_Committee\\_CCPR\\_USA\\_2006-07-28.pdf](http://indianlaw.org/UN_HR_Committee_CCPR_USA_2006-07-28.pdf)> (last visited 1 December 2006).

103 “Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation” (February 2004), available at <[http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf)> (last visited 1 December 2006).

104 Detainees in Guantánamo Bay, Cuba: request for precautionary measures (13 March 2002), available at <<http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>> (last visited 1 December 2006).

105 E.g. Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantánamo Bay, Cuba (10 March 2006), available at <<http://www.asil.org/pdfs/ilib0603212.pdf>> (last visited 1 December 2006); or the US Additional response to the request for precautionary measures – detention of enemy combatants at Guantánamo Bay, Cuba, Inter-American Commission on Human Rights (15 July 2002), at <<http://www.state.gov/s/1/38642.htm>> (last visited 1 December 2006).

106 From the kidnapping of Adolf Eichmann to the full-scale invasions of Lebanon in 1982 and 2006. See e.g. George Jonas, *Vengeance: The True Story of an Israeli Counter-Terrorist Team*, Simon & Schuster, New York, 1984.

107 In September 2005 Israel withdrew all Israeli settlers and soldiers and dismantled its military facilities in the Gaza Strip. It continues to control airspace, offshore maritime access and most other access to the Gaza Strip.

some four million Palestinians. It has also built settlements there for some 300,000 Jews.

Military occupation is regulated by IHL.<sup>108</sup> Israel has both used and dismissed IHL to justify its policies in the Palestinian territories.<sup>109</sup> A military decree of June 1967 said that the Geneva rules on occupation applied; diplomats and politicians, however, later argued that the West Bank and Gaza should not be considered occupied under IHL. This ambiguity has practical import: if those territories are occupied, Israel does not have to integrate the Arab population living there into its polity; if they are not occupied, then the IHL prohibition on establishing (Jewish) settlements does not apply.

Occupation, by definition, is temporary; for if not temporary it amounts to colonization or annexation. IHL on occupation, therefore, does not contemplate a *no peace – no war* situation of indefinite occupation. Yet for generations of Palestinians occupation has become the way of life, which calls into question the original conceptual distinction between IHL (as *lex specialis* in wartime) and international human rights law (as *lex ordinaria* in peacetime). Israel, for its part, has exploited this self-generated uncertainty as an argument against the applicability of international human rights law. In the words of a commentator, “Israel’s practice is to extract from each (but mainly from international humanitarian law) its benefits, while neglecting its obligations.”<sup>110</sup>

In its sweeping advisory opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, a nearly unanimous International Court of Justice stated that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights” and noted that “there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”.<sup>111</sup> Regarding the question put to it, the Court held that “The construction of such a wall ... constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.”<sup>112</sup>

108 The 1907 Hague Convention IV and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 1949.

109 The arguments in this paragraph are based on Gershom Gorenberg, “Israel’s tragedy foretold”, op-ed. contribution to the *New York Times*, 10 March 2006, and on Kathleen Cavanaugh, “Rewriting law: The case of Israel and the occupied territories”, in Wippman and Evangelista, above note 93, pp. 227–58. See also Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: The Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992.

110 Cavanaugh, above note 109, p. 228.

111 ICJ, Advisory Opinion 9 July 2004, para. 106. Available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited 23 January 2007).

112 *Ibid.*, para. 137.

## Occupation wars: Afghanistan and Iraq

Meanwhile two other inter-state wars – both dubbed “freedom” operations<sup>113</sup> – have evolved into open-ended intricate de facto occupations. Five years after the toppling of the Taliban regime in Afghanistan some 30,000 troops of the International Security Assistance Force (ISAF) find themselves fighting the resurgent Taliban and a booming opium production and trade. ISAF was created in December 2001 in accordance with the Bonn Conference, is made up of members of the North Atlantic Treaty Organization (NATO) and is deployed under the authorization of the UN Security Council.<sup>114</sup> Its initial six-month mandate “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas”<sup>115</sup> has been constantly extended and expanded and now includes all of Afghanistan. What was originally conceived as primarily a peace-keeping/nation-building operation has developed into a deadly counter-insurgency, counter-terrorism, and counter-narcotics conflict.<sup>116</sup>

In Iraq, three years after a victorious President Bush declared an end to major combat operations<sup>117</sup> and two years after the formal restoration of its sovereignty, the situation on the ground – humanitarian, political, military – appears even direr than in Afghanistan. Some 160,000 troops of a multinational coalition force (144,000 of whom are from the US), deployed with a mandate from the Security Council,<sup>118</sup> together with a newly constituted Iraqi army and police force are battling a Sunni-dominated insurgency, parts of an international terrorist network (al Qaeda in Iraq), foreign volunteer mujahidin, Shiite militia and organized crime, while also trying to win “the hearts and minds” of the Iraqi population.

In both countries the situations defy the existing IHL categories, since they are neither international nor civil war nor military occupation. The anarchy in Iraq in particular recalls Ignatieff’s notion of *postmodern war* – and its consequences: “[I]f the state loses control of war ... – if war becomes the preserve of private armies, gangsters, and paramilitaries – then the distinction between battle and barbarism may disappear.”<sup>119</sup> As argued earlier, constraining such anarchic violence is beyond humanitarian law. Yet I would like to formulate some questions for further consideration elsewhere: can a military occupation, and all

113 Operations Enduring Freedom (Afghanistan) and Iraqi Freedom.

114 Resolutions 1386, 1413, 1444, 1510, 1563, 1623 1659 and 1707.

115 Resolution 1386, para. 1.

116 According to an Associated Press count based on reports from US, NATO and Afghan officials, 2,800 people have died in the first nine months of 2006 in violence nationwide, including militants and civilians, thus about 1,300 more than the toll for all of 2005 (quoted in “Afghanistan body count raises scepticism”, *Guardian Online*, 15 September 2006).

117 Note 83 above.

118 In Resolution 1637 of 8 November 2005 the Council “Notes that the presence of the multinational force in Iraq is at the request of the Government of Iraq and having regard to the letters annexed to this resolution, reaffirms the authorization for the multinational force as set forth in resolution 1546 (2004) and decides to extend the mandate of the multinational force as set forth in that resolution 1546 (2004) until 31 December 2006” (italics in original).

119 Ignatieff, *Warrior’s Honor*, above note 1.

the responsibilities of an occupying power as laid down in the laws of war, end at a single moment in time and without the actual departure of the foreign military forces involved?<sup>120</sup> Is the latter's self-granted blanket immunity from Iraqi jurisdiction compatible with IHL?<sup>121</sup> When an occupying power miserably fails in its obligation<sup>122</sup> to establish law and order – after recklessly dismantling the existing state apparatus and defiantly challenging insurgents,<sup>123</sup> or when its continued presence *exacerbates* the security situation – as the head of the British army said in a comment on Iraq,<sup>124</sup> does armed insurgency then become legitimate?

## Conclusion

This article has demonstrated how transformations, revolutions and changes of all kinds in armed conflict constantly challenge international humanitarian law and compel it to adapt. Since the adoption of the first modern IHL instruments in the nineteenth century, that law has been substantially revised every twenty-five to thirty years by major new treaties. These adaptations have always been towards *greater protection*, greater reach than had existed before a particular conflict laid bare deficiencies.

IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony's militarization of its foreign and counter-terrorism policies, the privatization of traditional military activities and the near or total collapse of some states. Over the past ten years a number of new IHL norms and institutions (courts) have been created, not in Geneva, but in New York, Ottawa, The Hague and Arusha. In turn, these new institutions have contributed considerably to the development of customary IHL. The question then becomes whether expansion or revision of the Geneva law is desirable and likely. Do new wars call for new laws? Is IHL still one war behind?

I have argued that constraining endemic violence caused by the collapse or dismantlement of the state is beyond humanitarian law. As regards the challenges posed by non-state entities – transnational terrorist networks, criminal organizations, and PMCs – only the last can be regulated, both nationally and

120 Sir Adam Roberts deals with this question in “The End of Occupation in Iraq”, a policy paper published by the Harvard Program on Humanitarian Policy and Conflict Research, available at <<http://www.ihlresearch.org/iraq/pdfs/briefing3461.pdf>> (last visited 1 December 2006).

121 Order No. 17 (Revised) of the Coalition Provisional Authority (CPA) stipulates that Coalition forces, diplomatic personnel and contractors working for Coalition forces or for diplomats “shall be immune from the Iraqi legal process”. A subsequent CPA order provided that the order would remain in force until the final Coalition forces left Iraq, unless it was rescinded or amended by later legislation. The Iraqi parliament apparently has not ended or amended the order.

122 In accordance with Article 43 of the Regulations respecting the Laws and Customs of War on Land (Hague Regulations) of 18 October 1907.

123 US President Bush in a White House press conference on 2 July 2003 challenged Iraqi insurgents “to bring them on”.

124 “Sir Richard Dannatt: A very honest general”, *Daily Mail*, 12 October 2006 (online edition).

internationally, since by definition terrorists and criminals operate outside the law. The answer to attempts by certain states to circumvent the existing law does not lie in promulgating more IHL but in urging more respect for it. And wherever deficiencies or ambiguities exist, customary IHL has an important role to play. For these reasons I submit that expansion or revision of the law of Geneva is not desirable.

Is it nonetheless likely? David Wippman notes that “most governments and many human rights and humanitarian law experts prefer an informal process leading to the evolution of international humanitarian law through state practice informed by expert analysis”, and points to the “cautious, research-oriented approach [of the ICRC] to the further development of IHL”.<sup>125</sup> Noteworthy in this regard are several recent ICRC initiatives and reports: the Project on the Reaffirmation and Development of IHL, the report “International humanitarian law and the challenges of contemporary armed conflicts”,<sup>126</sup> and the initiative, in collaboration with the Swiss government, to clarify and strengthen the responsibility of states for the actions of private security and military companies.<sup>127</sup>

Through brief descriptions of the relevant conflicts this article also has shown that warfare since the 1648 Peace of Westphalia has, despite (or because of) its many changes, in several ways come full circle. And so has IHL: consider, for example, the Hague peace movement at the end of the nineteenth century and the Hague International Criminal Court movement at the turn of this century. *Plus ça change, plus c'est la même chose.*<sup>128</sup>

125 Wippman, “Do new wars call for new laws?” in Wippman and Evangelista, above note 93, p. 6. See also Jean-Philippe Lavoyer, “Should international humanitarian law be reaffirmed, clarified or developed?”, *Israel Yearbook on Human Rights*, Vol. 34, 2004, pp. 1–24, available at the ICRC website, <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/659JXZ/\\$File/Lavoyer-01-05-04.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/659JXZ/$File/Lavoyer-01-05-04.pdf)> (last visited 1 December 2006). For more on this topic see Yves Sandoz, “International humanitarian law in the 21st century”, *Yearbook of International Humanitarian Law*, Vol. 6, 2003, pp. 3–40.

126 Available at <<http://www.icrc.org>> (last visited 1 December 2006).

127 Note 88 above.

128 The French version of the proverb, “The more things change the more they remain the same.”

# Asymmetric conflict structures

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## Abstract

*Inequality in arms, indeed, significant disparity between belligerents, has become a prominent feature of various contemporary armed conflicts. Such asymmetries, albeit not at all a new phenomenon in the field of warfare, no longer constitute a random occurrence of singular battles. As a structural characteristic of modern-day warfare asymmetric conflict structures have repercussions on the application of fundamental principles of international humanitarian law. How, for example, can the concept of military necessity, commonly understood to justify the degree of force necessary to secure military defeat of the enemy, be reconciled with a constellation in which one side in the conflict is from the outset bereft of any chance of winning the conflict militarily? Moreover, military imbalances of this scope evidently carry incentives for the inferior party to level out its inferiority by circumventing accepted rules of warfare. This article attempts tentatively to assess the repercussions this could have on the principle of reciprocity, especially the risk of the instigation of a destabilizing dynamic of negative reciprocity which ultimately could lead to a gradual intensification of a mutual disregard of international humanitarian law.*

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## Introduction

With only one remaining superpower and more generally the considerable and predictably widening technological divide, an imbalance in the military capacity of warring parties has become a characteristic feature of contemporary armed

\* Parts of this paper were delivered as a speech at the Second Biennial Conference of the European Society of International Law (ESIL) in Paris on 18–20 May 2006. Warm thanks are due to Nicki Boldt for his helpful comments.

conflicts. Coupled with a growing involvement of non-state entities, the disparity between belligerents is steadily increasing, and various contemporary armed conflicts appear to be more and more asymmetric in structure. Unlike the geo-strategic set-up that prevailed throughout the cold war period, it is a widely perceived paradox of today's strategic environment that military superiority may actually accentuate the threat of nuclear, biological, chemical and, generally speaking, perfidious attack. Indeed, direct attacks against civilians, hostage-taking and the use of human shields<sup>1</sup> – practices that have long been outlawed in armed conflicts – have seen a revival in recent conflicts in which the far weaker party has often sought to gain a comparative advantage over the militarily superior enemy by resorting to such practices as a matter of strategy. International terrorism, although not necessarily conducted within the context of an armed conflict triggering the application of international humanitarian law (IHL), is often regarded as the epitome of such asymmetry. At the same time militarily superior parties at the other end of the spectrum have had recourse to indiscriminate attacks, illegal interrogation practices and renditions, as well as legally dubious practices such as targeted killings or hardly reviewable covert operations, in order to strike at their frequently amorphous enemy.<sup>2</sup>

Significant inequality of arms, that is a disparate distribution of military strength and technological capability in a given conflict, seemingly creates incentives for adversaries to resort to means and methods of warfare that undermine and are sometimes an outright violation of long-accepted standards of international humanitarian law. The war between the US-led Coalition and Iraq or the war in Afghanistan are clear examples. This tendency is reinforced if belligerents differ in nature, as in the recent conflict between Israel and Hezbollah (“party of God”) – the Lebanon-based Shia Islamic militia and political organization – or if factual asymmetries are combined with a legal asymmetry, that is in a constellation in which one side is accorded little or no legal standing.

To be sure, perfect symmetries have rarely been present in war. However, the patterns of non-compliance displayed in various contemporary conflicts seem to be more structured and systematic than ever before. The present study first seeks to verify this assumption. It considers whether factual and potentially legal asymmetries do indeed constitute an incentive for breaches of international humanitarian law provisions, and, if so, how patterns of contemporary conflicts differ from those of previous conflicts that likewise exhibited discernible asymmetries. In a second step, closer scrutiny is given to the actual patterns of non-compliance in asymmetric scenarios, particularly in the light of the interplay of the principle of distinction and the principle of proportionality.

1 Suicide attacks, on the other hand, are not per se outlawed by international humanitarian law.

2 Generally on asymmetric warfare from an IHL perspective, see Toni Pfanner, “Asymmetrical warfare from the perspective of humanitarian law and humanitarian action”, *International Review of the Red Cross*, Vol. 87, No. 857, March 2005. See also Colin S. Gray, who comments that “irregular warfare almost invariably drives the regular belligerent to behave terroristically”, in *Another Bloody Century: Future Warfare*, Weidenfeld & Nicolson, London, 2005, p. 223.

Neither the term “asymmetric warfare” nor the sometimes synonymously employed terms “fourth-generation warfare” or “non-linear war” have thus far been concordantly defined.<sup>3</sup> It is not the intention of this study to venture into this perhaps impenetrable terrain. Analysis shows, however, that there is a noticeable tendency in contemporary conflicts towards an increasing inequality between belligerents in terms of weaponry. While this is a long-known phenomenon in non-international armed conflicts, evaluation of the effects of military disparity in international armed conflicts continues, as does the debate over the extent to which transnational conflicts involving states and non-state entities should be subject to the laws of war.<sup>4</sup>

In attempting to approach this debate from a somewhat different angle, it is the overall purpose of this study to gauge the long-term repercussions that asymmetric conflict structures may have on the fundamental principles of international humanitarian law and thereby tentatively to assess the degree of asymmetry – that is, the level of military disparity between belligerents – that can still be reconciled with the legal regime applicable in times of war.<sup>5</sup>

To this end the study, in a third step, weighs the traditional concept of military necessity as laid down in the Lieber Code of 1863 against the promulgated necessities in asymmetric conflicts of our time. Even though the fundamental concepts and principles of the laws of war have been designed as prophylactic mechanisms flexible enough to outlast changes in the way in which wars are waged, it is here contended that the concept of military necessity and the principle of distinction presuppose a minimum degree of symmetry and therefore cannot be applied in subordinate constellations akin to human rights patterns, as are commonly seen in the fight against international terrorism.

- 3 In general see Herfried Münkler, *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*, Weilerswist, Velbrück Wissenschaft, 2006; Thazha Varkey Paul, *Asymmetric Conflicts: War Initiation by Weaker Powers*, Cambridge University Press, Cambridge, 1994; Mohammad-Mahmoud Ould Mohamedou, *Al Qaeda's Non-Linear War: Paradigm Shifts in Conflict and Law*, available at <[http://www.iued.ch/information/conferences/pdf/conf\\_2005.11.3\\_alqaeda.pdf](http://www.iued.ch/information/conferences/pdf/conf_2005.11.3_alqaeda.pdf)> (last visited 10 August 2006). See also Paul L. DeVito, “Terrorism as asymmetrical warfare is still war”, *Officer*, Vol. 78, No. 6, July–August 2002, pp. 33–35. In the past the term asymmetric warfare has most commonly been referred to as a synonym for guerrilla war; see Josef Schröfl et al. (eds.), *Aspekte der Asymmetrie: Reflexionen über ein gesellschafts- und sicherheitspolitisches Phänomen*, Nomos, Baden-Baden, 2004.
- 4 On the element of transnationality, see, e.g., Fred Schreier, “Transnational terrorism: The newest mutation in the forms of warfare”, in Theodor Winkler et al., *Combating Terrorism and its Implications for the Security Sector*, Geneva Centre for the Democratic Control of Armed Forces, and the Swedish National Defence College, Geneva and Stockholm, 2005, p. 46. For different proposals see “Transnationality, war and the law, A report on a Roundtable on the Transformation of Warfare, International Law, and the Role of Transnational Armed Groups”, April 2006, available at <[http://www.hpcr.org/pdfs/HPCR\\_-\\_Transnationality\\_Roundtable\\_-\\_April\\_2006.pdf](http://www.hpcr.org/pdfs/HPCR_-_Transnationality_Roundtable_-_April_2006.pdf)> (last visited August 2006).
- 5 The principle of distinction, the concept of military necessity and the principle of proportionality are applicable irrespective of whether a conflict is international or non-international in nature; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, *Rules*, ICRC and Cambridge University Press, Cambridge, 2005. See Rules 7–14. Thus irrespective of which of these regimes would be applied to a potential new category of transnational armed conflicts, the following findings with regard to the repercussions asymmetric conflict structures may have on these fundamental principles retain their validity.

The vantage point for the fourth and final part of the analysis is the principle of reciprocity. As the military mismatch between conflicting parties in numerous modern armed conflicts becomes more marked, the balancing influence of the reciprocity entailed by the traditional concept of symmetric warfare is gradually being undermined.<sup>6</sup> While the deterrent effects of an increasingly effective system of international criminal law and of media coverage and public opinion – although the last two are ambivalent factors that could also be used for the opposite purpose – could arguably help to contain non-compliant behaviour in war, international humanitarian law might thus be simultaneously bereft of its own inherent regulating mechanisms which have traditionally taken effect in the combat zone itself. The destabilizing dynamic of reciprocity could lead to a gradual and perhaps insidious erosion of the protective scope of core principles of international humanitarian law. Repeated violations of, for example, the principle of distinction by one party to a conflict are likely to induce the other side to expand its perception of what is militarily necessary, and hence proportional, when engaging in battle against such an enemy. In the final stage, and admittedly only as a worst-case scenario, an intentional and deceitful deviation from accepted standards regulating the conduct of hostilities carries the considerable risk of starting a vicious circle of ever greater negative reciprocity, in which the expectations of the warring parties are transformed into an escalating mutual non-compliance with international humanitarian law.

## A heightened risk of structural non-compliance?

Historically, the majority of laws on international armed conflict have been designed on the basis of Clausewitz's arguably rather Eurocentric conception of war, that is, the assumption of symmetric conflicts taking place between state armies of roughly equal military strength or at least comparable organizational structures. Throughout most of the nineteenth and twentieth centuries the dominant powers engaged in sustained arms races either to maintain a peace-ensuring symmetry or to establish a tactical asymmetry vis-à-vis their opponents as a guarantee of military victory in war.<sup>7</sup> But quite apart from the biblical story of David and Goliath it is evident that asymmetry in the sense of military disparity is no new phenomenon.<sup>8</sup> Nor is it a concept entirely alien to IHL. With the intrinsic disparity of the parties concerned, and even though the threshold criteria of Article 1 of Additional Protocol II to the 1949 Geneva Conventions arguably help to ensure a minimum degree of comparability between those parties,

6 See Hersch Lauterpacht, "The limits of operation of the laws of war", *British Yearbook of International Law*, Vol. 30, 1953, p. 212.

7 Münkler, above note 3, pp. 62 ff. See also e.g. John Ellis, *The Social History of the Machine Gun*, Johns Hopkins University Press, Baltimore, 1986.

8 At the same time it should be borne in mind that symmetric warfare scenarios are far from having become entirely obsolete. Recurring friction between the two nuclear powers India and Pakistan constitutes but one, albeit arguably the most threatening, scenario of potentially symmetric warfare.

non-international armed conflicts are inherently asymmetric. It was moreover already accepted in the classic concept of symmetric warfare that the structure of conflicts could shift from symmetric to asymmetric, for by the time a conflict drew to its close and one party had gained the upper hand, the initial military balance would be out of kilter. More recently, during the Diplomatic Conference that led to the adoption of Additional Protocol I, states taking part not only acknowledged the persistence of significant disparities in military capacity but accepted that factual disparity between opponents may even lead to differing humanitarian law obligations. For example, with respect to Article 57 of Additional Protocol I on the obligation to take precautions in attack,<sup>9</sup> the Indian delegation pointed out that according to the chosen wording the content of the due diligence obligation enshrined therein – that is, the precise identification of objectives as military or civilian – largely depended on the technical means of detection available to the belligerents.<sup>10</sup> Despite these concerns, the present wording was accepted on the implicit understanding that because of prevailing factual disparities, international humanitarian law obligations may impose differing burdens in practice.<sup>11</sup>

Schwarzenberger has pointed out that the protective scope of the laws of war has historically been the strongest in duel-type wars between comparable belligerents that were fought for limited purposes, such as the Crimean War of 1853–6 or the Franco-German War of 1870–1, whereas in major wars such as the Napoleonic wars or the two world wars of the twentieth century – wars that were fought to the bitter end – the weaker side often tended to seek short-term

9 Even though, with regard to non-international armed conflicts, Article 13 (1) of Additional Protocol II merely requires that “[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”, it would be difficult to comply with this requirement without taking precautions in attack. In the same vein the UN General Assembly resolution of 1968 on respect for human rights in armed conflicts stipulates: “spare civilians as much as possible”, UN GA Res. 2444 (XXIII). Moreover, in a resolution adopted in 1970 on basic principles for the protection of civilian populations in armed conflicts, the General Assembly required that “in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations”, UN GA Res. 2675 (XXV).

10 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (CDDH), Geneva, 1974–7, CDDH/SR.42, p. 228. See also Claude Pilloud et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1948*, Martinus Nijhoff, Geneva, 1987, p. 682, para. 2199. Obviously, no absolute certainty can be guaranteed in the process of determining the military nature of an objective selected for attack, but there is an obligation of due diligence and acting in good faith; M. Bothe, “Legal restraints on targeting: Protection of civilian population and the changing faces of modern conflicts”, *IYHR*, Vol. 31, 2001, p. 45.

11 According to the wording of Additional Protocol I, Article 57.2(a)(i), State Parties are obliged to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects ...” and to (ii) “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life...”. It follows that in the event of a technological gap between belligerents, Article 57 of Additional Protocol I binds the high-tech belligerent to significantly higher standards with regard to precautions in attack than its less well equipped opponent. See Michel Schmitt, “War, technology, and international humanitarian law”, *HPCR Occasional Papers Series*, Summer 2005, p. 2, available at <<http://www.hpcr.org/pdfs/OccasionalPaper4.pdf>> (last visited August 2006).

advantages by violating the laws of war.<sup>12</sup> Indeed, violations of the laws of war have occurred in nearly every case in which IHL has been applicable,<sup>13</sup> and the risk that one party may order or connive in large-scale violations of the laws of war in order to gain a tempting advantage or stave off in some way an otherwise threatening defeat has always hovered over the legal regime intended to regulate conduct in armed conflicts.<sup>14</sup> However, in symmetric constellations such instances have tended to remain marginal, often limited to the final stages of a war and confined to individual battles in which defeat seemed inevitable, or resort to perfidy or similarly prohibited tactics was perceived as guaranteeing an immediate tactical breakthrough in what was otherwise a military stalemate.

As a result of the evident disparate military capabilities of opponents in certain contemporary conflicts, incentives for violations of IHL seem in comparison to have reached a new height. Non-compliance with the provisions of IHL is no longer a random event, confined to temporally and spatially limited incidents within a conflict, but has become a recurrent structural feature that characterizes many of today's armed conflicts from the outset. The reason is that, faced with an enemy of overwhelming technological superiority, the weaker party *ab initio* has no chance of winning the war militarily. Figures from the recent war against Iraq illustrate this imbalance of power and capacity quite well. While the Iraqi air force reportedly never left the ground, Coalition forces flew rather more than 20,000 sorties, during which only one fixed-wing aircraft and only seven aircraft in all were lost to hostile fire.<sup>15</sup> Evidence of a comparable inequality in the military capability of belligerents will probably become available in the aftermath of the recent conflict in Lebanon. Without anticipating the more detailed analysis below, it should be noted that the Iraqi army's widespread infringements during the international conflict against the US-led Coalition, as well as Hezbollah's indiscriminate attacks, stem to a significant extent from the blatant inequality in weaponry. Practices employed by the Iraqi army included recourse to human shields, abuse of the red cross and red crescent emblems, the use of anti-personnel mines and the placing of military objects in protected areas such as mosques and hospitals. Clearly, there is thus an elevated risk that the militarily inferior party, unable to identify any military weaknesses of its superior opponent, may feel compelled systematically to offset the enemy's superiority by resorting to means and methods of warfare outside the realm of international humanitarian law.

12 Georg Schwarzenberger, *The Frontiers of International Law*, Stevens, London, 1962, pp. 15 ff.

13 See only e.g. "Final declaration of the International Conference for the Protection of War Victims", Geneva, 1 September 1993, para. 2: "We refuse to accept that, since war has not been eradicated, obligations under international humanitarian law aimed at limiting the suffering caused by armed conflicts are constantly violated", available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList246/DCD935D08F1B0044C1256B66005988F8>> (last visited September 2006).

14 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Stevens, London, 1968, p. 453.

15 "Operation Iraqi Freedom: By the numbers", 30 April 2003, p. 3, available at <[http://www.globalsecurity.org/military/library/report/2003/uscentaf\\_oif\\_report\\_30apr2003.pdf](http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf)> (last visited August 2006). Similarly, during the battle of Fallujah, US Marines killed nearly 1,200 of the enemy while suffering only 50 casualties. Schmitt, above note 11, p. 33.

At the same time the use of “unthinkable” tactics as well as the tactical circumvention of accepted IHL standards creates a barrier that cannot be readily overcome by military superiority alone. Apart from the ongoing hostilities in Iraq, the tactics employed by the Somali tribal leader Farah Aydid in 1993 are a good example of this. In conventional terms, his forces were no match for heavily armed and technologically sophisticated airborne US troops. However, by using primitive weapons and communication systems – which reportedly varied from cellular phones to tribal drums – and by resorting to “unthinkable” tactics and to “barbaric” acts perpetrated for the benefit of the news media, the militia convinced the leadership of the United States that despite the military backwardness of the Somali forces the price of involvement in Somalia was very high.<sup>16</sup> In the course of the war against Iraq the use of cluster munitions in populated areas, as well as the alleged use of white phosphorus and the continued recourse by US and British forces to “decapitation” strikes that caused high numbers of civilian casualties, partly constituted indiscriminate attacks and arguably a failure to take “all feasible precautions” as required by IHL.

There are thus apparent incentives for both sides to give increasing priority, potentially to the detriment of humanitarian considerations, to the necessities of such a kind of warfare.<sup>17</sup>

### Patterns of non-compliance: the interplay between the principle of distinction and the principle of proportionality

Recent conflict patterns suggest that militarily inferior parties, in order to evade attack by an enemy of insurmountable superiority or to level out inequalities in

16 Steven Lambakis, James Kiras and Kristin Kolet, “Understanding “asymmetric” threats to the United States”, September 2002, in *Comparative Strategy*, National Institute for Public Policy, Vol. 21, No. 4, 1 October 2002, pp. 241–77, available at <<http://www.nipp.org/Adobe/Asymmetry%20%20final%2002.pdf>> (last visited August 2006). Tactics reportedly also included the use of women and children as shields and combatants and resulted in several hundred to several thousand Somali casualties. See also Mark Bowden, *Black Hawk Down: A Story of Modern War*, Penguin, New York, 2000, and Martin Libicki, *What is Information Warfare?*, National Defence University Press, Washington, 1995, p. 36, esp. n. 31. In another glaring example of a response that successfully challenged the resolve of the United States, a handful of protesters on the dock at Port-au-Prince in Haiti led to executive recall of the USS *Harlan County* and its load of peacekeepers (1993). For details see Michael Bailey, Robert Maguire and J. O’Neil Pouliot, “Haiti: Military–police partnership for public security”, in Robert B. Oakley, Michael J. Dziedzic and Eliot M. Goldberg (eds.), *Policing the New World Disorder: Peace Operations and Public Security*, NDU Press, Washington, 1998, available at <<http://www.ndu.edu/ndu/inss/books/policing/chapter7.html>> (last visited August 2006).

17 Initially the concept of military necessity was arraigned by the Confederate authorities, who suspected it to be a licence for mischief, and it was indeed developed into a doctrine of *Kriegsräson* in Prussia, which adopted the Lieber Code in 1870; see Burrus M. Carnahan, Lincoln, “Lieber and the Law of War: The origins and limits of the principle of military necessity”, *AJIL*, Vol. 92, 1998, p. 213, at pp. 217 ff. During the Nuremberg trials, too, some defendants invoked military necessity to justify their atrocities against the civilian populations; see, among others, “*In re Von Leeb* (High Command Case)”, *ILR*, No. 15, p. 376, at p. 397. Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthoff, Leiden, 1971, p. 366; Julius Stone, *Legal Controls of International Conflict*, New York, 1954, pp. 351–2; and more generally N. Dunbar, “Military necessity in war crimes trials”, *BYIL*, Vol. 29, 1952, pp. 446–52.

military power, tend in particular to instrumentalize and intentionally manipulate the principle of distinction. This manipulation may occur in different ways.<sup>18</sup> Similarly, superior parties are likely to lower the barrier of proportionality in response to a systematic misuse of the principle of distinction and their resulting inability to tackle the enemy effectively. The following description of potential strategies that belligerents may feel compelled to adopt when faced with overwhelming odds or systematic deviations from accepted legal rules is merely intended to facilitate understanding of likely patterns of non-compliance and does not claim to be comprehensive. It is part of the very nature of asymmetric strategies that they are impossible to predict.

## The principle of distinction

As a defensive strategy when facing a technologically superior enemy it is essential, but ever more difficult, to stay out of reach and conceal one's presence as a combatant. Hiding in mountainous areas, caves, underground facilities and tunnels is one way. However, another means of doing so quickly and efficiently is readily available by virtue of the provisions of IHL themselves. In view of the various forms of protection accorded to civilians, assuming civilian guise is an easy way to evade the enemy and, unlike the more traditional guerrilla-style tactics of hiding underground or in inaccessible areas, it cannot be countered by the development of advanced discovery technologies. Indeed, in order to keep Coalition forces from identifying them as enemies, that is as legitimate targets, many Iraqi soldiers in the recent war reportedly quite often discarded their uniforms.<sup>19</sup> This is not a prohibited tactic, as long as such practices are not used to launch an attack under the cover of protected status; according to Article 4 of the Third Geneva Convention the absence of any fixed distinctive sign recognizable at a distance merely leads to the loss of combatant status and the corresponding privileges.<sup>20</sup> Still, despite its legality such a practice will, if employed as a matter of strategy, create considerable uncertainty about a person's status and thus subtly erode the effectiveness of the fundamental and, in the words of the International Court of Justice (ICJ), intransgressible principle of distinction.<sup>21</sup>

Evidently the notion of distinction, that is, the legally prescribed invulnerability of certain persons and objects, can if manipulated offer manifold loopholes for the evasion of attack.<sup>22</sup> The dividing line between legal tactics and

18 See below.

19 *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, Human Rights Watch, December 2003, pp. 78–9; W. Hays Parks, "Special forces' wear of non-standard uniforms", *Chicago Journal of International Law*, No. 4, 2003, p. 493.

20 Generally, see Knut Dörmann, "The legal situation of "unlawful/unprivileged combatants"", *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, p. 45–74.

21 ICJ Advisory Opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons, *ICJ Report 1996*, para. 79.

22 Generally on the principle of distinction see e.g. Eric David, "Respect for the principle of distinction in the Kosovo war", *Yearbook of International Humanitarian Law*, Vol. 3, 2000, pp. 81–107; Esbjörn Rosenblad, *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of*

illegitimate practices is easily crossed. The misuse of protective emblems for the concealment of military objects is a case in point, and the marking of the Ba'ath Party building in Basra with the ICRC emblem is a flagrant example of such tactics.<sup>23</sup> To protect military objects whose nature could not be so readily concealed, weaker warring parties have repeatedly utilized the proportionality barrier: in order to manipulate the adversary's proportionality equation, immobile military objects are shielded by civilians, while mobile military equipment is intentionally sited close to civilian installations or other specifically protected locations. For example, in the recent conflict in the Middle East Hezbollah hid its rockets and military equipment in civilian neighbourhoods, and UN Under-Secretary-General Jan Egeland's statement clearly points to the vicious circle that might be triggered by such a practice.<sup>24</sup>

Similar modes of conduct have been employed with regard to offensive tactics. The reported seizure of ambulance vehicles in order to feign protected status and thus improve the chances of attacking is a typical example, as is the fact that during the battle of Fallujah in November 2004 sixty of the city's one hundred mosques were reportedly used as bases for military operations.<sup>25</sup> It should be noted that, besides violating the principle of distinction, creating the false impression of legal entitlement to immunity from attack and exploiting the enemy's confidence in that status also amount to perfidy and are prohibited as such.<sup>26</sup> Not each and every strategy employed to circumvent superior military power by cunning, surprise, indirect approach or ruthlessness automatically constitutes prohibited conduct; it may, depending on the circumstances, amount to no more than good tactics. However, if unable to identify any military weaknesses of a superior enemy, the weaker opponent may ultimately see no other alternative than to aim for the stronger state's soft underbelly and attack civilians or civilian objects directly, in outright violation of the principle of distinction. The series of terrorist attacks in the aftermath of 9/11, that is, the attacks in Bali, Mombasa and Djerba in 2002, Riyadh and Casablanca in 2003,

*Distinction and Related Problems*, Henry Dunant Institute, Geneva, 1979; Daniela Kravetz, "The protection of civilians in war: The ICTY's *Galic* case", *Leiden Journal of International Law*, Vol. 17, No. 3, 2004, pp. 521–36; Wolff Heintschel von Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, Brockmeyer, Bochum, 1991.

23 Schmitt, above note 11, p. 35.

24 See the Statement of Jan Egeland to the Security Council on the humanitarian situation in the Middle East, 28 July 2006, p. 3: "I urged the Foreign Minister and the Defence Minister of Israel in my meetings to review the conduct of the air strikes and bombardments to avoid excessive use of force that inflicts disproportionate suffering on the civilian population. When there are clearly more dead children than actual combatants, the conduct of hostilities must be reviewed. At the same time, I repeatedly and publicly appealed from within Lebanon that the armed men of Hezbollah must stop their deplorable tactic of hiding ammunition, arms, or combatants among civilians. Using civilian neighbourhoods as human camouflage is abhorrent and in violation of international humanitarian law." Available at <<http://ochaonline.un.org/DocView.asp?DocID=4764>> (last visited 2 August 2006). See also Kenneth Roth, "Indiscriminate Bombardment", August 2006, available at <<http://www.hrw.org/english/docs/2006/08/22/lebanon14061.htm>>.

25 Schmitt, above note 11, p. 38.

26 Hans-Peter Furrer, *Perfidie in der Geschichte und im heutigen Kriegsvölkerrecht*, Diss. Rechtswiss, Basel, 1988.

Madrid in 2004, London and Cairo in 2005 and Mumbai in 2006 – to mention only those which have received the greatest media attention – and the constant attacks in Afghanistan and Iraq, shows that this tendency is increasing. Avoiding the risks of attacking well-protected military installations, it enables the weaker opponent to wage an offensive war on the television screens and in the homes of the stronger state and to benefit from the repercussive effects of mass media coverage.<sup>27</sup>

## The principle of proportionality

Over time there is a considerable risk that in view of the aforesaid practices, international humanitarian law itself, with its clear-cut categorizations and differentiations between military and civil, may be perceived by a belligerent confronted with repeated violations by its opponent as opening the doors to a kind of war which intentionally does away with such clear demarcations.<sup>28</sup>

However, the more immediate risk is that the adversary, faced with such a misuse of the principle of distinction, could feel compelled gradually to lower the proportionality barrier. Evidently, if the use of human shields or the concealment of military equipment among civilian facilities occurs only sporadically and at random in an armed conflict, humanitarian concerns are likely to outweigh the necessity to attack using disproportionate force, whereas if such tactics are systematically employed for a strategic purpose, the enemy may feel a compelling and overriding necessity to attack irrespective of the anticipated civilian casualties and damage. Indeed, the explanation given by the Israeli government for the mounting number of civilian casualties in its recent military operations against Hezbollah in Lebanon<sup>29</sup> confirms that systematic violation of, for example, the principle of distinction by one side during a conflict is likely adversely to affect the other side's interpretation and application of the proportionality principle.<sup>30</sup>

27 Pfanner, above note 2, p. 153. See also Gerhard Paul, *Bilder des Krieges, Krieg der Bilder: Die Visualisierung des modernen Krieges*, Ferdinand Schöningh Verlag, Paderborn, 2004.

28 Carl Schmitt, *Theorie des Partisanen*, Duncker & Humblot, Berlin, 1963, p. 37.

29 On the homepage of the Israeli Ministry of Foreign Affairs it is stated that "Israel regrets the loss of innocent lives. Israel does not target civilians, yet is forced to take decisive action against Hezbollah, a ruthless terrorist organization which has over 12,000 missiles pointing towards its cities. Israel, like any other country, must protect its citizens, and had no choice but to remove this grave threat to the lives of millions of innocent civilians. Had Hezbollah not established such a missile force, Israel would have no need to take action, and had Hezbollah chosen to set up its arsenal away from populated areas, no civilians would have been hurt when Israel did what it obviously had to do." The statement is available at <<http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Israels+counter+terrorist+campaign+-+FAQ+18-Jul-2006.htm#disproportionateforce>> (last visited August 2006).

30 See e.g. Pilloud, above note 10, p. 683: "proportionality in *ius in bello* contributes to the "equitable balance between the necessities of war and humanitarian requirements"". See also the judgment of the trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kupreskic* Case, Case No. IT-95-16-T-14, Judgement, January 2000, para. 524.

## Military necessity in asymmetric conflicts

Although the concept of military necessity is invoked now and then as a separate justification for violations of the laws of war,<sup>31</sup> today there can be no doubt that in contemporary international humanitarian law the element of military necessity must be balanced against the principle of humanity, and that there is no such elasticity in the laws of war that military necessity can be claimed as a reason to deviate from accepted humanitarian standards.<sup>32</sup> Nevertheless, asymmetric conflict arguably entails a certain risk of the emergence of a modern-day *Kriegsräson* because obstacles seen as insurmountable could make both sides feel inclined and ultimately compelled vastly to expand their perception of what is necessary to overcome the enemy. Since military necessity is a component of the *ius in bello* equation of proportionality, to expand or overemphasize the concept of military necessity would impair the protective scope of the proportionality principle.<sup>33</sup>

The principle of military necessity is closely linked to the objectives of war.<sup>34</sup> However, the objectives sought in asymmetric conflicts vary significantly from those sought in the kind of symmetric conflict constellations which the drafting fathers of the principle of military necessity had in mind.<sup>35</sup> Modern authorities on the laws of war continue to refer to the definition of military necessity laid down in Article 14 of the Lieber Code, according to which “Military necessity, as understood by modern civilized nations, consists in the necessity of

31 Despite the unequivocal rejection of any extreme form of military necessity akin to a doctrine of *Kriegsräson* after the Second World War, the concept of military necessity has still sporadically been invoked as a separate ground justifying violations of the laws of war. Von Knieriem concludes from the preamble to the 1899 Hague Convention on Land Warfare that the annexed Regulations were no more than a guiding principle that only needed to be taken into account in so far as “military necessities” would permit. A. von Knieriem, *Nürnberg: rechtliche und menschliche Probleme*, E. Klett, Stuttgart, 1953, p. 321.

32 Kalshoven, above note 17, p. 366; Erik Castrén, *The Present Law of War and Neutrality*, Annales. Academiae Scientiarum Fennicae, Helsinki, 1954, p. 66; E. Rauch, *Le Concept de Nécessité Militaire*, *Revue de droit pénal militaire et de droit de la guerre*, 1980, pp. 214 ff.; Carnahan, above note 17, p. 218; Robert W. Gehring, “Loss of civilian protections under the Fourth Geneva Convention and Protocol I”, 90 *Military Law Review*, Vol. 90, No. 49, 1980, p. 14; Morris Greenspan, *Modern Law of Land Warfare*, University of California Press, Berkeley, 1959, p. 314; A. P. V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester and New York, 2004, p. 4.

33 Moreover, military necessity has often been characterized as the source of the requirement that warfare be proportionate; see e.g. Michael Bothe, Karl-Josef Parsch, Waldemar Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, pp. 194–5; Mures McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, Yale University Press, New Haven, 1961, p. 528; Rauch, above note 32, p. 213.

34 Section 3 of the British *Manual of Military Law* defines military necessity as “the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources, and money ...”, quoted in Rogers, above note 32, p. 5.

35 Generally see e.g. McDougal and Feliciano, above note 33, pp. 521–2. The principle of military necessity gained international recognition in the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg Declaration) of 29 Nov./11 Dec. 1868, available at <<http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>> (last visited August 2006).

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.”<sup>36</sup> In view of the formulation “indispensable for securing the ends of war”, the principle of military necessity is commonly understood to justify only that degree of force necessary to secure military defeat and the prompt submission of the enemy.<sup>37</sup> Indeed, the Declaration of St Petersburg states as early as 1868 that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”<sup>38</sup> and the *US Army Field Manual* stipulates that “The law of war ... requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes” and defines military necessity as “that principle which justifies those measures not forbidden by international law which are indispensable for the complete submission of the enemy as soon as possible”.<sup>39</sup>

Historically, the rather strict alignment of the concept of military necessity with exclusively military objectives, that is, military defeat and the prompt military submission of the enemy, is due to the fact that the concept was originally designed to restrain violence in war.<sup>40</sup> Although sometimes overlooked today, restrictions on violence in war do not merely stem from balancing the

36 Instructions for the Government of the Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100, 24 April 1863, reprinted in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd edn, Martinus Nijhoff, Dordrecht, 1988, p. 3. The Lieber Code is also available at <<http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>> (last visited August 2006). Generally on the principle of military necessity see Rauch, above note 32, p. 211; Carnahan, above note 17, p. 230; Pilloud, above note 10, p. 392; Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff/Henry Dunant Institute, Dordrecht, Geneva, 1983, p. 62; as well as Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge Studies in International and Comparative Law (No. 35), Cambridge, 2004, p. 681. See also Article 15 of the Lieber Code, according to which “Military necessity 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; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.” Article 16: “Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions; it does not admit of the use of poison in any war, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”

37 Botte et al., above note 33, p. 195; Carnahan, above note 17, p. 231. See also the *Commanders Handbook on the Law of Naval Operations*, US Department of the Navy, para. 6.2.5.5.2; *US Army Field Manual*, No. 27–10, 1956: “... only the use of those weapons and means of combat which is necessary to attain the military purposes of war, purposes based on the ultimate goal of overpowering the enemy armed forces, are permitted”.

38 St Petersburg Declaration, above note 35. See also Pictet, above note 36, p. 62.

39 *Field Manual*, above note 37, para. 3 (emphasis added).

40 Carnahan, above note 17, at p. 217.

principle of military necessity against the principle of humanity.<sup>41</sup> The principle of military necessity in and of itself constitutes an important restrictive factor by prescribing that to be legitimate, violence in war first of all has to be militarily necessary.<sup>42</sup> A gradual, clandestine widening of this concept, or simply a more lenient understanding of the factors that determine military necessity and hence the notion of military advantage, would therefore undermine the restrictive standards imposed on the use of violence in armed conflicts. Such a process seems particularly likely in view of asymmetric constellations which, owing to their complexity and intangibility, escape any military apprehension *stricto sensu*. For example, application of the rule of proportionality as laid down in Articles 51 and 57 of Additional Protocol I is significantly affected, even in traditional armed conflicts, by whether the notion of military advantage is understood to mean the advantage anticipated from an attack considered as a whole or merely from isolated or particular parts of the attack.<sup>43</sup> In asymmetric constellations that elude both temporal and spatial boundaries – in other words, the traditional concept of the “battlefield” altogether – it would seem somewhat difficult to delineate and determine with any degree of precision what is meant by the notion of “an attack considered as a whole”.<sup>44</sup>

More generally, as the asymmetry between belligerents increases, the distinction between political and military objectives and necessities becomes more and more blurred. Especially in conflicts such as those against al Qaeda or Hezbollah, that is, conflicts between a state or group of states and a non-state entity, that entity’s ultimate aim in using military force will be to exert pressure on the politics of the enemy rather than even attempt to achieve the latter’s military submission. Conversely, the superior party is likely to adopt a far more holistic approach, inseparably combining political and military efforts to bring about the entire political eradication or dissolution of the enemy and not just the enemy’s military submission – especially if it is battling against a non-state entity it categorizes as a terrorist organization.<sup>45</sup> To be sure, the separation of military and political aims already present in traditional warfare has always been axiomatic to

41 It is generally recognized that modern IHL essentially constitutes “a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other”, Pilloud, above note 10, pp. 392 ff.

42 Rauch, above note 32, p. 209; Carnahan, above note 17, p. 230; Gardam, above note 36, pp. 7 ff.

43 See e.g. para. 5 of the German reservation to Additional Protocol I, which specifies that Germany understands “military advantage” in Articles 51 and 57 of Additional Protocol I to refer to the advantage anticipated from the attack considered as a whole. The text of the reservation is available at <<http://www.icrc.org/ihl.nsf/NORM/3F4D8706B6B7EA40C1256402003FB3C7?OpenDocument>> (last visited August 2006).

44 “The United States of America is fighting a war against terrorists of global reach. ... The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time”, National Security Strategy, White House, p. 5. The National Security Strategy is available at <<http://www.whitehouse.gov/nsc/nss.html>> (last visited August 2006).

45 Rogers in particular has pointed out that “[t]he reference to the complete submission of the enemy, written in the light of the experience of total war in the Second World War, is probably now obsolete, since war can have a limited purpose ...”; above note 32, p. 5.

some extent, given that each and every military operation emanates from both military and political motivations.<sup>46</sup> The so-called Christmas bombing of North Vietnam in 1972 is a typical example: even though solely military objectives within the definition thereof were targeted, its purpose was to induce the North Vietnamese government to proceed with political negotiations.<sup>47</sup> Nonetheless, symmetric warfare with its identifiable battlefields in terms of space and duration did allow, at least in theory, a relatively clear separation of military and political necessities and objectives in the actual conduct of warfare. In asymmetric scenarios, however, the weaker adversary is militarily outmatched from the start, military superiority in itself is no longer a reliable guarantee for winning such conflicts and the very notions of “victory” or “defeat” thus become more and more indistinct. If these parameters remain undefined or even indefinable, straightforward determinations of what is militarily necessary are impeded. Military necessities have always been subject to change as warfare has developed, and the concept of military necessity has been flexible enough to adapt accordingly as long as that development largely resulted from technological advances in weaponry. Yet it seems doubtful whether asymmetric constellations akin to law enforcement patterns could still be grasped by and measured against the concept of military necessity,<sup>48</sup> for the complexities and intangibility of such scenarios escape its traditionally narrow delimitations. To compromise the concept’s very narrowness, however, would mean compromising long-achieved humanitarian protections that flow directly from the concept itself and could shift the focus of the proportionality equation away from humanitarian considerations and towards military necessities.

## Disparate military means and objectives in the light of the principle of reciprocity

Irrespective of the ongoing debate as to the precise role and scope of the principle of reciprocity in international humanitarian law<sup>49</sup> – some authors have denied the relevance of reciprocity in the formation of humanitarian law altogether,<sup>50</sup> while others consider it to be a sociological order principle without any direct legal relevance<sup>51</sup> – it is generally accepted that reciprocity remains a powerful force in

46 Carnahan, above note 17, p. 222.

47 Ibid., p. 221; Martin Herz, *The Prestige Press and the Christmas Bombing*, Ethics and Public Policy Center, Paperback, Washington DC, 1972, pp. 6 ff.

48 See Clyde Eagleton, “Of the illusion that war does not change”, *AJIL*, Vol. 35, 1941, pp. 659 ff.

49 On the principle of reciprocity, see generally Michel Virally, “Le principe de réciprocité dans le droit international contemporain”, *Recueil des Cours*, Vol. 122, 1967 III, pp. 1–106; Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Editions A. Pedone, Paris, 1970.

50 René-Jean Wilhelm, “Le caractère des droits accordés à l'individu dans les Conventions de Genève”, *Revue internationale de la Croix-Rouge*, 1950, p. 561, at p. 579: “la réciprocité est un élément de l'application effective de ces règles conventionnelles, comme elle l'est pour d'autres parties du droit des gens; elle n'en constitue nullement le fondement”.

51 “Reciprocity is a *de facto* element which should not be neglected. It can play an important role in the effective application of the rules concerned. To admit this element, which is more of a sociological

inducing continued compliance with humanitarian norms.<sup>52</sup> Yet it is a Janus-faced concept. While reciprocity may in a positive sense serve as a mitigating and stabilizing force, in its negative form it may ultimately bring about the breakdown of any legal order.<sup>53</sup> Reservations to the 1925 Geneva Gases Protocol, whereby the Protocol *ipso facto* ceased to be binding in the event of violation,<sup>54</sup> graphically illustrate this danger, and reprisals are likewise a typical example of the potentially negative dynamic inherent in the principle of reciprocity.

Historically, reciprocity has played an important if not dominant role in the field of international humanitarian law, the formation and adaptation of which has traditionally been closely linked to vital state interests, namely the desire to ensure military effectiveness in warfare. Prior to the codification of humanitarian norms at the end of the nineteenth century, conduct in warfare was often regulated in cartels – written agreements – drafted on an ad hoc basis by the warring parties in response to the military prerequisites of the moment, that is, of a specific battle, but in terms of practical reciprocity rather than humanitarian concerns.<sup>55</sup> Subsequent early codification efforts were often inspired by rules contained in these cartels,<sup>56</sup> as for instance the original Geneva Convention of 1864, or Article 62 of the Lieber Code according to which troops giving no quarter were entitled to receive none.<sup>57</sup> Moreover, the Hague Conventions of 1907 as well as the Geneva Convention of 1906 contained a so-called *clausula si omnes*, according to which humanitarian conventions became wholly inapplicable if one belligerent engaged in a conflict was not party to them.<sup>58</sup> However, even though the *si omnes* clause was in force throughout the First World War and despite the fact that Montenegro

order, as a principle of international law in the field considered would however be very dangerous”, “Reaffirmation and development of the laws and customs applicable in armed conflicts”, Report submitted by the ICRC to the XX1st International Conference of the Red Cross, 1969, p. 83.

52 Generally on reciprocity in relation to IHL, see René Provost, *International Human Rights and Humanitarian Law*, Cambridge Studies in International and Comparative Law (No. 22), Cambridge, 2002, pp. 136 ff.; Jean de Preux, “The Geneva Conventions and reciprocity”, *International Review of the Red Cross*, No. 244, January–February 1985, pp. 25–9.

53 Bruno Simma, “Reciprocity”, in R. Bernhardt (ed.), *EPIL*, Vol. 4, 2000, p. 32.

54 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. See e.g. the reservation of the Republic of Serbia, made on ratification on 12 April 1929, according to which “The said Protocol shall cease to be binding on the Government of Serbs, Croats and Slovenes in regard to all enemy States whose armed forces or whose allies do not respect the restrictions which are object of this Protocol.” The text of the reservation is available at <<http://www.icrc.org/ihl.nsf/NORM/5532AC2C94D0F5A8C1256402003F769B?OpenDocument>> (last visited August 2006).

55 P. Bogaiewsky, “Les secours aux militaires malades et blessés avant le XIXème siècle”, *Revue générale de droit international public*, Vol. 10, 1903, pp. 202–21. Reciprocity is most visibly manifested in the conclusion and termination stage of a treaty. See Bruno Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*, Duncker & Humblot, Berlin, 1972, p. 55.

56 In fact the content of subsequent conventions, e.g. the 1864 Geneva Convention, was often inspired by rules contained in cartels. See Provost, above note 52, p. 130; Henri Coursier, “L’évolution du droit international humanitaire”, *Recueil des Cours*, 1960-I, Vol. 99, pp. 357, 371.

57 This rule was subsequently incorporated into the *US Rules of Land Warfare*, WD Doc. No. 467, US War Dept., Office of the Chief of Staff, 1914, para. 368.

58 Article 2 of the 1907 Hague Convention IV provides: “The provisions ... do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention”.

as one of the belligerents was not party to the Convention, the signatory states heeded their signature. In 1929 the clause was consequently abandoned, since it no longer corresponded to humanitarian needs, and Article 2 (3) of the four Geneva Conventions adopted in 1949 now stipulates that in conflicts in which the belligerents are not all parties to the Convention,<sup>59</sup> “the Powers who are parties thereto shall remain bound by it in their mutual relations”, thus making the principle of reciprocity work in favour of the extended application of these conventions.<sup>60</sup>

The inter-state aspect of earlier days, that is, the predominant factor for inducing reciprocity, has gradually diminished as the humanitarian component has gained in importance and as humanitarian norms have progressively developed towards public order standards similar to those laid down in human rights norms.<sup>61</sup> The elementary considerations of humanity contained in Article 3 common to the four Geneva Conventions are the most prominent example in that regard, although Articles 73 and 75 of Additional Protocol I as well as most of the provisions of Additional Protocol II and Part II of the Fourth Geneva Convention are arguably likewise devoid of reciprocal considerations.<sup>62</sup> The adoption of Article 60(5) of the Vienna Convention on the Law of Treaties marks another step towards the exclusion of certain humanitarian provisions, relating to the protection of the human person, from the regime of reciprocity entailed by the *inadimplenti non est adimplendum* rule (one has no need to fulfil one’s obligation if the counter-party has not fulfilled his own) codified in Article 60(1)–(3) of the Vienna Convention.<sup>63</sup> Ever since the adoption of the Geneva Conventions in 1949, there have in fact been various signs of a progressive decline of the notion of reciprocity in the formation and continued application of international humanitarian law. They include the imposition of an obligation in common

59 The 1929 Convention relative to the Treatment of Prisoners of War stated in Art. 82 that: “in time of war, if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto”. See Jean S. Pictet, *The Geneva Conventions of 12 August 1949: Commentary*, Vol. III (Prisoners of War), ICRC, Geneva, 1960, p. 21. As stated in the commentary on the 1929 Geneva Convention, “the facts backed by the signatures of the signatories and by the humanitarian interests of all, outweighed the law”. See also Paul des Gouttes, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, Art. 25, p. 188, and the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Art. 25, available at <<http://www.icrc.org/ihl.nsf/FULL/300?OpenDocument>> (last visited August 2006).

60 Schwarzenberger, above note 14, p. 21.

61 Provost, above note 52, p. 137.

62 Common Article 3 and its customary equivalent impose an absolute obligation, completely disconnected from reciprocity, on all parties to an armed conflict; see Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, p. 94. Robert Craigie, the UK representative, emphasized that “any civilized government should feel bound to apply the principles of the convention even if the insurgents failed to apply them”, *ibid.* See also Pictet, above note 59, Vol. IV (Civilians), ICRC, Geneva, 1958, pp. 36–7.

63 See generally Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, Manchester, 1984, p. 188; Bruno Simma, “Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its background in general international law”, *Österreichische Zeitschrift für öffentliches Recht*, Vol. 20, 1970, pp. 5–81; Mohammed M. Gommaa, *Suspension or Termination of Treaties on Grounds of Breach* Martinus ,The Hague, 1996, p. 110.

Article 1 of those Conventions and in Article 1 of Additional Protocol I to ensure respect for the provisions thereof,<sup>64</sup> the ban on contracting parties absolving themselves or any other contracting party of any liability incurred by itself or by another contracting party in respect of grave breaches,<sup>65</sup> and the increasing classification of humanitarian norms as *ius cogens* or as norms that are binding *erga omnes*.<sup>66</sup>

Nevertheless, the potential danger of negative reciprocity may not necessarily hinge on the decline of reciprocity in its positive connotation. Despite the process described above, both the Geneva Conventions and Additional Protocol I contain apparent residual reciprocity requirements, particularly in the actual conduct of hostilities. Moreover, state practice shows that in some areas states regard the abandonment of the notion of reciprocity as somewhat premature. Tellingly, one of the reasons for US opposition to the ratification of Additional Protocol I is the stipulation in Article 44(2) that “violations of the rules of war shall not deprive a combatant of his right to be a combatant”.

Surely, for as long as belligerents have parallel interests, that is, while compliance with the applicable law has roughly equal advantages and disadvantages for both sides, overall observance of the legal rules remains likely.<sup>67</sup> As early as the 1930s it was contended that the mutual and parallel nature of interests prevalent in a war waged between two sea powers or between two land powers would constitute a powerful basis for the laws of war, whereas the disparity of interests and positions in a conflict between a land and a sea power would be a significant source of destabilization.<sup>68</sup> Clearly, the disparity of interests between belligerents in many contemporary conflicts now goes far deeper and the readiness to deviate from accepted legal standards in order to gain an immediate advantage is much greater. As the ICRC has rightly pointed out, “It is evident that if one Party, in violation of definite rules, employs weapons or other methods of warfare which give it an immediate, great military advantage, the adversary may, in its own defence, be induced to retort at once with similar measures.”<sup>69</sup> This affirmation of a hovering possibility of negative reciprocity is corroborated, for example, by the reservations made by the United Kingdom with regard to Articles 53 and 51–5 of

64 Pictet, above note 59, Vol. III, p. 15: “It is not an engagement concluded on a basis of reciprocity, binding each party to the contract in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others.”

65 See respectively Articles 51, 52, 131 and 148 of the 1949 Geneva Conventions.

66 ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, Case No. IT-94-1-AR72, Appeals Chamber, p. 30 ff.; *Prosecutor v. Kurpeskic* (Lasva Valley case), Decision on Defence Motion to Summon Witness, 8 Feb. 1999, Case No. IT-95-16-T, TC, 3: “all are *erga omnes* designed to safeguard fundamental human values”. Simma, above note 55, pp. 173–4.

67 Georg Schwarzenberger, *International Law and Totalitarian Lawlessness*, London, 1943, p. 33, and *idem*, above note 12, p. 15 ff.

68 Sir Henry Richmond, *Imperial Defence and Capture at Sea in War*, Hutchinson & Co., London, 1932, pp. 167 ff.; H.A. Smith, *Le Développement Moderne des Lois de la Guerre Maritime, Recueil des Cours*, Vol. 63, 1938, pp. 18 ff.

69 “Reaffirmation and development of the laws and customs applicable in armed conflicts”, report submitted by the ICRC to the XX1st International Conference of the Red Cross, 1969, p. 83.

Additional Protocol I. It declared that “if the objects protected by this Article are unlawfully used for military purposes they will thereby lose protection from attacks directed against such unlawful military uses.”<sup>70</sup>

The effects of negative reciprocity are manifold; although partially evident when violation or rejection of a norm leads to violation or rejection in turn, they are often more subtle. In international armed conflict, the chances are high that if one party opts for military necessity as its sole leitmotiv in combat, the other party will do so too. This need not necessarily result in outright violations of the law. Instead, with regard to the provisions regulating the actual conduct of hostilities, and especially the principle of distinction, the effects are likely to be more subtle because numerous provisions derived from the principle of distinction include special clauses that already *ipso jure* provide for the application of reciprocity. Article 19 of the Fourth Geneva Convention, for instance, provides for the protection of hospitals to be discontinued if they are used to commit harmful acts to the enemy, Article 11(1) of the 1954 Hague Convention on Cultural Property contains a similar provision relating to cultural objects and, more generally, according to Article 51(3) of the Fourth Geneva Convention, civilians enjoy protection only unless and for such time as they do not take a direct part in hostilities.<sup>71</sup> Recurrent alterations of status from civilian to combatant and vice versa, as well as the deliberate use of civilian and specially protected installations for military purposes, are likely to encourage militarily superior states to expand their interpretations of these exceptional clauses – to the detriment of the protective scope of the principle of distinction. The current discussion as to the precise content and temporal scope of the notion of “direct participation in hostilities”, especially the notorious revolving-door debate sparked by the exigencies of recent conflicts, is only one example. Similarly, the incentives to expand the notion of what constitutes a legitimate military objective have grown, and the definition in Article 52(2) of Additional Protocol I, which refers to “objects which by their nature, location, purpose or use make an effective contribution to military action”, offers considerable leeway in this regard. Moreover, Article 50(1) of Additional Protocol I stipulates that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. Evidently, when faced with recurrent changes of status from civilian to combatant and vice versa the superior party may be inclined to shift the burden of proof towards the victim. It is quite telling in this regard that already on ratifying Additional Protocol I, France and the United Kingdom expressed their understanding that the presumption formulated in Article 50(1) thereof does not override a commander’s duty to protect the safety of troops or to

70 Sub-para. (k) of the UK reservation on Article 53. Sub-para. (m) extends this reservation to Articles 51–55 of Additional Protocol I. The text of these reservations are available at <<http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>> (last visited August 2006).

71 Conceptually, these notions are closer in nature to reprisals than to the condition of reciprocity, given that in light of the “unless and for such time as” verbiage in Art. 51 (3) AP I they are limited in time and must stop when the illegal use for military purposes ceases.

preserve their military situation in conformity with other provisions of Additional Protocol I.<sup>72</sup>

It is worthy of note that prior to the adoption of Additional Protocol II, when the overall feasibility of further regulation of non-international armed conflicts was under discussion, several authors voiced concerns related to the asymmetric nature of such conflicts, which in their view exhibited very weak links of reciprocity and therefore, so they believed, largely evaded regulation.<sup>73</sup> Yet potential areas of reciprocity with regard to prisoners, wounded and sick soldiers, and even battlefield tactics have been pointed out in that type of warfare, despite its asymmetric structure. In the initial draft presented by the ICRC at the 1949 Conference, application of the whole of humanitarian law in a non-international armed conflict was expressly made subject to reciprocity.<sup>74</sup> Moreover, Additional Protocol II itself aims to ensure at least a minimum degree of reciprocity by expressly requiring, as a condition for its application, that the rebel party must possess the capacity to implement its provisions.<sup>75</sup>

Nevertheless, the effectiveness of this legal regime rests predominantly on the strong traditional motivation of non-state parties to adhere – at least formally – to the rules of international humanitarian law in order to acquire legitimacy and become “respectable”.<sup>76</sup> Where comparable motivational factors and incentives to abide by the law are lacking, the concerns initially voiced about the incompatibility of asymmetry and reciprocity in non-international armed conflicts again become valid.

## Conclusion

In conclusion, factual as well as legal asymmetries are indisputably prevalent in many contemporary conflicts. Historically, such conflict patterns are not

72 The relevant text of the French reservation reads, “Le gouvernement de la République Française considère que la règle édictée dans la seconde phrase du paragraphe 1 de l’article 50 ne peut être interprétée comme obligeant le commandement à prendre une décision qui, selon les circonstances et les informations à sa disposition, pourrait ne pas être compatible avec son devoir d’assurer la sécurité des troupes sous sa responsabilité ou de préserver sa situation militaire, conformément aux autres dispositions du protocole”. Available at: <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44-C1256A34004897B2?OpenDocument> (last visited August 2006).

73 Richard A. Falk (ed.), *The International Law of Civil War*, The Johns Hopkins Press, Baltimore, 1971, “Introduction”, p. 7: “Civil war situations exhibit very weak links of reciprocity under many circumstances.”

74 Jean Siotis, *Le droit de la guerre et les conflits armés d’un caractère non-internationaux*, Librairie générale de droit et de jurisprudence, Paris, 1958, pp. 190–3, 203–4.

75 Moreover, Articles 1(4) and 2 of the 1907 Hague Regulations, as well as Articles 13(2)–(6), 13(2)–(6) and 4A2–6 of the 1949 First, Second and Third Geneva Conventions respectively, stipulate as a condition for the applicability of the laws of war to militia, resistance groups and *levées en masse* that they must conduct their operations in accordance with the laws and customs of war. See Henri Meyrowitz, “La guérilla et le droit de la guerre: problèmes principaux”, in *Droit humanitaire et conflits armés*, Pédone, p. 185, at p. 197.

76 Major non-governmental parties to internal wars, such as the ANC in South Africa, the PKK in Turkey, UNITA in Angola or the Maoists in Nepal have accordingly given unilateral undertakings that they will abide by international humanitarian law, and the parties to the wars in the former Yugoslavia did likewise in multilateral agreements. See Pfanner, above note 2, at p. 160.

unprecedented and their side-effects have long been known. Military imbalances in a given conflict have always carried incentives for the weaker belligerent to seek a short-term advantage by circumventing accepted legal standards for the conduct of hostilities.

Such instances of non-compliance have remained a relatively marginal problem in international armed conflicts, in which incentives for compliance have overall outweighed impulses to the contrary and have usually confined deviations to brief and random occurrences. However, analysis has shown that as the disparity between belligerents grows, the effectiveness of the fundamental principles of IHL is gradually undermined and the compliance-inducing effects of reciprocity are increasingly evaded.

In international armed conflicts the steadily widening technological divide, evidenced for example by the fact that with a total defence budget for 2006 of US\$500 billion the United States hugely outstrips the rest of the world,<sup>77</sup> is a strong indication that for weaker parties faced with such overwhelming odds the incentives for compliance could be more and more severely compromised. It may nevertheless be assumed that in such wars compliance-inducing stimuli, stemming from the *ius ad bellum* level and fostered by the pursuit of credibility and legitimacy in the eyes of the world public, will very probably continue to prevail for the superior party, especially because as long as one party is able to bring its greater military superiority to bear, perfidious tactics used by the weaker opponent are perceived as militarily affordable and thus do not have the potential to start a vicious circle of negative reciprocity. Those stimuli are therefore likely to be effective whether the weaker opponent violates accepted legal rules or not, at least for as long as such deviant behaviour does not really alter the overall strategic balance so that it favours the weaker side. Nevertheless, in view of the continuously growing power gap, objective observers and above all the ICRC are urged to watch out for early signs of general changes in interpretation of the protective scope of rules relating to the conduct of hostilities.

Patterns of compliance are far more unstable if the aforesaid factual asymmetries are coupled with legal asymmetries and a profound divergence of interests between the parties involved. As mentioned above, non-international armed conflicts show far weaker links of reciprocity than international armed conflicts, and the question of enhancing compliance with the rules of IHL has consequently remained particularly topical and problematic ever since the scope of application of IHL was extended to that category of armed conflict. While the territorial delineation of non-international armed conflicts has left room for

77 Price Waterhouse Cooper in its recent study, *The Defence Industry in the 21st Century* (p. 9), estimates that by 2006 US military expenditure is expected to equal that of the whole of the rest of the world put together. President George W. Bush sent his 2006 fiscal budget to Congress on 7 February 2005, requesting \$419.3 billion, a 5 per cent increase on the previous year. Together with a bill providing for supplemental spending of \$80 billion, it thus totals a massive US\$500 billion. *Ibid.*, p. 36, available at <[http://www.pwc.com/extweb/pwcpublishings.nsf/4bd5f76b48e282738525662b00739e22/d0916ea815450f4185256fef0059437d/\\$FILE/The%20Defence%20Industry\\_13.pdf#search=%22The%20Defence%20Industry%20in%20the%2021st%20Century%20Price%22](http://www.pwc.com/extweb/pwcpublishings.nsf/4bd5f76b48e282738525662b00739e22/d0916ea815450f4185256fef0059437d/$FILE/The%20Defence%20Industry_13.pdf#search=%22The%20Defence%20Industry%20in%20the%2021st%20Century%20Price%22)> (last visited August 2006).

certain compliance-inducing incentives to take effect,<sup>78</sup> the intangibility of trans-boundary conflicts between states and non-state entities renders these stimuli largely inoperative.

Admittedly the above analysis is partly axiomatic in that transnational asymmetric conflicts do not necessarily constitute an armed conflict within the meaning of IHL. It has nonetheless revealed some aspects that caution against any premature over-extension of IHL's scope of application to cover asymmetric constellations akin to subordinative patterns of law enforcement, which therefore lack the minimum degree of symmetry required for the fundamental principles of IHL to be applicable. The legislative history of regulating non-international armed conflicts beyond the provisions laid down in Article 3 common to the Geneva Conventions shows that states intentionally sought to prescribe a minimum degree of symmetry between opponents so as to ensure a level of reciprocity that would in turn guarantee the legal regime's ability to function.

Neither the mere fact that the use of military means is unequivocally included in effective counter-strategies for security threats presented by non-state entities, nor the questionable perception that human rights law may not be suitable to address such a level of violence, automatically indicates the suitability of IHL. Without a minimum of reciprocal interconnections between belligerents or other compliance-inducing incentives, a tendency towards negative reciprocity is very likely to develop. The concept of military necessity, on which the protective scope of the rules regulating the conduct of hostilities largely depends, could potentially be misused to generate such a tendency, since the principle of military necessity cannot readily be reconciled with distinctly asymmetric structures that escape any purely military comprehension and the traditional idea of victory in war. Potentially anything could be justified as necessary when faced with either a militarily unbeatable or an unfathomable foe, and without strong incentives to the contrary there is quite a strong inclination to do so. Any use of coercive force, and *a fortiori* violence, undoubtedly requires regulation. However, if the concept of military necessity is applied to the use of military force in asymmetric constellations akin to law enforcement patterns and without any reciprocal links, this could result in a hardly controllable margin of discretion that would betray the initial aim of regulating the use of violence in such cases.

78 See "ICRC report on improving compliance with international humanitarian law", ICRC Expert Seminar, October 2003, available at <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TAM64/\\$File/Improving%20compliance%20with%20ihl-Oct%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TAM64/$File/Improving%20compliance%20with%20ihl-Oct%202003.pdf)> (last visited August 2006).

# Contextualizing proportionality: *jus ad bellum* and *jus in bello* in the Lebanese war

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## **Abstract**

*This article analyses the role and content of proportionality under contemporary international law governing the use of force, with a view to clarifying the legal framework governing the conduct of the parties to an armed conflict. In the system of jus ad bellum, protection is primarily granted to the interest of the attacked state in repelling the attack; the other competing interests are considered only to curtail the choice of the means to be employed in order to achieve that aim. Conversely, in the system of jus in bello there is by definition no prevailing interest, but instead a variety of interests and values which are entitled to equal protection of the law and must be balanced against each other. The existence of two distinct normative systems, with distinct standards of legality applicable to the same conduct, does not as a rule give rise to major problems. The legality of recourse to force is measured against the proportionality of self-defence, whereas individual actions would have to conform to the requirement of proportionality in jus in bello. However, beyond the large area in which these two standards overlap, there might be situations in which the strict application of the jus ad bellum standard makes it impossible to achieve the aims of jus in bello. In these cases, the proportionality test under jus in bello must be regarded as part of the proportionality test under jus ad bellum. States must thus take humanitarian implications into account in determining the level of security they may seek to obtain using military action.*

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Even the most unaware reader can easily see the relevance of proportionality in the debate on the legality of the forceful campaign conducted by Israel in Lebanon in the summer of 2006. Virtually all the positions adopted by states and international bodies with regard to that intricate issue revolve around an assessment of proportionality. Indeed, the opinions expressed generally seem to agree that Israel's recourse to force was justifiable as self-defence in response to attacks by the Hezbollah militias, a political and religious group exerting exclusive control over the territory of South Lebanon. Hezbollah periodically launched rockets against settlements on Israeli territory and ultimately, in the course of a cross-border incursion, exchanged fire with Israeli soldiers, killing some and kidnapping others. However, that response was widely labelled as disproportionate because it began with air attacks even on those military and civilian infrastructures far away from the combat zone, resulting in heavy civilian casualties, and finally took the form of tank operations across the border, with the alleged goal of dismantling the Hezbollah organization in southern Lebanon and establishing a buffer zone in that part of Lebanese territory.<sup>1</sup>

The present analysis of the role and content of proportionality under contemporary international law governing the use of force is designed to delineate the legal framework governing the conduct of the parties in the case in point. Indeed, those events and the reactions of the international community may be instrumental in determining the role assigned by the international community to proportionality in the context of armed conflicts. A study on proportionality with reference to the Lebanese war thus offers a twofold methodological advantage: the concept of proportionality helps to determine the legal framework for assessing the legality of the parties' conduct; and the positions adopted with regard to the Lebanese war may contribute to further development of that concept and to resolving some still controversial issues concerning its role and content.

1 For example, at the 5,489th Meeting of the Security Council of 14 July 2006 (SC/8776) many state representatives, while condemning the Israeli action as disproportionate, nonetheless referred to it as self-defence (Argentina, Japan, United Kingdom, Peru, Denmark, Slovakia, Greece, France). According to the UK representative, "Israel has every right to act in self-defence. But it must exercise restraint and ensure that its actions are proportionate and measured; conform to international law; and avoid civilian death and suffering. Disproportionate action will only escalate an already dangerous situation." According to the Statement by the Council of the European Union on the Middle East of 17 July 2006, "The EU recognises Israel's legitimate right to self-defence, but it urges Israel to exercise utmost restraint and not to resort to disproportionate action." In the same vein, according to the statement issued by the leaders of the G-8 Summit of 16 July 2006, "It is critical that Israel, while exercising the right to defend itself, be mindful of the strategic and humanitarian consequences of its actions. We call upon Israel to exercise utmost restraint, seeking to avoid casualties among innocent civilians and damage to civilian infrastructure and to refrain from acts that would destabilize the Lebanese government." See also the report of the Commission of Inquiry on Lebanon, established on 11 August 2006 by the Human Rights Council by resolution S-2/1, available at <http://www.ohchr.org/english/bodies/hrcouncil/specialsession/2/CI-Lebanon/index.htm>. Israel's view on proportionality was expressed in the document issued by the Ministry of Foreign Affairs on 25 July 2006: "Responding to Hezbollah attacks from Lebanon: Issues of proportionality – legal background," available at <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+-+Issues+of+proportionality+July+2006.htm>

The narrowness of that scope will also dictate the course taken by the analysis, which will focus only on certain specific issues arising in connection with the events in Lebanon. Bibliographical and documentary references will be kept to the minimum required to illustrate the line of reasoning. Other issues which might be relevant for a comprehensive review of the legal framework governing the parties' conduct will be left aside, such as the legal status of Hezbollah in international law and the legality of self-defence against non-state entities.

## Two notions of proportionality?

The prevailing view in legal scholarship tends to draw a clear-cut distinction between two different ways in which proportionality limits the use of armed force. Proportionality constitutes a limit both to the power of states to resort to force (*jus ad bellum*) and to the power to choose the means and methods of warfare (*jus in bello*).<sup>2</sup>

The distinction between these two notions of proportionality, though clear in theory, tends to blur in practice, as they are not uncommonly merged together in a comprehensive assessment of the legality of the use of force. This is also what happened in the case of the Lebanese war. Although emphasis in the reaction of many states is placed on the disproportionate character of the Israeli response, it is much more difficult to see which kind of proportionality was being referred to. Quite often their statements contain elements of both *jus ad bellum* and *jus in bello* arguments.<sup>3</sup>

Carelessness in the legal appraisal of proportionality in international practice is by no means surprising. Even in legal scholarship, although the opinion that these normative systems have different historical roots and perform different functions is widely accepted, there is no clarity as to their mutual relationship. It is therefore appropriate to devote a brief analysis to the role and content of proportionality in both *jus ad bellum* and *jus in bello* and to ascertain whether they are autonomous notions in each system, or whether there is a case for analysing their mutual interaction.

## Proportionality in *jus ad bellum*

### Proportionality and the notion of armed attack

In *jus ad bellum*, proportionality has a dual role: it serves to identify the situations in which the unilateral use of force is permissible; and it serves to determine the intensity and the magnitude of military action. In both regards, the events in Lebanon can make a valuable contribution to legal analysis.

2 See Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, Cambridge, 2004. For a more general analysis, see my previous study, Enzo Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale*, Giuffrè, Milan, 2000.

3 For a clear example, see the remarks by the representative of France within the Security Council at the meeting of 14 July 2006, Doc. S/PV.5489.

As to the first aspect, situations in which force can be unilaterally used are determined by recourse to a functional argument: states can unilaterally resort to force only defensively, in the presence of an armed attack and to the extent necessary to repel it.<sup>4</sup> This means that self-defence is not an open-ended instrument, but only has the aim of repelling armed attacks and provisionally guaranteeing the security of states. The forcible removal of threatening situations and the creation of permanent conditions of security seem to have been reserved by the international community as tasks to be performed collectively. This solution is consistent with the structure of the international community, where unilateral use of force can result in irremediable abuses and carries the permanent risk of escalation that could jeopardize collective security.

Moreover, defensive force can be used only in order to counter armed attacks starting from a certain threshold of intensity. Below that threshold, the use of minor types of force falls short of the notion of “armed attack” and cannot be met with a forcible response. This is probably because the self-defence regime does not protect the interest of individual states in responding to *any* offensive use of force, but regards forcible measures as appropriate only in response to acts of aggression which objectively endanger their security, and only to the extent necessary to repel them. This means that the system of *jus ad bellum* predetermines the interests for which force can lawfully be employed, as well as their standard of protection, and that proportionality serves only to determine the means appropriate to attain that aim.

In the *Nicaragua* case, the International Court of Justice (ICJ) ruled that the mere cross-border flow of arms and logistic supplies did not constitute a violation of the prohibition of the use of force that might, as such, prompt an armed response.<sup>5</sup> More recently the Claims Commission, when asked to settle the dispute between Ethiopia and Eritrea concerning, *inter alia*, the lawfulness of an armed response to a cross-border incursion, went even further by holding that “the predicate for a valid claim of self-defence under the Charter is that the party resorting to force has been subjected to an armed attack. Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter.”<sup>6</sup> It follows that minor violations of the prohibition of the use of force falling below the threshold of the notion of armed attack do not justify a corresponding minor use of force as self-defence.<sup>7</sup>

4 See the findings of the ICJ in the decision of 27 June 1986 on the *Nicaragua* case (*Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986), paras. 176ff., esp. paras. 194–195 and 211.

5 *Ibid.*, paras. 195, 230. See also the ICJ decision of 6 November 2003 in the *Oil Platforms* case (*Islamic Republic of Iran v. the United States*, Merits, [2003] ICJ Rep.), para. 55, and Judge Simma’s discussion on that point in his Individual Opinion, esp. paras. 12 and 13.

6 Arbitral award of 19 December 2005, “Ethiopia vs. Eritrea, *jus ad bellum*, Ethiopia’s claim 1–8”, available at [www.pca-cpa.org](http://www.pca-cpa.org).

7 This means that proportionality in the context of self-defence is not a full-scale functional standard, but is instead a threshold functional scale. This way of approaching the proportionality argument is consistent with the philosophy of social control of unilateral force. Since force used unilaterally is a dangerous instrument, it must be employed only as a last resort. The flipside is that, if the collective security mechanisms fail, states do not have a coercive instrument at their disposal to guarantee effectively their own security.

The events immediately preceding the Israeli reaction against Lebanon seem to be very similar to the type of conduct which, according to the Court's ruling, does not justify recourse to an armed response. Indeed, press reports speak of an exchange of fire between patrols, with a limited number of losses and two soldiers captured.<sup>8</sup> Within the international community, however, as noted above, the Israeli reaction is widely qualified as self-defence. This might be explained by the fact that the Hezbollah incursion was viewed in the broader context of an array of minor attacks carried out repeatedly across the borders.<sup>9</sup> Thus the qualification of Israel's reaction as self-defence seems to imply that, for this purpose, one must not take into account single actions performed by the attacker but rather the entire plan of aggression, which can unfold throughout a series of small-scale attacks. This means that in order to determine what is an armed attack which justifies an armed reaction, one is entitled to take into account not only single armed actions amounting to minor violations of the prohibition of the use of force, but also other actions related to each other in a more complex strategy of aggression. However, it does not necessarily also imply that the response, instead of being tailored to the single actions which form part of such a complex strategy, can be commensurate with the entire series of actions considered as a whole. I shall return to this point below.

### Proportionality and the intensity of defensive action

Once an armed attack prompting an armed response in self-defence is considered to have occurred, the further question arises as to the type and scale of action that constitutes an appropriate response. Proportionality is measured by a *quantitative* test if the response is required to conform to quantitative features of the attack, such as the scale of the action, the type of weaponry and the magnitude of the damage. A *qualitative* test looks not so much at the extrinsic correspondence between attack and response, but instead seeks to establish whether the means employed are appropriate in relation to the aim sought by the response. As such, a proportionate response is one which is necessary and appropriate to repel the attack and which entails acceptable side-effects on other interests and values affected by the response.

Whereas quantitative proportionality intuitively satisfies a sense of symmetry between attack and defence and therefore might seem less prone to

8 See e.g. "Turmoil in the Mideast: Escalation – clashes spread to Lebanon as Hezbollah raids Israel", *New York Times*, 14 July 2006, p. 1. See also the Special Cabinet Communiqué of the Israeli government of 2 July 2006, available at [www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hizbullah+attack+12-Jul-2006.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hizbullah+attack+12-Jul-2006.htm).

9 Significantly, no state seems to have considered it relevant that a small part of Lebanese territory was, and still is, under the control of Israel. This might also shed further light on the particular structure of the rule on self-defence, in that it illustrates the fact that the objective of completely liberating a small part of a state's territory, which has moreover remained for years under the control of another state, cannot in itself justify forcible reactions.

subjective assessment, qualitative proportionality seems logically more in accordance with the structural element of the rule of self-defence, whose aim is not so much to give the attacked state the right to inflict punishment but to give only the right to repel the attack, using the means appropriate to the particular circumstances.<sup>10</sup>

In most cases application of the two tests leads to similar results. Both seem to emphasize the need for social control over unilateral recourse to violence by requesting the state acting in self-defence to maintain a certain level of correspondence between the defensive conduct and the attack which prompted it. Moreover, the qualitative test, wrongly said to leave broad discretion to the attacked state, also entails a quantitative analysis insofar as it calls for a balance to be struck between the need to repel the attack and the harm that defensive military action is likely to result in for other values and interests at stake, such as values of a humanitarian nature.

This is a crucial point in assessing the legality of the Israeli response to the Hezbollah attacks. The disproportionality of Israel's response was mostly attributed to three considerations: the scale of its action, which considerably exceeded what was deemed necessary for repelling the attack; the fact that the response involved the destruction of military and civilian infrastructures located hundreds of miles from the area attacked, which were therefore unrelated to the defensive objective of the action; and the threat to and harm sustained by civilians. Although these arguments all refer to the quantitative aspect of the response, they do not point to the need for a strict quantitative correspondence between attack and defence, but rather to a requirement that the defensive action be reasonably related to its goal and that the goal be attained without having consequences out of proportion with what is normally considered the social cost of a defensive reaction.

This observation can help in grasping the distinctive features of the two tests. Although in the qualitative test the defender is permitted to depart from an exact correspondence to the original attack, which is the hallmark of the quantitative test, this wider discretion is offset by the need also to take into account an open set of interests and values which might suffer prejudice in consequence thereof. As the International Court of Justice said in the *Nuclear Weapons* case with regard to environmental protection, "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."<sup>11</sup>

10 For a further discussion of these conceptually different approaches to the proportionality issue, I refer readers again to my book, above note 2, pp. 278ff.

11 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep., para. 30.

## Proportionality and “accumulation of events”

This observation calls for a further remark concerning the specific standard for measuring the appropriateness of the response. We have seen that a complex strategy of aggression may qualify as an armed attack, under Article 51 of the UN Charter, even if composed of a number of small-scale individual violations of the prohibition of the use of force, none of which, individually considered, would perhaps exceed the scale of magnitude considered necessary to that end. Curiously enough, however, this logical operation, commonly referred to as the doctrine of the accumulation of events,<sup>12</sup> was not employed in the context of the Lebanese war in measuring the proportionality of the response. Quite to the contrary, the reactions of the international community seem to point out that the Israeli response was disproportionate to the various individual events which prompted the response, and could not be commensurate with the aggressive strategy of Hezbollah.<sup>13</sup>

This conclusion is hardly surprising if one considers the logic inspiring proportionality in *jus ad bellum*. Although assigning priority to the defensive needs of the attacker, proportionality remains an instrument for social control of unilateral resort to force. As such, the use of force must necessarily be commensurate with the concrete need to repel the current attack, and not with the need to produce the level of security sought by the attacked state. The idea that a series of small-scale attacks, none of which seriously jeopardizes the security of the attacked state, can be considered cumulatively and can therefore prompt a wide-scale response, seems to depart from the conception of proportionality as an instrument designed to keep the level of force to the minimum necessary for repelling an attack and to avoid escalation.

## Proportionality in *jus in bello*

The proportionality requirement in *jus in bello* is inspired by 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. Thus the interplay which dominates the assessment of proportionality in *jus in bello* is concerned instead with the military advantage that either belligerent intends to attain and the harm to humanitarian values, in particular – but not only – among civilians and protected persons. It is well known that this conceptual structure underlies the assessment of

12 To my knowledge, the most elaborate conceptualization of this doctrine was made by Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd edn, Cambridge University Press, Cambridge, 2001, p. 202.

13 Here, too, see the remarks by various states within the Security Council on 14 July 2006, Doc. S/PV.5488, S/PV.5489.

proportionality laid down in Article 51(5)(b) of Protocol I additional to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflicts, which considers as indiscriminate and therefore prohibited, “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.<sup>14</sup> Elements of this provision lead to the conclusion that it has now become a rule of customary law, applicable even beyond the scope *ratione personae* of Protocol I.<sup>15</sup>

Rules which do not impose a specific form of conduct upon belligerents, but require instead a proportionality test, apply in situations in which the balance between values is not predetermined by the law but must be achieved by reference to concrete situations, using as guidance the relative importance of the various interests in the light of actual needs in the situation in question. For want of an abstract rule of conduct, the task of reconciling competing interests is assigned to the state taking action, which must apply a standard of proportionality.

Thus the absence of a specific rule prescribing conduct in a certain situation does not necessarily mean that the parties are left free to do as they wish. Methodological insight is provided by the reasoning which led the ICJ, in the well-known *Nuclear Weapons* Opinion, to state that the consistency of threat or even use of nuclear weapons cannot be assessed *in abstracto*, but must be evaluated in the light of the concrete situations of each specific case.

### Proportionality and the aims-means relationship in *jus in bello*

The particular structure of proportionality as a normative technique applicable in *jus in bello*, in which no interest can claim absolute priority over the others, explains why, in that particular system, proportionality cannot logically be measured by reference to the ultimate goals of a military mission, but instead to the more immediate aims of each single military action. This element makes proportionality in *jus in bello* appreciably different from the analogous technique applicable in *jus ad bellum*. In the latter, international law confers upon the

14 This provision is complemented by Article 57 of the Protocol, which concerns the different, but related, aspect of precaution. Under Article 57(2)(a)(iii) it is mandatory to, *inter alia*, “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. Article 2(b)(iv) of the ICC Statute also seems to rely on an assessment of proportionality, which may, however, differ from the notion included in Protocol I. The ICC Statute lists, among the forms of conduct constituting a grave breach of the laws and customs of war, “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”. The emphasis placed on the subjective intention to launch an attack while being aware of its lethal consequences is probably due to the nature of the rule, which makes individuals criminally liable for violations of humanitarian law.

15 See the relevant practice in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. II, part 1, Cambridge University Press, Cambridge, 2005, p. 297.

attacked state a superior power to take defensive action, and the proportionality requirement serves only to determine the degree to which other values can be sacrificed to that higher value. Conversely, in *jus in bello* there is by definition no higher value, as the offensive or defensive character of the military action does not count as such for assessment of the proportionality thereof.

This conceptual difference explains why, unlike *jus ad bellum*, in *jus in bello* the factors for assessing proportionality, in particular the notion of military advantage and that of collateral damage, are to be considered only in the short term. For example, in the assessment of the proportionality of Israel's military actions and the collateral damage to civilians, the ultimate aim pursued by Israel, which was allegedly to stop the aggressive conduct of the Lebanese faction, was immaterial – even if hypothetically the defeat of the Hezbollah strategy envisaging the use of civilians as human shields could, in the long term, have brought about a more secure situation for civilians on both sides and thus be considered more beneficial for humanitarian purposes.

### Proportionality as an objective assessment

In recent practice there is a growing tendency to present the assessment of proportionality as having to be conducted with the best means at one's disposal in order to avoid excessive collateral damage in attacks. In the large majority of cases this assessment, which emphasizes a certain relativism, leads to appropriate results. However, there are situations in which, mainly because of the belligerents' asymmetric technological development, a relativistic assessment is inaccurate and distorts application of the proportionality standard. The question, simply put, concerns the perspective from which one must proceed to assess the likelihood of collateral damage and strike a balance between the expected damage and the prospective military advantage. Should such a logical operation be accomplished according to the best practice available, or rather according to the best practice available to the state or to the individual commander who directs the action? The alternative, although sometimes suggestively formulated, is legally meaningless.<sup>16</sup> Proportionality is not a rule of conduct but a rule which requires a balancing of antagonistic values, such as the interest of the belligerent in carrying out a military action, on the one hand, and the interest of civilians who, although extraneous to the conduct of the hostilities, might be victimized by that action. It would therefore be illogical to assume that the level of protection of one of the parties to this balancing operation might depend on the subjective qualities of the other. What proportionality requires, on the contrary, is that civilians be protected independently of the intrinsic characteristics of the belligerents. If a state authority or agent is unable in a particular situation to assess with a certain degree of predictability the collateral damage likely to ensue from the envisaged attack, it or

16 This seems to be the position suggested by Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 126.

he must simply abstain from taking that action. A subjective standard is thus inconsistent with the essence of the proportionality principle.

Obviously, in a conflict between two parties at different levels of development, the need to assess proportionality objectively is advantageous for developed states, which can draw on the best technology to minimize casualties and can consequently launch attacks in situations where the other party should abstain from attacking, since it does not have an equivalent technological advantage.<sup>17</sup>

But things are never as easy as might be expected. Even developed states may be inclined to favour a subjective standard in order to prevent proportionality from being invoked to restrict the choice of military strategies. The best example of this tendency is the recourse to “aerial war”. In the most recent conflicts, aerial war was strongly favoured by strategists in order to minimize losses among their own troops, even at the cost of altering the balance between military losses and civilian casualties.<sup>18</sup> Yet if proportionality must be assessed according to the circumstances in which a single action is performed, this implies that casualties can be considered reasonably related to the attainment of a military advantage even if it were proved that a different strategy would have made it possible to further minimize casualties, at the cost of exposing the troops to a higher risk. Nonetheless, this seems to be the position supported by the Public Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>19</sup> In her decision not to issue an indictment against NATO troops operating during the bombing campaigns in the former Yugoslavia, the Public Prosecutor endorsed the conclusions of a panel of experts which upheld the idea that the choice of strategy to be followed remains entirely at the discretion of the acting state, and that the proportionality of the action must be assessed strictly in regard to individual

17 The need to evaluate objectively the elements to be considered for the proportionality assessment means that, by virtue of the precautionary principle, one must abstain from conducting operations in situations in which those elements cannot be properly evaluated, and the risk of collateral damage consequently cannot be precisely assessed. Indeed, precaution is a particular form of application of the more general standard of proportionality. Unfortunately, this was not the principle which inspired the decision of the Eritrea–Ethiopia Claims Commission in its Partial Award, Central Front, and Ethiopia’s Claim 2, handed down within the context of a wider dispute between Ethiopia and Eritrea on 28 April 2004. Paragraph 110 of the award reads: “the Commission believes that the governing legal standard for this claim is best set forth in Article 57 of Protocol I, the essence of which is that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations. The Commission does not question either the Eritrean Air Force’s choice of Mekele airport as a target, or its choice of weapons. Nor does the Commission question the validity of Eritrea’s argument that it had to use some inexperienced pilots and ground crew, as it did not have more than a very few experienced personnel. The law requires all “feasible” precautions, not precautions that are practically impossible.”

18 See the recent study by Luisa Vierucci, “Sulla nozione di obiettivo militare nella guerra aerea: recenti sviluppi della giurisprudenza internazionale”, *Rivista di diritto internazionale*, Vol. 89 (2006), p. 693.

19 See Paolo Benvenuti, “The ICTY Prosecutor and the review of the NATO bombing campaign against the Federal Republic of Yugoslavia”, *European Journal of International Law*, Vol. 12 (2001), p. 503; Michael Bothe, “The protection of the civilian population and NATO bombing on Yugoslavia: Comments on a report to the Prosecutor of the ICTY”, *ibid.*, p. 531; Enzo Cannizzaro, “Le operazioni aeree della NATO contro la Repubblica federale di Jugoslavia e il diritto umanitario”, *Rivista di diritto internazionale*, Vol. 84 (2001), p.133.

military actions. Their report also seems to support the idea that casualties caused by high-altitude bombers flying above the range of air-defence systems on the ground were proportionate inasmuch as the resulting damage could not, precisely because of the high altitude, be envisaged by the aircrew.<sup>20</sup> However, this conclusion appears to be at odds with that same idea of striking a balance between military advantage and collateral damage. It seems preposterous to assume that an action is proportionate if the agent, in order to maximize his own security and to avoid exposure to risk, deliberately chooses conditions which do not allow him to conduct an objective cost-benefit analysis on which proportionality is ultimately based.<sup>21</sup>

### Proportionality and collateral damage to civilians used as human shields

Again, it is worth stressing that in the particular context of humanitarian law, proportionality is employed to determine the balance between two clashing values: on the one hand, the military interest of the parties; and on the other, the interests of the civilian population, considered as a separate entity unconnected with the belligerents. However, it must be admitted that balancing two highly heterogeneous interests such as military advantage vs. humanitarian concerns is not an easy task. The respective value of either interest is subjective; it depends on a number of historical and social factors and varies greatly according to the level of humanitarian sensitivity of each epoch. Yet this does not mean that an objective assessment is impossible. In other fields of international law, the proportionality assessment is based on what is considered to be the “normal” social cost for a certain action, the notion of “normality” here being a historical notion which can be construed on the basis of the practice in the same or similar situations.

More serious seems to be the objection asserting that the rule, based as it is on the presumption that military and civilian interests are antithetical, is going to become, or will soon become, obsolete in relation to contemporary conflicts, in which civilians not uncommonly tend to participate more or less actively in the conduct of the hostilities.

The Lebanese conflict offers us a situation of this kind, where the civilian population were seriously regarded by Israel as being involved in the conflict insofar as they provided Hezbollah with logistical support and permitted it to operate behind a shield of civilians. This is a frequent occurrence in modern conflict, which involves a clash between armed forces on one side and a system of military militias acting with the support or behind the shield of civilian populations on the other. In these types of situations there will very likely be a certain asymmetry in the positions of the parties: one belligerent feels compelled to abide scrupulously by the rules of humanitarian law, which mostly favour the

20 See in particular, paras. 69ff of the report.

21 For a different conclusion see William J. Fenrick, “Targeting and proportionality during the NATO bombing campaign against Yugoslavia”, *European Journal of International Law*, Vol. 12 (2001), p. 489, at p. 501.

population of the other side, whereas its adversary infringes these rules and uses the population as a shield in spite of the possible harm its doing so may cause to civilians.

In these kinds of scenario the question is whether there is any justification for violating humanitarian law in response to the corresponding violations by the other party. In more concrete terms the issue is whether, in response to a violation committed by one party of the obligation to maintain a clear distinction between combatants and civilians, in particular by placing military equipment among civilian facilities and infrastructures, the other party is released from its obligation to distinguish between military and civilian objectives and to abstain from indiscriminate attacks.

Framed in this way, the question admits but one answer, namely a clear negative. In normative terms, since the interests of civilians are conceived as being formally detached from those of the belligerents, respect for these interests is owed by both parties. Consequently, violations of the rule of distinction by one party cannot justify a corresponding violation by the other, owing to the rule's lack of reciprocal character. This solution is less formalistic than it appears, since the absence of reciprocity in the entire field of humanitarian law, and in the treatment of civilians in particular, corresponds to a lengthy evolution of legal sensitivity which can be only mentioned here in passing. A different solution would be conceivable only by considering that in concrete situations civilians are active parties to the hostilities or by questioning the combatant/civilian distinction at its very roots and thereby casting doubt on some of the most fundamental principles of humanitarian law.<sup>22</sup>

A different question, technically more subtle and conceptually more insidious, is whether the conduct of civilians and the asymmetry resulting from the connections between militias and those civilians in modern conflicts alter the nature of the balance of values required by the proportionality test, and whether the “excessiveness” of the damage should be judged in that light. In other words, according to this solution a certain amount of collateral damage could be “less excessive” in situations where there is a strong presumption that civilians are aware of the danger, and accept it voluntarily as part of their participation as human shields, than in situations in which the civilians are genuinely unconnected to the violence.

Although implicitly referred to by attacking states, which claim that the (more or less active) participation of civilians in the conduct of hostilities justifies greater collateral damage, this argument is unconvincing. Humanitarian protection of civilians as it now stands is based on a clear-cut distinction between combatants and civilians. In order to change the status normally assigned to civilians, a threshold of involvement is required, usually corresponding to the performance of functions normally discharged by persons belonging to a military

22 See the study undertaken under the auspices of the ICRC and the TMC Asser Institute on the “Notion of direct participation in hostilities”, available at [www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205?opendocument#a1](http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205?opendocument#a1) .

corps. To go beyond this assumption, and to assume instead that civilians not actively involved in hostilities can nonetheless be deemed by virtue of their behaviour to accept a higher risk of collateral damage, entails the imposition on civilians of positive obligations, such as the responsibility to take action to prevent militias from using civilian facilities or even to leave civilian-inhabited areas. The failure to do so would then allow the other party to regard civilian facilities, or “double-use” facilities, as military targets and to act accordingly.

It is easy to see that this line of reasoning has the effect of significantly subverting the logic of humanitarian law and creating the presumption that civilians who do not take clear action to dissociate themselves from militias are objectively contributing to the militias’ operations. The principle of proportionality, incorporated into humanitarian law in order to enhance the protection of civilians, is thus used in order to attain the *inverse* objective, that is, to grant greater discretion to the attacking party. Indeed, if the *onus probandi* in regard to the distinction between military and civilians fell on the civilian population, and if the protection normally accorded to civilians were revoked upon failure to make such a showing, then the application of the principle of proportionality would be indistinguishable from collective punishment, a result plainly antithetical to the more noble aims inspiring the application of that principle in humanitarian law.<sup>23</sup>

### **Concluding remarks: using proportionality as a link between *jus in bello* and *jus ad bellum***

The conceptual analysis undertaken thus far shows that proportionality also serves as a tool capable of bridging the gap between *jus ad bellum* and *jus in bello*. As emphasized more than once, these two normative systems have diverse historical origins and are each formulated in response to a different set of aims and values. The diverse values addressed account for a differently structured concept of proportionality. In the system of *jus ad bellum*, protection is primarily granted to the interest of the attacked state in repelling the attack, and the other competing interests are considered only to curtail the choice of the means to be employed in order to achieve that aim. Conversely, in the system of *jus in bello* there is by definition no prevailing interest, but instead a variety of interests and values entitled to equal protection of the law which must be balanced against each other.

The existence of two distinct normative systems, with distinct standards of legality applicable to the same conduct, does not as a rule give rise to major problems. The legality of recourse to force is measured against the proportionality of self-defence, whereas individual actions would have to conform to the requirement of proportionality in *jus in bello*. However, beyond the large area in which these two standards overlap, there might be situations in which strict application of the *jus ad bellum* standard would make it impossible to achieve the

23 For a different conclusion see Dinstein, above note 16, p. 131.

aims of *jus in bello*. In such cases, the proportionality test under *jus in bello* must be regarded as part of the proportionality test under *jus ad bellum*. States must thus consider the humanitarian implications in order to determine the security standard they may pursue using military action.

In terms of legal technique, this conclusion flows from an analysis of the interaction between these overlapping systems. As states are simultaneously compelled to abide by both the *jus in bello* and the *jus ad bellum* systems, it seems reasonable to assume that in the event of a clash, the principles which inspire one of the two systems must be considered as a source of guidance in striking a balance with the values of the other, and thus influence the way in which the principle of proportionality operates.

The appropriateness of this conclusion does not seem to be purely conceptual. It can also be appraised in practical terms in the light of the events in Lebanon. In a number of reactions by third states and international organizations the existence of collateral damage, in particular the high toll of victims among civilians, was invoked as proof of the disproportionality of Israel's self-defence reaction. This means that proportionality under *jus in bello* must be considered as an element of the more general assessment of proportionality to be conducted under *jus ad bellum*.

I started this analysis by noting that a number of reactions to the Israeli response in Lebanon did not distinguish between proportionality in *jus in bello* and proportionality in *jus ad bellum*, as one would expect on the basis of a rigorous distinction between these two systems. However, what might seem an oddity in fact improves our understanding of how these two systems, instead of functioning separately, interact and provide for an overall assessment of the proportionality of the armed response. The conclusion that the proportionality test provided for in *jus in bello* is a key element of the proportionality test required by *jus ad bellum* is significant in both systematic and practical terms, as it helps to determine the acceptable balance between security and humanitarian needs in contemporary international law. For example, in the case in point it means that a state cannot freely determine the standard of security for its own population if the achievement of that standard entails excessive prejudicial consequences for civilians of the attacked state. Even if the destruction of rocket bases and the eradication of paramilitary militias in southern Lebanon were proved to be the only means by which Israel might prevent further attacks, these objectives cannot be attained if they entail, as a side effect, a disproportionate humanitarian cost. The attainment of a lower standard, which implies a more acceptable humanitarian cost, appears more in conformity with international law.

# Precautions under the law governing the conduct of hostilities

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## Abstract

*This article presents a descriptive analysis of the precautions that are required of all belligerents in order to ensure the protection of civilian populations and objects against the effects of hostilities. The author argues that both the attacker and the defender must take precautions to avoid, or at least minimize, collateral casualties and damage. The rules imposing such precautionary measures represent clear standards of conduct. This is true even though they are worded in flexible terms to take into account the reality that mistakes or misjudgements are inevitable, and that the balance between military and humanitarian interests is not always easy to reach.*

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Respect for civilian persons and objects and protecting them against the effects of hostilities is an important *raison d'être* of international humanitarian law (IHL). The basic rule – enshrined in Article 48 of Additional Protocol I to the Geneva Conventions – requires that parties to a conflict distinguish between civilian persons and objects on the one hand, and combatants and military objectives on the other, and that they direct their operations against military objectives (persons or objects) only.

A number of concrete obligations can be derived from this general principle of distinction, such as the prohibition of direct attacks against civilian

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persons and objects<sup>1</sup> and the prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.<sup>2</sup> Similarly, indiscriminate attacks are also prohibited. These are attacks that are not or cannot be directed at a specific military objective, as well as those whose intended effects cannot be limited as required by IHL.<sup>3</sup>

However, it remains legally accepted that, in the harsh reality of war, civilian persons and objects may be incidentally affected by an attack directed at a legitimate military objective. Euphemistically referred to as “collateral casualties” or “collateral damage”,<sup>4</sup> civilians may be victims of mistaken target identification or of unintended but inevitable side effects of an attack on a legitimate target in their vicinity. According to the principle of proportionality, these collateral casualties and damages are lawful under treaty and customary law only if they are not excessive in relation to the concrete and direct military advantage anticipated.<sup>5</sup>

In addition, even when a lawful attack is launched, precautionary measures are required of both the attacking party and the party being attacked, in order to avoid (or at least to minimize) the collateral effects of hostilities on civilian persons, the civilian population and civilian objects. The present contribution will focus on the substance of the precautionary obligations required of all belligerents – both in attack and against the effects of attack – as codified in Additional Protocol I.<sup>6</sup> This article will seek to demonstrate that these rules are not simply hortatory norms encouraging good practice. They constitute obligatory standards of conduct whose violation would entail international responsibility.

1 The fact that, in principle, civilian and other protected persons or objects may not be attacked does not preclude this legal protection from ceasing under exceptional circumstances.

2 See, in particular, Articles 51(2) and 52(2) of Additional Protocol I to the Geneva Conventions.

3 Article 51(4) Additional Protocol I.

4 “Collateral casualties” and “collateral damage” are defined in Rule 13(c) of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea as “*the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives*”.

5 Codified in Article 51(5)(b) of Additional Protocol I, the principle of proportionality encompasses more than the duty to take precautions in attack. It is, however, relevant in this context, as illustrated by Article 57(2)(a)(iii). Since the difficulties in applying this principle are discussed at length in a separate contribution to this volume (see Enzo Cannizzaro, “Contextualising proportionality: *ius ad bellum* and *ius in bello* in the Lebanese war”, pp. 779–792), a detailed analysis of this precautionary measure will not be made here.

6 In accordance with the scope of application of Additional Protocol I set forth in Article 49(3), the present contribution will focus only on the protection of civilian persons and objects on land, excluding precautions required in naval or air warfare. In this respect, Article 57(4) of Additional Protocol I simply indicates that “In the conduct of military operations at sea or in the air, each Party to the conflict shall ... take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.” Customary international humanitarian law certainly prescribes more detailed precautionary measures to be adopted, but an analysis of these measures exceeds the scope of this contribution.

## Precautions in attack

While the duty to give warning of an impending attack (in order to allow the civilian population to evacuate) was stipulated in the earliest treaties on the law of armed conflict, the general obligation to take precautions in attack was codified rather late.<sup>7</sup> In fact, before Additional Protocol I was adopted, the doctrine stating that the obligation to take precautions was binding on all attacking commanders was based on a broad interpretation of the 1899 and 1907 Hague Conventions and 1949 Geneva Conventions, and on customary rules. Thus when the delegates who attended the 1974–7 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts prepared a written list of the required precautions, they made an undeniably valuable contribution to the law governing the conduct of hostilities.

The legal regime governing precautions in attack during an international armed conflict is set out in Article 57 of Additional Protocol I. This article is not the only treaty provision setting out the precautions required of an attacker. A number of treaties governing the use of specific weapons also cover the duty to take precautionary measures, although these instruments merely apply pre-existing Additional Protocol I obligations to specific means of warfare. In drawing up a (non-exhaustive) list of the precautions required during an attack, it is therefore reasonable to rely on Article 57 of Additional Protocol I as a primary source. Below is a descriptive review of these precautions, with brief concluding remarks on how these are limited to what is “feasible”.

### Inventory of the precautionary obligations incumbent on the attacker

Article 57 reads as follows:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
  - (a) those who plan or decide upon an attack shall:
    - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
    - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing,

7 In the report prepared for the 1971 Conference of Government Experts, the ICRC noted that the obligation to take precautions in attack “*has been affirmed by publicists for a long time, but without being expressed in a very precise manner in the provisions of international law in force*”.

- incidental loss or civilian life, injury to civilians and damage to civilian objects;
- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
  - (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
  - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

*The obligation to take constant care to spare the civilian population, civilians, and civilian objects in the conduct of military operations*

The obligation, in the conduct of military operations, to take constant care to spare the civilian population, individual civilians and civilian objects is a direct consequence of the fundamental rule of distinction. Yet this duty remains relatively abstract, which explains why it is found in the opening paragraph of Article 57. The paragraphs that follow are, according to the ICRC Commentary to Additional Protocol I, devoted only to “the practical application of this principle”.<sup>8</sup> This first duty therefore constitutes the legal link between the general obligation of distinction and the operational practicalities of taking precautions in attack.

The fact that this obligation forms a sort of preamble to Article 57 often leads to the perception that it is merely inspirational, particularly in the light of its very general wording. It is often believed that this obligation must be read in conjunction with one of the more concrete rules listed in subsequent paragraphs in order to carry legal weight. Nevertheless, the direct connection that exists between the first paragraph of Article 57 and the obligations covered in the paragraphs that follow does not suffice to deprive paragraph 1 of its independent

<sup>8</sup> Commentary on Additional Protocol I (p. 680, para. 2191). The ICRC study on customary international humanitarian law reaffirms this obligation in Rule 15 (the first rule in Chapter 5 devoted to precautions in attack), the commentary stating: “This is a basic rule to which more content is given by the specific obligations contained in Rules 16–21” (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, Cambridge, 2005, Vol. I (Rules), p. 51).

legal effect. Kinship does not mean identity, and paragraph 1 of Article 57 must not merely be understood as a standard clause reflecting a general objective of an “inspirational” nature.

Close examination of the wording of Article 57 reveals that the scope of the obligation set out in paragraph 1 is broader than the scope of the obligations that follow. As it explicitly states in its first sentence, paragraph 2 applies exclusively in the event of an “attack”,<sup>9</sup> that is, an act of violence against the enemy. The first paragraph applies more broadly to “military operations”, which also include troop movements, manoeuvres and other deployment or retreat activities carried out by armed forces before actual combat.<sup>10</sup> This broader field of application logically implies that the provision can, on its own, give rise to concrete legal obligations.

*The obligation to verify the military nature of the objective to be attacked and to assess collateral damage*

The obligation set out in Article 57(2)(a)(i) finds itself at the intersection of military effectiveness and humanitarian imperatives. By requiring that those planning or deciding upon an attack do everything feasible to verify the nature of the objective, this provision aims to ensure that operations will target strictly military objectives and thus contributes to preserving the immunity of both civilian populations and objects. Therefore the duty to verify the nature of a target is a vital ramification of the principle of distinction. In the light of this, and contrary to what was stated during negotiations of Additional Protocol I, it is incorrect to assert that this is an innovative provision<sup>11</sup> or that it results from the gradual development of a new rule. Instead, this provision is clearly a codification of existing law.

The obligation to verify the nature of the objective to be attacked obviously requires that close attention be paid to the gathering, assessment and rapid circulation of information on potential targets.<sup>12</sup> These activities are naturally dependent on the availability and quality of the belligerents’ technical resources. Indeed, the obligation imposed by paragraph 2(a)(i) of Article 57

9 This reasoning is applicable by analogy to the third paragraph, which can be understood only in the context of an attack.

10 “The term “military operations” should be understood to mean any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat”; Commentary on Additional Protocol I (p. 680, para. 2191). Such a view could be contradicted by the fact that it would liberate Article 57 from the strict context of precautions in attack, which, as explicitly stated in the title, is its only object. But this criticism in no way detracts from the fact that the first paragraph is precisely intended to establish a link between distinction and precautions.

11 See in this regard the ICRC Commentary on Additional Protocol I, which supports the view that this requirement of identification is “new” (p. 680, para. 2194).

12 According to Article 57(2)(a)(i), this verification has to be performed at the stage of planning or deciding to attack. Nevertheless, if a period of time has passed between these stages and the actual attack, then there is an obligation to update the information at hand in order to verify that no change of circumstances has led to a change in the nature of the target (Jorge J. Urbina, *Derecho internacional humanitario*, La Coruña, 2000, p. 241).

cannot be interpreted as obliging the parties to a conflict to possess modern and highly sophisticated means of reconnaissance. It does, however, require that the most effective and reasonably available means be used systematically in order to obtain the most reliable information possible before an attack. Therefore an attack may only be launched once a commander is convinced, on the basis of all the information at his disposal, that the target is military in nature.

In other words, while this provision in no way imposes an obligation of result,<sup>13</sup> it does require that, in case of doubt, additional information must be obtained before an attack is launched.<sup>14</sup> Above all, this standard means that a bombing raid that is carried out on the basis of mere suspicion as to the military nature of the target amounts *ipso facto* to a violation of the principle of distinction.<sup>15</sup> To give an example, it has been reported that in 2003, in the context of the war in Iraq, the United States admitted to launching attacks against high-ranking enemy figures without having firm knowledge of the targets' identity. It appears that US armed forces justified their decision to attack on the basis of evidence that established, with relative certainty, that a high-ranking political or military leader was located in a given building. Such an approach seems difficult to reconcile with the fundamental requirement of distinction: if an attack is aimed at a specific individual, then identification of this individual as a legitimate military objective can reasonably be established only with definite knowledge of the name and function of the person being targeted.<sup>16</sup>

Furthermore, the information that must be gathered before an attack must relate to more than just the nature of the objective. Many other details must be collected, in particular on the immediate surroundings of the target, in order to gain a clear picture of the conditions that will trigger the obligation to apply the principle of proportionality. The main difficulty in this respect is indisputably due to "emerging targets", for which no advance planning has been possible, and

13 As noted by Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, "Palpably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith" (p. 126).

14 Commentary on Additional Protocol I (p. 680, para. 2195). It might be useful to point out that the obligation must be interpreted together with the provisions relating to the presumption of civilian character in case of doubt, which are contained in Articles 50(1) and 52(3) of Additional Protocol I.

15 It has even been asserted that such conduct could amount to a war crime, since lack of information in such cases cannot be regarded as an exonerating circumstance (Stefan Oeter, "Methods and means of combat", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 457).

16 Human Rights Watch, "Off Target: The Conduct of the War and Civilian Casualties in Iraq", New York, 2003, pp. 23 and 38. Furthermore, to locate enemy leaders the United States relied on satellite telephone intercept technology. Doubts have been expressed as to the reliability of such identification procedures: tracing a mobile phone does not necessarily lead to the location of its owner, who might have changed phones before the attack. These doubts were also fuelled by the US military's silence with respect to the methods used to verify that the person using the phone was indeed the desired target. It is plausible, however, that a database had been set up to verify that the voice of the user matched that of the target. Moreover, human informants were reportedly used to confirm or invalidate the electronic data. Had they been reliable, these techniques might certainly have met verification requirements; however, it would appear that this was not the case (*ibid.*, p. 25).

which, by their sudden appearance, make it necessary to strike within a very short time, leaving no opportunity to follow complicated procedures. In such circumstances, determining the military nature of a target and potential collateral casualties and damage will require an accelerated analysis on the basis of predetermined criteria.<sup>17</sup> The fact remains, however, that these expeditious procedures must leave room for practical precautionary measures. In the context of the conflict in Iraq in 2003, it was asserted that the process of assessing collateral damage usually worked rather well in relation to pre-planned targets, although the same could not be said when the process was applied to emerging targets. In the latter case there was no time to carry out sufficiently precise assessments, this often resulting in disproportionate bombing.<sup>18</sup>

These various examples demonstrate that identifying the objective – especially when it is distant – and estimating collateral damage are both complex operations that demand a vast network of complementary skills. In the very large majority of cases, those who plan or decide on an attack will base their decisions on indirect information provided by intelligence or reconnaissance (human, aerial, satellite or other) services. This chain of decision-making involves as many levels of liability as there are links in the chain. For example, the intelligence services will be held responsible if the information provided is unreliable or leads to mistakes. While the planning and decision-making authorities cannot be expected to have personal knowledge of the objective to be attacked, they will nevertheless be held responsible if, on the basis of reliable intelligence, they make the wrong decision through incompetence, negligence or bad faith.

Finally, it should be noted that the attacking commander's efforts to obtain credible information will be hampered by the ruses employed by the enemy to direct fire to false targets or to mislead the adverse party's intelligence services. One famous example of such ruses was the use by the Federal Republic of Yugoslavia (FRY) of decoys during the 1999 NATO bombings. Such methods of deception as to the nature of a target are lawful as long as they do not lead the attacking commander to direct military operations against civilian persons or property in the genuine belief that these are military objectives.<sup>19</sup>

17 According to Human Rights Watch (*ibid.*, p. 20), US practice during operations in Iraq (2003) reveals the existence of two approaches depending on the circumstances: when the armed forces have time to conduct a study of the target, a careful procedure is set in motion. On the other hand, when the strike has to be executed very rapidly, special procedures are applied.

18 *Ibid.*, p. 20.

19 For example, during the Second World War, British forces – who exercised complete control over the German espionage system deployed on their territory – sent false reports that led the German air force to bomb English city areas populated by civilians on the conviction that these were actually military objectives. See Burrus Carnahan, “The law of air bombardment in its historical context”, *Air Force Law Review*, Vol. 17 (2) (1975), p. 60. For some, this would now be in violation of Article 51(7) of Additional Protocol I (Michael Bothe et al., *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 363, para. 2.5).

*The obligation to choose means and methods of attack designed to avoid, or at least limit, loss or damage to the civilian population or civilian objects*

The obligation to choose means and methods of attack designed to avoid, or at least limit, loss or damage to the civilian population or civilian objects also receives broad support in diplomatic practice.<sup>20</sup> Here again, the main difficulty lies in identifying the practical consequences of this obligation. One commentary on Additional Protocol I reduced this obligation to the mere duty to promote, as far as possible, the accuracy of bombing raids conducted against military objectives situated in densely populated areas.<sup>21</sup> Such an interpretation would appear to be much too restrictive. First of all, the idea that the *ratione loci* scope of the obligation is limited to densely populated areas finds no support in either the text of the Additional Protocol or the preparatory work leading up to its adoption. Second, only a minimum amount of imagination is required to give this provision a scope that is far broader than the mere duty to improve the accuracy of bombing raids. This can be illustrated with specific examples of methods of attack.

First, this provision can serve to impose restrictions on the timing of an attack. In this regard, the ICRC Commentary on Additional Protocol I refers to the precautionary measures taken by the Allies in the Second World War during the bombing of factories located in territories occupied by German troops. These bombing raids were carried out on days and at times when the factories were unoccupied, the aim being to destroy the factories and not kill the people working in them.<sup>22</sup> While it is a matter of record that these measures were motivated more by the wish to prevent loss or damage to compatriots than to ensure general protection of the civilian population,<sup>23</sup> this example nevertheless offers a perfect illustration of the type of precautionary conduct required by Article 57(2)(a)(ii). In other words, the obligation to use methods of attack designed to spare the civilian population and civilian objects – in any zone of attack, that is, even in enemy territory – requires that the timing of the attack be chosen with a view to limiting collateral damage. As a more recent example, the US forces who, in 2003, repeatedly bombed urban areas during operations against Iraq, decided to minimize civilian losses by trying, where possible, to conduct their attacks at night when the population had left the streets.<sup>24</sup>

This obligation can also serve to impose restrictions on the location of an attack by requiring, where circumstances permit, that parties avoid attacking a densely populated area if the attack is likely to cause heavy civilian losses. This is

20 For an analysis of this practice, see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 374–84.

21 “The obligation under subpara. 2 (a)(ii) to take all feasible precautions in the choice of means and methods of attack to avoid or minimize incidental civilian casualties and damage to civilian property is an injunction to promote the maximum feasible accuracy in the conduct of bombardments of military objectives situated in populated places” (Bothe et al., above note 19, p. 364, para. 2.6).

22 Commentary on Additional Protocol I (p. 682, para. 2200).

23 It is significant that no such precautions were taken outside the occupied zones.

24 Human Rights Watch, above note 16, p. 17.

one of the reasons why the Coalition forces gave up the idea of an amphibian attack on Kuwait City during the Gulf war in 1991. The Department of Defense Report to Congress explained that such an attack would have forced the Coalition to fight in an urban environment, thereby constituting “a form of fighting that is costly to attacker, defender, innocent civilians and civilian objects”.<sup>25</sup> Instead, Coalition forces decided to give the Iraqi armed forces the option of leaving Kuwait City in order to fight in the desert areas north of the capital. This precautionary measure becomes relevant when deciding on which sites should be attacked and which zones should be used to advance or station armed forces.

Moreover, the obligation to choose methods of attack designed to avoid or minimize loss or damage to the civilian population or civilian objects also imposes caution in choosing the angle of attack.<sup>26</sup> As a very concrete example, during the Gulf war in 1991, pilots were advised to attack bridges in urban areas along a longitudinal axis. This measure was taken so that bombs that missed their targets – because they were dropped either too early or too late – would hopefully fall in the river and not on civilian housing.<sup>27</sup> This last example is one of many cases in which the rule has been applied.

Concerning means of combat more specifically, the main issue raised by Article 57(2)(a)(ii) relates to belligerent parties’ obligation to use the most precise weapons available (precision-guided munitions in particular) when carrying out attacks that may cause collateral casualties or damage. Most legal doctrine tends to support the absence of this obligation, as it is generally considered that the choice of weapons is left to the discretion of the belligerent party, according to its particular military interests and the circumstances of each operation. For example, Danielle Infeld notes,

While the law of war defines legitimate targets, nothing in the law of war regulates the type of weapon that must be used in attacking particular targets. When attacking particular targets, there is no law of war concept requiring that the most discriminatory means be used. The applicable law only mandates a balancing of military necessity and unnecessary suffering so that the concept of proportionality is followed.<sup>28</sup>

25 See “Department of Defense Report to Congress on the Conduct of the Persian Gulf War”, ILM, 1992 (3), p. 622.

26 Human Rights Watch, above note 16, p. 17. This example appears explicitly in the Australian military manual, *Australian Defence Force Manual on the Law of Armed Conflict*, ADFP 37 (1994), para. 552.

27 This example is particularly interesting because such an angle of attack also means that damage would tend to be in the middle of the bridge and thus easier to repair (Michael W. Lewis, “The law of aerial bombardment in the 1991 Gulf War”, *AJIL*, Vol. 97 (2003), p. 501).

28 Danielle L. Infeld, “Precision-guided munitions demonstrated their pinpoint accuracy in desert storm; but is a country obligated to use precision technology to minimize collateral civilian injury and damage?”, *George Washington Journal of International Law and Economics*, Vol. 26 (1) (1992), pp. 134–5. This reasoning is also found – although in a more nuanced way – in the Australian military manual, above note 26: “The existence of precision guided weapons ... in a military inventory does not mean that they must necessarily be used in preference to conventional weapons even though the latter may cause collateral damage. In many cases, conventional weapons may be used to bomb legitimate military targets without violating LOAC [law of armed conflict] requirements. It is a command decision as to which weapon to use; this decision will be guided by the basic principles of LOAC; military necessity, unnecessary suffering and proportionality” (para. 834).

However, it seems limiting to subject the rules on the choice of weapon to a simple analysis of proportionality. In certain circumstances Article 57(2)(a)(ii) plays a significant role by requiring that the attacking party take all practically possible precautions in its choice of means of attack in order to avoid, or at least to minimize, civilian losses.

Several arguments have been put forward to contradict this conclusion. First, an obligation to use the most precise means of attack would entail different standards of protection depending on the technological sophistication of each party's weaponry. This, in turn, would run counter to the classic IHL principle of equality of belligerents.<sup>29</sup> This argument is not entirely convincing: as already noted, one of the ultimate objectives of IHL is to protect civilian populations and objects, as far as possible, against the effects of hostilities. And "[s]uggesting that a party with the technological ability to exercise great care in attack need not do so because its opponent is not similarly equipped runs counter to such purposes".<sup>30</sup> In any event, the obligation to take precautions in attack "when feasible" already acknowledges that the lawfulness of an attack will be judged according to relative standards of measurement, which will namely depend on the economic and technological development of each party to the conflict.<sup>31</sup>

It has also been argued that imposing an obligation to use the most precise weaponry possible would have the perverse effect of slowing the development of sophisticated and expensive weapon systems. By avoiding the development of advanced systems, a party could lawfully use weapons that are less precise and much cheaper, thereby lowering its precision standards when applying the proportionality principle. This argument, which lacks any legal dimension, is not well supported. The advantages of using weapons of higher precision are not strictly humanitarian – in fact, the benefits are first and foremost military. Thus no obligation to use the most precise means of attack will ever eliminate the military interests that lie behind research and development programmes on precision munitions.

In conclusion, under IHL as it stands today, states have no legal obligation to acquire the most precise weapons available on the market, even when they have the financial resources to do so.<sup>32</sup> Nevertheless, the law of armed conflict does

29 "[I]t seems illogical to presume that the handful of states with precision weapons – such as the United States, Britain and, to a lesser degree, Russia – should be held to a higher standard of law"; Nathan A. Canestaro, "Legal and Policy Constraints on the Conduct of Aerial Precision Warfare", *Vanderbilt Journal of Transnational Law*, Vol. 37 (2004), p. 465. For Yoram Dinstein, "Such claims would introduce an inadmissible discriminatory bias either in favour of, or against, more developed belligerent States equipped with expensive ordnance at the cutting edge of modern technology" (above note 13, p. 126).

30 Michael N. Schmitt, "The Impact of High and Low-Tech Warfare on the Principle of Distinction", Briefing Paper, November 2003, Program on Humanitarian Policy and Conflict Research at Harvard University, p. 10.

31 Eric Jaworski, "'Military Necessity' and 'Civilian Immunity': Where is the Balance?", *Chinese Journal of International Law*, (1) (2003), p. 201. This author notes that the application of relative standards is not limited to the field of international humanitarian law; other areas of international law (namely environmental law) also apply different standards according to the contracting parties' respective means.

32 Schmitt, above note 30, p. 10. This author contemplates a manner of determining a state's obligation to own precision-guided weapons according to a percentage of GNP or defence credits. The author adds that states would probably not readily accept a legal obligation that would limit their discretion in setting their own budgets.

require that such systems be used as soon as they form part of a state's arsenal and their use is practically possible.

*The obligation to cancel or suspend an attack if it becomes apparent that it would violate the principle of proportionality, that the objective is not a military one or that the objective is subject to special protection*

This provision may, understandably, appear to be completely redundant: both the prohibition of direct attacks on civilian persons and objects and the obligation to take constant care, in the conduct of military operations, to spare civilian persons and objects are expressly provided for elsewhere. In the light of this, it seems perfectly obvious to state that an attack must be cancelled or suspended if the initially selected target cannot be regarded as a military objective or if the attack is likely to violate the principle of proportionality. Nevertheless, expressly formulating this obligation does bear some value, especially in the context of modern warfare, which is often marred by the fact that the authorities who decide or plan attacks are not the same as those who carry them out. This rule confirms, in case any doubt should arise, that the required standard of conduct applies at all operational levels.<sup>33</sup>

In some cases, this provision will apply to the planners of the attack if it is revealed that an error was made in the initial plans, as illustrated by NATO's Operation "Allied Force" against the FRY. On 14 April 1999, after carrying out a series of attacks on a convoy of vehicles believed to be military, NATO planners began to form doubts as to the military nature of the convoys, since it was unusual for the Yugoslav armed forces to travel in such large convoys. As a result, NATO forces chose to send in a slower, more stable aircraft to verify the nature of the targets. The military operation was suspended for more than 20 minutes and, on reports that the convoy consisted of both military and civilian vehicles, all attacks were cancelled and NATO withdrew its aircraft.<sup>34</sup>

First and foremost this provision must be interpreted as imposing a special and personal obligation on all members of the armed forces to cancel or suspend an attack when they acquire, in the course of an operation, information that was not available at the planning stage. Where aircrew are following an order to destroy what is believed to be a command and control centre, but at a later stage discover that the designated target is displaying a protective emblem,<sup>35</sup> the aircrew

33 The ICRC Commentary on this provision begins by affirming the rule's applicability to those planning or deciding upon attacks, but also – and primarily – to those executing them (Commentary on Additional Protocol I, p. 686, para. 2220). See also the manual *Fight it Right* (ICRC, Geneva, 1999), which appears to single out this particular precaution in attack because it applies not only to the authorities who plan an attack, but also to those who actually carry it out (p. 71, para. 1103.1c).

34 Anthony P. V. Rogers, "Zero-casualty warfare", IRRIC, No. 837 (March 2000), pp. 174–5. In the present context, we should stress that the planners who harboured doubts as to the exact nature of the target acted appropriately. However, this in no way precludes their liability for the fact that these doubts should have surfaced before the first wave of attacks took place.

35 For example a red cross or red crescent, or an emblem designating cultural property, works or installations containing dangerous forces, etc.

will be under an obligation to suspend operations, report their observations to their superiors and request confirmation of the nature of the target before proceeding with the bombing raid. If the aircrew receive no additional information confirming the military nature of the objective, then the attack must be suspended.<sup>36</sup>

Of course, an attack will usually be cancelled or suspended before the first bombs have been dropped. However, in modern warfare, and especially when precision laser-guided weapons are being used, there are situations in which this rule can be applied even after munitions have been launched. For example, at a NATO press briefing held on 18 April 1999, the following story emerged. A pilot who was in charge of carrying out an aerial operation against an enemy radar noticed, after the attack had been launched, that the targeted site was near a church. In order to avoid damaging the church, the pilot decided to remove his weapon from the target, letting it harmlessly explode in the woods instead.<sup>37</sup>

Thus, in order to uphold the principle of distinction, combatants who are conducting operations in the field and who, by the nature of their activities, have first-hand information must exercise such cautious behaviour. The precision with which the obligation is worded implies that instructions that are issued in advance of an attack can never be definite: a soldier cannot avoid responsibility for acts committed in violation of the law simply by saying that he was following orders.

This rule is much more difficult to apply when assessing the proportionality of an attack. It has been pointed out that, in a concerted or co-ordinated operation, it is not possible to ask every individual tank driver or pilot to measure the concrete and direct military advantage expected from the attack against the collateral casualties and damage that is likely to result. First, a military operation of this scale demands discipline and swift action, and cannot allow a tank or air squadron to operate in a disorganized manner or temporarily to suspend the attack in order to discuss the practical application of the rule. Moreover, in such circumstances the proportionality must be assessed in the light of the attack as a whole. If, in order to prevent the enemy's army from advancing, planners decide to destroy all the bridges that span a river, it is obvious that a significant military advantage can only be gained by achieving a total destruction of the infrastructure. Thus, while each driver or pilot may judge that his own action is disproportionate, the operation as a whole may meet the proportionality requirement. It has been argued that, on the basis of Article 85(3) of Additional Protocol I, criminal responsibility in this type of situation would rest solely on those persons issuing the orders and not on those carrying them out.<sup>38</sup> In other words, the existence of superior orders would exonerate the person who most directly caused the damage.

36 This example is cited by the Australian military manual as a perfect illustration of situations of aerial warfare in which this provision might be applied, above note 26, para. 832.

37 This example is taken from Rogers, above note 34, p. 172 (n. 25).

38 Bothe et al., above note 19, pp. 366–7, para. 2.8.1.3.

While these observations might appear to follow the strictest logic, they can nevertheless lead to a mistaken understanding of the law. It is not sufficient to assert that those who carry out the attack must assume that the planners and deciders have correctly assessed the situation and that all that is required of them is faithfully to follow the instructions they have received. Article 57(2)(b) is based on the premise that a mistake might have been made as to the nature of the target, or that new information could become available and radically change one's assessment of the nature of the target. In such a case, imposing a strict obligation on a driver or pilot to obey orders would be contrary to the letter and spirit of this provision. Referring back to the example cited above, if, before launching a first salvo against a bridge, a tank driver notices that a crowd of fleeing civilians have taken refuge under the targeted bridge, the driver cannot assume that the planners have correctly considered the principle of proportionality and continue his mission in wilful blindness and impunity. He must, at the very least, suspend his attack in order to allow the civilians to evacuate, or to request that his orders be confirmed in the light of these new circumstances.

*The obligation to choose the military objective that involves the least danger to civilian lives and civilian objects*

Article 8(a)(2) of the 1956 New Delhi Draft Rules already required that, when the military advantage to be gained allowed for a choice between several objectives, the person responsible for ordering or launching an attack choose the objective that involved the least danger to the civilian population. It would appear that the authors of the Draft Rules gave this provision less importance, as it was seen more as a recommendation than as a strict obligation. It is true that these alternative targets for attack are all military objectives whose destruction is *a priori* lawful, and that the possibility of gaining an identical military advantage by destroying any of these targets might not be realistic in practice.<sup>39</sup> Nevertheless, a similarly worded obligation was introduced in Article 57(3) of Additional Protocol I, extending the scope of the 1956 provision to civilian objects. As a result this rule, which also appears in a number of military manuals,<sup>40</sup> constitutes a binding legal obligation.

Most frequently, the choice to be made relates to the enemy's infrastructure and lines of communication. For instance, in choosing between directly attacking a telephone exchange and attacking transmission lines at vital points located far from population centres, the attacking party would be bound to choose the latter if a similar military advantage could be gained in either instance. As modern communication systems progressively avoid transmitting from a central point and begin to reduce their vulnerability by decentralizing their networks, the obligation to choose between military targets will most likely become more important in the future. As a result, it will become less pertinent to

39 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, ICRC, Geneva, 2001, p. 109.

40 For a list of military manuals featuring this obligation (and other elements of practice), see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 413–18.

invoke military necessity to justify bombing an urban nerve centre whose destruction would paralyse the entire system.<sup>41</sup>

### *The obligation to give advance warning of an attack that may affect the civilian population*

The obligation to give advance warning of an attack that may affect the civilian population is an age-old requirement that may be found in the earliest codifications of the law governing the conduct of hostilities. Article 19 of the Lieber Code requires that military commanders inform the enemy “of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences”. The instruments adopted after the Lieber Code and up to the beginning of the twentieth century have systematically referred to this precaution.<sup>42</sup> Admittedly, its implementation created little difficulty in earlier days, as the only bombardment that was likely to have a serious effect on the civilian population came from artillery, usually in a siege operation. In such a context, it was easy to imagine the attacking troops giving advance warning, as the element of surprise played no part in the attack. The authorities of the besieged area had no practical means of protecting the military objectives being targeted, therefore the attacking party lost no military advantage by issuing a warning.

Some authors argue that the emergence of aerial bombardment has changed the situation, and that the obligation to give advance warning belongs in warfare of another age.<sup>43</sup> Indeed, surprise has become a primordial condition for success, particularly in view of the effectiveness of modern anti-aircraft defences. Nevertheless, state practice refutes the theory that this precaution has become outdated. Not only has the obligation been taken up in all modern codifications, both normative and academic,<sup>44</sup> but it is also referred to in many military manuals,

41 Eric David follows similar reasoning when he contends that the Serb radio and television tower could not be considered to be indispensable to the FRY's communication network because there were several hundred relay stations in the country (“Respect for the principle of distinction in the Kosovo war”, *YIHL*, Vol. 3 (2000), pp. 90–1).

42 The Brussels Declaration reiterated the requirement that a party give prior warning of an attack on a defended place, specifying both the giver and the receiver of the warning (at Article 16). In fact, while the Lieber Code referred to commanders in general, the Brussels Declaration imposed this obligation more specifically on the officer in command of an attacking force – he alone bore responsibility in the event of a violation. Furthermore, this instrument specified that the warning had to be given to the authorities of the defended place. It was then up to them to take appropriate measures in response. Both the Oxford Manual (at Article 33) and the Regulations annexed to 1899 Hague Convention II (at Article 26) contained wording that was almost identical to that of the Brussels Declaration. Article 27 of the Regulations annexed to the 1907 Hague Convention IV reiterated this obligation, although its wording seemed to limit the field of application to towns under siege.

43 Peter Rowe, “Kosovo 1999: ‘The air campaign – Have the provisions of Additional Protocol I withstood the test?’”, *IRRC*, No. 837 (March 2000), p. 154, who quotes in this respect Theodor Meron, *War Crimes Law Comes of Age*, Clarendon Press, Oxford, 1998.

44 See, for example, Article 8(c) of the New Delhi Draft Rules (1956). Furthermore, a reiteration of this obligation under Article 57 of Additional Protocol I was accepted without a debate.

including the most recent ones.<sup>45</sup> Moreover, even military practice subsequent to the emergence of airborne operations reveals many instances in which the rule has been applied in practice. For example, NATO issued warnings during its “Allied Force” operation over the territory of the FRY (1999). The argument that surprise was the key to victory made little sense in the context of a dissymmetrical war waged by a military alliance which enjoyed total air supremacy, was more or less immune from any defensive action on the part of the FRY and wished – mainly for political reasons – to prevent civilian losses.<sup>46</sup>

While practice confirms that the obligation to warn remains a fundamental precaution in attack, it also draws attention to the fact that this rule is not phrased in absolute terms. As already explained, military necessity sometimes requires that the rule be flouted if compliance would result in annihilating – or at least seriously compromising – the military operation’s chances of success. The relevant texts have therefore systematically included a phrase to attenuate the effect of the obligation. Additional Protocol I stipulates that a warning must be given “unless circumstances do not permit”, thereby emphasizing that the duty to warn remains the rule unless the belligerent can invoke special circumstances that would justify its non-compliance.<sup>47</sup>

Apart from the difficulty of identifying exceptional situations envisaged in this provision, there is also the challenge of determining which form the warning should take, and the degree of specificity to which it should be made. Article 57(2)(c) of Additional Protocol I, which stipulates that “effective advance” warning must be given, provides no precise answer to the crucial question of how much detail is required for the warning to comply with IHL.<sup>48</sup> In this respect, the Commission of Inquiry on Lebanon established pursuant to Human Rights Council Resolution S-2/1 noted in its report dated 10 November 2006 that “If a military force is really serious in its attempts to warn civilians to evacuate because of impending danger, it should take into account how they expect the civilian population to carry out the instruction and not just drop paper messages from an aircraft.”<sup>49</sup>

45 For a list of pertinent military manuals and other elements of state diplomatic and military practice, see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 400–13.

46 Rowe, above note 43, p. 154.

47 The phrase used in Additional Protocol I was taken up in Article 5(2) of Protocol II to the 1980 Conventional Weapons Convention, as well as in this Protocol’s new, amended text of 3 May 1996 (see Article 3(11), concerning general restrictions on the use of mines, booby-traps and other devices, and Article 6(4), relating more specifically to remotely delivered mines).

48 “It is not easy to determine what kind of advance warning would constitute an effective warning, nor is it clear how specific and direct the warning has to be” (Dinstein, above note 13, p. 128). The armed forces nevertheless have to show a minimum of common sense (or good faith); as noted in the manual *Fight it Right*, above note 33, p. 76, para. 1110.2: “A broadcast in a language which the population does not understand would not be effective, nor would a warning to authorities hundreds of miles away from a place that was cut off or one whose terms were so vague as to be useless.”

49 Report of the Commission of Inquiry on Lebanon established pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2, 23 November 2006, para. 156, available at <http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf>.

One essential question is whether the requirement can be met by merely providing an “abstract” warning consisting of a list of the various types of infrastructure considered to be military objectives. Or must a party give warning before any specific attack that may affect the civilian population? It is difficult to provide a clear-cut answer here. The level of precision required will depend on the general objective pursued; the attacking party will have to ensure the immunity of the civilian population and civilian property, while also taking into account its own military interests in each strategic context.

It seems clear, however, that the attacking commander does not have to issue multiple warnings of the danger incurred by a civilian population that is located near a clearly defined military objective that has been declared as such. A warning made in general terms at the start of the hostilities, and then repeated during the conflict, will satisfy both the letter and spirit of the obligation.<sup>50</sup> Indeed, practice shows that states usually fulfil this duty by issuing a general warning to the civilian population by broadcasting radio messages or distributing leaflets. This, however, does not exempt the attacking commander from giving further, more precise warning whenever possible or necessary. For example, when the target is an infrastructure that is essential for public service and is staffed almost permanently by civilians, the warning will, depending on the circumstances, have to be more specific. It is obviously impossible for a party to the conflict to accept an interruption in public services just because an enemy has designated these services as a legitimate military objective. In order to spare the civilian population working at the site, a more precise warning must be issued as early as possible.

Whether general or specific, a warning must be clearly expressed. When NATO attacked the Serbian radio and television tower in Belgrade, they asserted that foreign journalists had been warned to stay away from the site. This warning was not sufficient to meet the requirement of informing the Yugoslav authorities of an attack. Furthermore, a party must issue its warning within a reasonable time before the attack is actually launched. If a warning is issued too late, then it will not allow sufficient time for the civilian population to evacuate.<sup>51</sup> Of course, a warning must not be issued too early either, as this might lead people to believe that the threat is no longer real. Returning to the example of NATO’s attack on the Serbian radio and television tower, a warning was issued to the Yugoslav

50 This is expressly recognized by the Commentary on Additional Protocol I (pp. 686–7, paras. 2224 and 2225): “Warnings may also have a general character. A belligerent could, for example, give notice by radio that he will attack certain types of installations or factories. A warning could also contain a list of the objectives that will be attacked.” However, other, more precise warnings might be considered, as in the case of pilots during the Second World War who flew very low over their targets before launching an attack in order to give civilians the time to take cover. Such measures naturally depend on being in control of the airspace and on the defensive measures that have been put in place.

51 The Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1 stated that: “The timing of the warning is of importance. In some cases, the IDF [Israeli Defense Forces] are reported to have dropped leaflets or given loudspeaker warnings only two hours before a threatened attack. Having given a warning, the actual physical possibility to react to it must be considered” (Report, above note 49, § 153). However, judging when is the right moment is admittedly difficult, as the time allowed must not give the enemy the opportunity also to remove military equipment held inside the designated target. See Rowe, above note 43, p. 154.

authorities on 12 April 1999. However, when the attack was carried out eleven days later, on 23 April, the threat was no longer perceived as plausible.<sup>52</sup>

One final difficulty arises from a party's duty to give advance warning of an attack. Some authors have written about the possibility of pernicious effects. Sloutzky, for example, wonders whether issuing a warning and granting civilians enough time to evacuate might result in allowing the attacker greater freedom of action. More specifically, the warning might have the effect of transforming a populated zone into a veritable fortress predominated by military personnel. This would imply that the precautions to spare civilians who have – or should have – been evacuated might be less punctilious than in an inhabited zone. This same author even considers whether the issuance of a warning might, in turn, tempt the attacking commander to regard the entire zone as a military objective so as to justify the launch of a highly concentrated attack similar to an area attack.<sup>53</sup> Unfortunately, this scenario is not limited to academic hypothesis. For example, during the conflict in Lebanon in 2006, the Israeli Justice Minister reportedly declared that anyone still remaining in southern Lebanon could be considered a “Hezbollah supporter”, given that civilians had been given ample time to leave the area.<sup>54</sup> Such an assertion is legally untenable. A warning is solely meant to ensure that the civilian population is protected, and it can in no way free the attacking party of its obligation to comply with additional precautionary measures. To reason otherwise would be inconsistent with the general principle of distinction. The Commission of Inquiry on Lebanon confirmed this unequivocally:

Obligations with respect to the principle of distinction and the conduct of hostilities remain applicable even if civilians remain in the zone of operations after a warning has been given .... A warning to evacuate does not relieve the military of their ongoing obligation to take all feasible precautions to protect civilians who remain behind, and this includes their property.<sup>55</sup>

### The notion of “feasible” precaution

The expressions “everything feasible” or “all feasible” are used in Article 57 as a clear reminder of the obvious fact that, when taking precautions in attack, armed forces cannot be required to do the objectively impossible, nor can they be content

52 In this regard it might be useful to point out – as does Yoram Dinstein – that, as the sole aim of the warning was to allow evacuation of the civilian population, “warnings must not be misleading or deceptive; no ruses of war are acceptable in this context” (above note 13, p. 128).

53 N. Sloutzky, “Le bombardement aérien des objectifs militaires”, *RGDIP*, Vol. 61, 1957 (3), p. 372.

54 The IDF had already used this type of reasoning in the past: on 11 April 1996, immediately before carrying out a bombing raid on southern Lebanon, Israeli Defense Forces issued a warning to the civilian population, stating that anyone who remained in the designated area past a certain deadline would be considered a legitimate target. It should be noted that when the Israeli forces saw that a large proportion of the population had not evacuated, they refrained from considering the entire zone as a military objective, and limited their fire to carefully selected targets. This would have been the only legally correct procedure, even if the entire civilian population had been evacuated.

55 Report of the Commission of inquiry on Lebanon, above note 49, §§ 151 and 158.

with merely doing what is possible. While this basic idea sounds like a truism, its wording and its practical implications for the conduct of hostilities have prompted some debate. At the time when Additional Protocol I was being signed, the British delegation put forward an especially broad interpretation of the expression, maintaining that it covered everything that was feasible or practically feasible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations. It was this last part that gave rise to the greatest difficulty: this interpretation seemed to grant licence to belligerents to give their military interests precedence over humanitarian imperatives.<sup>56</sup> It is interesting to note that, at the time of ratification, the United Kingdom amended its declaration to include humanitarian interests among the military considerations to be taken into account when aiming to do “everything feasible”.<sup>57</sup>

The basic challenge raised by the expression “feasible” is in determining whether, and to what extent, it can be interpreted as legitimizing mistakes. For example, information sought and gathered in good faith may lead a party to believe that an object is a military objective, while in fact it is entirely civilian in nature. Or a weapon-delivering carrier could experience a failure leading it to divert from its programmed trajectory and to strike objects that the attacking party did not intend to target. The position of principle on this issue may be summarized as follows:

The duty to take precautionary measures is not absolute. It is a duty to act in good faith to take practicable measures, and persons acting in good faith may make mistakes.<sup>58</sup>

Thus a legal assessment of a given situation will allow a clear line to be drawn between a negligent act that is unlawful under international law and a mistake that was made despite the taking of all feasible precautions. The former type of act will engage a state’s responsibility (to be distinguished from individual criminal responsibility), while the latter type will not.

In that respect, the report prepared by the Committee appointed by the International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor to review the NATO bombing campaign against the FRY stressed that

a determination that inadequate efforts have been made to distinguish between military objectives and civilian objects should not necessarily focus exclusively on one incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact that they have

56 Commentary on Additional Protocol I (pp. 681–2, para. 2198).

57 This interpretation was also adopted by other states (such as Belgium, Spain and Italy) at the time of ratification, and, more significantly, was incorporated into Article 3(10) of amended Protocol II to the 1980 Convention on Conventional Weapons.

58 William J. Fenrick, “Targeting and proportionality during the NATO bombing campaign against Yugoslavia”, *EJIL*, Vol. 12 (3) (2001), p. 501.

not worked well in a small number of cases does not necessarily mean they are generally inadequate.<sup>59</sup>

This excerpt does not mean, however, that it is impossible to identify a violation if a precautionary measure has generally worked adequately. While any unsuccessful precautionary measure should be examined in the light of its broader application, the specific incident must also be the subject of review. This excerpt implies that, where a number of precautionary measures have led to loss or damage to the civilian population or civilian objects, this must necessarily lead to a readjustment of precautionary measures in order to prevent such loss or damage from recurring.<sup>60</sup>

## Precautions to be taken by the party subject to an attack

Any party subject to an attack is prohibited from abusing the obligations of the attacker by trying to shield military objectives and operations. Although “technically” it could be contested that such prohibition belongs to precautions (it is entailed in Article 51(7) Additional Protocol I and not in the provisions dealing with precautions) – it remains logical to envisage its content in this context since it is one of the main obligations addressed to the defender in order to protect the civilian population. In addition to this absolute prohibition of human shield, feasible precautions against the effect of attacks are enshrined in Article 58.

### The absolute prohibition of human shield

#### *The prohibition of the use of the civilian population, individual civilians or civilian objects to render a point or an area immune from military operations*

While the prohibition of using human shields can be traced back to ancient times,<sup>61</sup> the treaty codification of this rule did not make its appearance until much later. Admittedly, Article 19 of the Third Geneva Convention of 1949 requires belligerents to evacuate prisoners of war as soon as possible after their capture to camps situated in an area far enough from the combat zone for them to be out of danger from hostilities.<sup>62</sup> Article 23 of the same instrument is even more explicit,

59 See the report of the Committee appointed by the ICTY Prosecutor to determine whether an inquiry should be made into NATO’s bombing campaign against the FRY from 24 March to 10 May 1999, ILM, Vol. 39 (5) (2000), para. 29.

60 Robert Cryer, “The fine art of friendship”, *Journal of Conflict and Security Law*, Vol. 7 (1) (2002), pp. 51–2.

61 The first modern attempts to establish international criminal liability did set out to criminalize such practices. The prohibition on using human shields is mentioned in the 29 March 1919 report drafted by the Commission that was responsible, *inter alia*, for identifying violations committed by the forces of the German Empire and its allies (Miguel A. Marin, “The evolution and present status of the laws of war”, RCADI (1957-II), p. 678).

62 The obligation to evacuate knows one exception, when the prisoner concerned cannot be moved, due to, for example, the seriousness of his wounds. It should be noted that the protection afforded to prisoners of war also covers the period of time between capture and evacuation. During this interval, they must not be unnecessarily exposed to danger.

stipulating that prisoners of war may not be sent to, or detained in, areas in which they may be exposed to fire from the combat zone. Nor, *a fortiori*, may they be used to render certain points or areas immune from military operations. Along the same lines, Article 28 of the Fourth Geneva Convention of 1949 provides that the presence of a protected person may not be used to render certain points or areas immune from military operations. However, the scope of each of these very important provisions is necessarily limited in view of the two instruments' respective fields of application. It was only with the adoption of Article 51(7) of Additional Protocol I that the ban on using human shields was finally extended to protect the entire civilian population, and all individual civilians, in the following terms:

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.<sup>63</sup>

This provision is skilfully worded. It goes to the heart of the prohibition by covering both the forcible movement of civilians to shield military objectives from attack as well as more “subtle” practices. For instance, Article 51(7) clearly contemplates the scenario of moving civilians to a military site, but it also envisages the possibility of deliberately placing a military objective in the middle of, or close to, a civilian area, for example by positioning a piece of artillery in a school yard or a residential area. Depending on the circumstances, the latter scenario may also amount to a violation of the obligation – examined later in this paper – to refrain from placing military objectives in or near densely populated areas. This violation will be aggravated by the *intention* of using the civilian population as a shield. Article 51(7) also prohibits moving a civilian population or individual civilians in an attempt to shield military operations. In short, this provision has extended the personal scope of the prohibition to benefit all civilians, and has broadened the material scope of the prohibition to cover a maximum of situations.<sup>64</sup> The wide support for this rule, particularly in diplomatic practice, suggests – with little risk of contradiction – that the prohibition enjoys customary status in both international and non-international armed conflicts.<sup>65</sup>

63 Additional Protocol II contains no similar provision; Article 5(2) only mentions that places of internment and detention must not be located close to the combat zone.

64 As quite aptly noted in the manual *Fight it Right*, above note 33, p. 58, para. 1003.2, this prohibition on using human shields must nevertheless be interpreted in the context of a given military operation. For example, a defending commander may not be deemed to be using civilians as human shields when the area being defended is a town or residential area that is under siege and allows little opportunity for persons to move.

65 A very large number of military manuals contain provisions similar to that of Additional Protocol I; see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 2, pp. 2285–302. In addition, the Rome Statute includes the use of human shields in its list of war crimes set out in Article 8(2)(b)(xxiii).

Determining how to react to such unlawful conduct poses a legal challenge. What should an attacking commander do when the adverse party decides to use human shields to protect its military objectives? It should first be pointed out that an attack on such shielded military objectives would remain lawful in these circumstances. Holding a contrary legal position would mean allowing a violation of the law to result in the immunity of military objectives. This would be tantamount to rewarding the violation, and could also encourage further violations. It is highly understandable that states would never tolerate such a result.<sup>66</sup> Furthermore, this legal position appears to be in perfect harmony with diplomatic and military practice. The Australian military manual, for example, explicitly allows for the possibility of attacking an objective despite the presence of civilians being used as shields.<sup>67</sup> Similarly, during the Gulf war in 1991, the president of the United States declared that the Iraqi president's decision to place civilians at strategic sites in order to protect those sites from allied strikes would not prevent US armed forces from launching an attack.<sup>68</sup>

In order lawfully to attack an object shielded by civilians, a number of conditions must be met. This is stressed in unambiguous terms in Article 51(8) of Additional Protocol I, which states that no violation shall release the parties to the conflict from their legal obligations with respect to the civilian population. More precisely, the attacking commander must continue to take all necessary precautionary measures to limit loss or damage to civilian persons and objects.<sup>69</sup> This is a clear reference to Article 57 of the Protocol whose application is not

Unfortunately, the Statute does not contain a parallel provision that is applicable in non-international armed conflicts. While this in no way precludes the prohibition from being applicable in non-international armed conflicts, it does leave open the question of criminalizing the use of human shields in such contexts.

66 Contrary opinions – some of them very ancient – have nevertheless been expressed. For example, Ibn Khalil, a twelfth-century North African jurist, maintained that “if the enemy makes a rampart of women and children, it should be left unless it is too dangerous” (quoted by Marcel Boisard, “De certaines règles islamiques concernant la conduite des hostilités et la protection des victimes de conflits armés”, *Annales d'études internationales*, Vol. 8 (1977), p. 152). Much more recently, another author challenged the legality of such an attack on the basis that any individual could one day find himself in the position of a human shield, and that, in such circumstances, the last thing he would want to do is encourage an attack of which he would certainly be an innocent victim. This author further asserts that “in this type of situation, no amount of military necessity will convince [the innocent civilian] of the necessity to lose his life. So when one cannot support the application of a rule of which one is the object, consistency requires that one not support its application when one is not physically affected” (Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 1994, p. 242 (our translation)). This argument is of little value, as no average civilian would be keen to act as a human shield in order to protect a military site from possible attack! The ultimate aim of international humanitarian law, which is to ensure the protection of civilians against the effects of hostilities, requires reaching a well-balanced compromise between the legitimate interests of civilians and those of the state. This author's argument can only result in giving unreasonable priority to the former to the detriment of the latter.

67 The *Australian Defence Force Manual*, above note 26, para. 550, states: “The presence of civilians on or near the proposed military objective (either in a voluntary capacity or as a shield) is merely one of the factors that must be considered when planning an attack.”

68 “Department of Defense Report to Congress on the Conduct of the Persian Gulf War”, above note 20, p. 618.

69 Very ancient historical references to this type of obligation can be found. For example, the *Shaybani's Siyar*, an Arab antiquity text, considers the hypothesis of a city protecting itself by using Muslim children as human shields. It supports the lawfulness of an attack (even by using arrows) on condition

suspended when civilians have been used to shield military objects. This provision imposes a duty to adopt methods and means of warfare that are designed to avoid or minimize civilian losses among the human shields. It also entails that the attacking forces have a duty to look into alternative military objectives that are not shielded by civilians and whose destruction would allow them to gain a similar military advantage. The commander would also have the duty to consider alternative methods of attack that would spare civilians situated close to the military objective. The presence of human shields complicates armed forces' tasks considerably, and raises the degree of precaution required because the fundamental rights of civilians are clearly at stake. This heightened duty nevertheless remains tolerable in a military context – it is one of the many risks that troops accept taking in armed conflicts.<sup>70</sup>

*A priori*, when applying the rules on precautions in attack one should also take into account the principle of proportionality. However, this is a topic of some legal controversy. Insofar as the principle of proportionality requires striking a balance between collateral damage to civilian persons and objects on the one hand and the direct, concrete military advantage expected from an attack on the other, applying the principle of proportionality in this context will tilt the scale in favour of the party using human shields, to the detriment of the party launching its attack in compliance with the law. This difficulty is not insurmountable, nor can it allow any party to set aside a principle so fundamental as proportionality. In order to overcome this difficulty 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, which can indeed be considered appropriate, stems from the UK *Manual of Law of Armed Conflict*, which states,

Any violation by the enemy of this rule would not relieve an attacker of his responsibility to take precautions to protect the civilians affected, but the enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.<sup>71</sup>

that only the territory's inhabitants are targeted, and not the children. Therefore it is important to take into account the attacking party's intention when assessing the lawfulness of an attack. See *Shaybani's Siyar*, trans. Majid Khadduri, Johns Hopkins Press, Baltimore, 1966, p. 102, paras. 118–119, 120–121.

70 See, in particular, Frits Kalshoven ("Reaffirmation and development of international humanitarian law", *Netherlands Yearbook of International Law*, 1978, p. 121), who remarks in this regard, "The above precautions against the effects of attacks have not been introduced to facilitate military operations."

71 UK Ministry of Defence, *The Manual of Law of Armed Conflict*, Oxford University Press, Oxford, 2005, p. 68, para. 5.22.1. See also the manual *Fight it Right*, above note 33, p. 58, para. 1003.4) indicating that "The attacking commander is required to do his best to protect these civilians but he is entitled to take the defending commander's actions into account when considering the rule of proportionality." One of the authors of this manual reaffirms this position by stating that "in considering the rule of proportionality, any tribunal dealing with the matter would be obliged to weigh in the balance in favour of the attackers any such illegal activity by the defenders": Rogers, above note 34, pp. 178–9. See also Dinstein, above note 13, p. 131: "[T]he principle of proportionality remains prevalent. 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 – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher than usual."

One more condition has been introduced into the equation: Eric David suggests that, before attacking, a commander will have a duty to exhaust all lawful means of persuading the defending commander to withdraw his human shields.<sup>72</sup> This approach is highly laudable, and all relevant authorities must be encouraged to follow it. Nevertheless, it is not difficult to see that this is a moral condition rather than a legal one. To require that a commander warn the enemy of his intention to attack could place the attacking party in an unfavourable military position. As explained above, Additional Protocol I states that a warning must be given “unless circumstances do not permit”. After carrying out a detailed analysis of both national and international practice, it would appear that the condition put forward by Eric David does not stem from international treaties, military manuals or any unilateral act on the part of a state or an international organization. In the light of this, it is difficult to argue that the condition is legally binding.

### *The phenomenon of “voluntary human shields” and its legal implications*

In recent years, a new phenomenon has emerged. Referred to by the media as “voluntary human shields”, these are civilians who choose to demonstrate their opposition to war by physically placing themselves on sites that are clearly military in nature or purpose. These civilians, who are prepared to risk their lives for an ideal, will often be nationals of a belligerent state whose military objectives they wish to defend. For example, many Yugoslav citizens occupied bridges in Belgrade during the bombing campaign under NATO’s “Allied Force” operation in 1999. Voluntary human shields may also be civilians who are nationals of neutral, or even enemy, countries. As a classic example, in 2003, a group of individuals of various nationalities, acting under the auspices of non-governmental organizations, went to Iraq before armed operations began, in order to position themselves deliberately on the sites of military objectives designated as such by Iraq.

The applicability of Article 51(7) of Additional Protocol I to the situation of voluntary human shields may legitimately be regarded as debatable. At least in spirit, this provision implies that the civilian population or persons concerned have acted under duress or, at minimum, without knowledge of the way in which they are being manipulated to shield a military objective. It is therefore highly unlikely that drafters of this provision envisaged that the rule would also apply to the situation of individuals acting consciously and on their own initiative. Nevertheless, the prohibition on “using” the presence or movement of a civilian population is not limited to proscribing active violations by military authorities. The prohibition also applies to military authorities’ passive indifference towards

72 David, above note 53, p. 242.

civilians' voluntary presence or movements that would serve to shield military objectives.<sup>73</sup>

What is less clear is at what moment a belligerent's passive attitude towards the presence of voluntary human shields will become tantamount to the belligerent's using these civilians' presence or movements to shield military objectives or to shield, favour or impede military operations. Based on the work of the Preparatory Commission responsible for drawing up the elements of crimes contained in the Rome Statute, it may be argued, by analogy, that the criterion triggering the application of Article 51(7) is the intention of the party being favoured by the human shields.<sup>74</sup> Admittedly, it can be very difficult to identify the intention behind a belligerent's course of conduct. Nevertheless, intention can often be deduced from the circumstances of a particular case. 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 civilian volunteers are briefed by the armed forces on which military sites are to be "protected".

One might wonder what the advantage is of this subtle requirement of intention when the presence of voluntary human shields could be said to be already covered by Article 58 of Additional Protocol I, which requires that the civilian population, individual civilians and civilian objects be removed from the vicinity of military objectives. From a legal standpoint, it is important to specify in which cases Article 51(7) applies, first of all because the prohibition on using human shields is absolute whereas the precautions that must be taken against the effects of attacks are formulated in relative terms and, second, because a violation of Article 51(7) will entail individual criminal liability,<sup>75</sup> whereas a violation of Article 58 will not.

73 It is worth noting that the term "movement" was included in the text in order to cover cases in which the civilian population moves of its own accord. This does not, however, imply awareness on the part of the civilians that they are serving to protect a military objective (Commentary on Additional Protocol I, p. 627, para. 1988). This broad interpretation of the concept of use is confirmed by the wording of the first element of crime in Article 8(2)(b)(xxiii) of the Rome Statute, which reads as follows: "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" (emphasis added).

74 The second element of the crime in Article 8(2)(b)(xxiii) requires that "the perpetrator intended to shield a military objective from attack or shield, favour or impede military operations". In summarizing the discussions, Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, ICRC and Cambridge University Press, Cambridge, 2003, points out that, in the view of certain delegations, "the term "location" would not have any connotation as to how the civilians or other protected persons came to a certain place. They reiterated that what is important in this crime is not the type of movement or location being used, but the intended use" (pp. 344–5).

75 Pursuant to Article 8(2)(b)(xxiii) of the Rome Statute.

Turning to the attacking commander, will the voluntary character of a human shield be likely to influence his assessment of whether to attack the targeted object? Certain authors claim that civilians who act as voluntary human shields can be regarded as directly participating in hostilities, with the result that they are deprived of immunity against direct attack and have no effect whatsoever on a commander's assessment of proportionality.<sup>76</sup> If, however, it is accepted that direct participation in hostilities implies posing a direct and immediate threat to the adverse party, then it is doubtful whether merely passive voluntary human shields should really be regarded as directly participating in hostilities.<sup>77</sup> It is therefore reasonable to conclude that civilians acting as voluntary human shields will retain their immunity from direct attack. Moreover, the presence of voluntary human shields will in no way alter the attacking party's obligation to apply the proportionality principle when targeting its military objective. In applying the proportionality test, a military commander will take into account the deliberately imprudent behaviour of the voluntary human shields. As a result, these civilians will bear the risk of falling victim to a legitimate attack on the shielded object.

### The obligations arising from Article 58 of Additional Protocol I

The classic rule on precautions against the effects of attacks has gradually adapted to changes in modern warfare, although it perhaps still remains somewhat rudimentary. The first texts that codified the principle required that the besieged authorities display visible markings – usually flags – on certain buildings in order to make them easy to identify and thus protect them from enemy fire.<sup>78</sup> With technological progress – especially in aerial operations – and the resulting increase in loss and damage caused to the civilian population and civilian objects, the legal requirement to place markings on buildings subject to special protection has quickly proved to be insufficient. Therefore, in developing the law governing the conduct of hostilities, efforts have been made to strengthen the precautionary measures that a party under attack must take in order to protect the civilian persons and objects under its control. This bolstering also serves as a counterweight to the greater precautions required of an attacking party. In its

76 Dinstein, above note 13, p. 130. Without stating the argument in such clear terms, Schmitt, above note 30, also leans towards such a solution, according some merit to the theory that incidental loss or damage caused to voluntary human shields does not have to be taken into account (p. 12).

77 To equate such behaviour with direct participation in hostilities could also lead voluntary human shields to face criminal prosecution under the laws of their own country. In fact, proceedings were instituted against US nationals who went to Iraq in 2003, although the allegations against them were civil, not criminal, and were based only on their travelling to enemy territory in time of conflict.

78 The Lieber Code drew a distinction between hospitals, which had to display markings (Article 115), and other protected objects such as buildings dedicated to religion, art, science or charitable purposes and historical monuments, for which marking was merely recommended (Article 118). Later texts abandoned this dichotomy, considering that the marking of all these objects was a legal requirement; see in particular Article 17 of the Brussels Declaration, Article 34 of the Oxford Manual, and above all Article 27 of the Regulations annexed to the 1907 Hague Convention.

1956 Draft Rules the ICRC proposed that the content of such “passive” precautions be extended. In fact, Article 11 of the Draft Rules foreshadowed Article 58 of Additional Protocol I, which can be broken down into three separate but interconnected categories of precautions.

First, Article 58(a) requires that belligerents remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives. This provision’s express reference to Article 49 of the Fourth Geneva Convention, which prohibits forcible transfers and deportations of protected persons from occupied territory,<sup>79</sup> demonstrates that drafters were aware of the risk that this precaution could be used to pursue ends that are anything but humanitarian. It is obvious, however, that the obligation to remove civilian persons and objects must be carried out in the spirit of the Protocol, that is, with the sole aim of protecting civilian persons and objects threatened by the hostilities. Of course, such measures must also take into account the potentially traumatic effects of an evacuation.<sup>80</sup> In the light of this, the rule will apply only when it is materially impossible to guarantee the population’s safety by other means, and only until the danger has passed.

Article 58(b) requires that the parties to a conflict avoid positioning military objectives within or near densely populated areas. This obligation relates to the placement, in times of both peace and war, of fixed military objectives. For instance, setting up military barracks or a munitions depot in the middle of a residential complex could have disastrous consequences for the civilians living in the area. The obligation in Article 58(b) also covers mobile military objectives such as troops or weaponry supplies. In all their movements, it is preferable that military units avoid coming near densely populated areas. If they are unable to avoid this, then they must pass through the populated area as swiftly as possible and deploy in such a manner as to create the least possible risk to the civilian population and civilian objects.

Finally, Article 58(c) sets out an open-ended obligation to take “other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers arising from military operations”. This provision allows states to take additional precautionary measures according to circumstances such as the state’s available means and other considerations relating to the conflict. Both state practice and doctrinal writings offer useful examples of the types of measures that are likely to be taken in compliance with this obligation. The most common precautions include the

79 Article 49 nevertheless specifies that this prohibition of forcible transfers and deportations in no way affects the possibility of total or partial evacuation of a given area of the occupied zone if the security of the population or imperative military reasons so require.

80 The ICRC Commentary on Additional Protocol I (p. 693, para. 2248) notes: “In this field the Occupying Powers only have limited freedom and must comply with the provisions of Article 49 of the Fourth Convention: imperative military reasons, security of the population, proper accommodation to receive the persons concerned, satisfactory conditions of transfer (hygiene, health, safety, nutrition, members of the same family not separated, the Protecting Power be kept informed).”

construction of shelters, the establishment of civil defence organizations<sup>81</sup> and the installation of systems to alert and evacuate the civilian population. Other measures include programmes providing relief to the wounded, fire-fighting, decontamination, and identification and marking of high-risk areas.<sup>82</sup>

These precautions against the effects of hostilities are a logical extension of the principle of distinction. A large number of military manuals have used wording that is similar or even identical to Article 58,<sup>83</sup> which also constitutes a rule of customary international law.<sup>84</sup> The idea of imposing this duty to take precautions did, however, prompt sharp criticism before, during and after the 1974–7 Diplomatic Conference, since certain states considered that the obligation might be extremely difficult to meet. Where a densely populated country is rapidly undergoing urbanization, the idea of taking precautions may be easier said than done.<sup>85</sup> The strongest opposition to this duty was expressed by the Swiss Confederation: Switzerland’s mountainous topography means that the civilian population is heavily concentrated in valleys, which are areas of vital economic and military importance in which fighting would inevitably take place despite the density of civilian population and housing.<sup>86</sup> For these reasons, the requirement of removing the civilian population from the vicinity of military objectives, and of

81 There is an obvious link here with Chapter VI (entitled “Civil defence”) of Part IV, Section I of Additional Protocol I. (Precautionary measures appear in Chapter IV.)

82 For a list of such measures, see, in particular, *Fight it Right*, above note 33, p. 78, para. 1201.5 c). As this manual states, the obligations laid down in Article 58 depend as much on civilian authorities as on armed forces. Moreover, Article 58 is a classic example of a provision that requires the allocation of financial resources and the adoption of practical measures during peacetime, especially in terms of planning and location of military objectives. The fact that certain military objectives may lose their qualification as such because of changing contextual factors does not preclude a party from taking precautionary measures, which, should the need arise, will facilitate protection of the civilian population. One such precaution could be the establishment of protected or non-defended zones to which evacuees could be moved.

83 For examples of military practice, see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 419–50.

84 The ICTY unambiguously upheld the customary nature of the duty to take precautions in its January 14, 2000 judgment in the *Kupreskic* case (at para. 524). Some doctrinal authors also maintain that these obligations can be considered to have been customary for a very long time. See, in particular, Geoffrey Best, *War and Law since 1945*, Clarendon Press, Oxford, 1997, p. 330. The ICRC study on customary law also recognizes the customary status of these precautionary obligations in international armed conflicts. However, the study’s excessively prudent assessment of the customary nature of the rule in non-international armed conflicts is regrettable. It concludes that the only real customary obligation in non-international armed conflicts is to take all feasible precautions to protect the civilian population and civilian objects under its control against the effects of attacks (Henckaerts and Doswald-Beck, above note 8, Vol. I (Rules), pp. 68–76).

85 “At times, the intermingling of civilians (and civilian objects) with combatants (and military objectives) can scarcely be eliminated. For instance, sprawling metropolitan areas are only rarely bereft of military objectives”: Dinstein, above note 13, p. 129.

86 This special topography had reportedly led the Swiss army to envisage setting up command posts in the basements of private houses! This explains why Switzerland – and Austria, which is in a similar situation – filed an interpretive declaration subjecting the expression “to the maximum extent feasible” used in Article 58 to the requirements of defence of the national territory. On this reservation, see Maurice Aubert, “Les réserves formulées par la Suisse”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 139–40, 144.

refraining from placing such objectives within or in the vicinity of densely populated areas, has, on occasion, been described as difficult to achieve on a large scale.<sup>87</sup>

Yet it is precisely to address such realities that the duty to take these precautions is worded in relative terms. Additional Protocol I requires that these precautionary measures be applied only “to the maximum extent feasible”. This expression has already been examined earlier in this paper, in the context of precautions in attack. The words “to the maximum extent feasible” cannot be interpreted as referring to a mere recommendation rather than a legal obligation.<sup>88</sup>

It is also worth noting that the standards laid down in Article 58 are not limited to prohibiting the deliberate scattering of military elements in a civilian environment in order to impede enemy operations.<sup>89</sup> Article 58 has a much broader field of application: it requires the party under attack to adopt, in good faith, proactive measures that are designed to guarantee immunity of the civilian population and objects.

## Conclusion

Contrary to what is sometimes maintained, Additional Protocol I does not introduce a fundamental imbalance between the precautions required of the defender and those required of the attacker.<sup>90</sup> Responsibility for applying the principle of distinction rests equally on the defender, who alone controls the population and objects present on his territory, and on the attacker, who alone

87 Siege warfare is indisputably one of the most problematic situations in this respect. For example, it would be difficult to find a violation of Article 58 in the PLO’s practice of placing heavy weaponry next to civilian objects during the Israeli forces’ siege of West Beirut, since it was practically impossible for the organization to do anything else to defend itself.

88 This reminder is certainly useful because, as noted by Dinstein, above note 13, “Admittedly, considering that these obligations devolve on every belligerent only “to the maximum extent feasible”, they are often viewed by commentators as more in the nature of recommendations than strict duties” (p. 129).

89 Such conduct would indisputably be in violation of Article 58. More importantly, because of the element of intent, such acts could also amount to “use” of the civilian population or civilian objects to “shield, favour or impede military operations”, and thus fall within the scope of Article 51(7).

90 In his article entitled “Air war and the law of war”, *Air Force Law Review*, Vol. 32 (1) (1990), p. 112 (n. 351), W. Hays Parks asserts that, while the protection of civilian persons and property was traditionally the responsibility of the defenders, Additional Protocol I has shifted this responsibility to the attacker. Apart from the fact that, in our view, the protection of civilian persons and property has always been a shared responsibility, the basis for Parks’s position is not admissible under IHL. According to Parks, states acting in a defensive capacity are most often seen as acting in self-defence, and this perception would have rendered certain delegations hesitant, during Additional Protocol I negotiations, to impose any further restrictions on their military operations against an attacker. In other words, the natural law of self-defence took precedence over any other obligation, and authorized nations to place their civilian populations at risk if this was deemed necessary to protect their territory. While it cannot be denied that this argument led to some declarations during the Diplomatic Conference (see in particular the declaration made by France: CDDH/SR.42, paras. 54–55), it still does not justify challenging the basic structure of the law of armed conflict, which, in principle, excludes any consideration of *ius ad bellum* within the domain of *ius in bello*.

decides on the objects to be targeted and the methods and means of attack to be employed.<sup>91</sup> Consequently, only a combination of precautions taken by all belligerents will effectively ensure the protection of the civilian population and objects.

This does not, however, mean that respect for these obligations by one party depends on the conduct of the other party. This sharing of responsibility in no way implies that an attacker's refusal to fulfil its precautionary obligations would free the defender from its own obligations.<sup>92</sup> In the same way, a defending party who fails to meet its precautionary obligations will bear at least some legal responsibility for the loss or damage caused by an attack on a legitimate military objective, even when the attacking party has taken certain precautionary measures.<sup>93</sup>

The preceding comments bear a special significance in the context of modern strategic developments, which have a marked effect on belligerent parties' capacity to meet the obligations set out in Article 58. As a most striking example, recent technological advances, particularly in the areas of communication and information, have emerged in the form of a tightly interwoven network of civilian and military media.<sup>94</sup> Similarly, the rapid spread of asymmetrical strategies has inevitably led parties with lesser technological capacity both to increase and to conceal their strategic resources, the best hiding places – with some exceptions – being in densely populated urban areas. Regardless of whether belligerents have the ability to behave otherwise, such practices can only impair the efficacy of the principle of distinction in the future.

91 According to the 1976 *US Air Force Pamphlet* (pp. 5–8), “The requirement to distinguish between combatants and civilians, and between military objectives and civilian objects, imposes obligations on all the parties to the conflict to establish and maintain the distinctions. This is true whatever the legal status of the territory on or over which combatant activity occurs.” For a contrary opinion see Marco Sassoli, “Targeting: The scope and utility of the concept of military objectives for the protection of civilians in contemporary armed conflicts”, in David Wippman and Matthew Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st-Century Conflicts*, Transnational Publishers, Ardsley, New York, 2005, who states, “Customary law and treaties clearly do not impose obligations on the defender comparable to those of a belligerent launching an attack. The defender may simply not abuse the obligations of the attacker to render its military objectives immune from attack” (p. 209).

92 Having remarked that modern technological societies have made it much more difficult to apply the measures required by Article 58 of Additional Protocol I, the Committee appointed by the ICTY Prosecutor to determine whether an inquiry should be made into the NATO bombing campaign against the FR Yugoslavia (FRY) stated, “Civilians present within or near military objectives must, however, be taken into account in the proportionality equation even if a party to the conflict has failed to exercise its obligation to remove them.” In the same vein, see Bothe et al., above note 19, p. 307, para. 2.5.3.1.

93 “A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in the territory” (*US Air Force Pamphlet*, 1976, pp. 5–13).

94 In the words of Mark Shulman (“Discrimination in the laws of information warfare”, *Columbia Journal of Transnational Law*, Vol. 37 (1999), p. 963), “[W]here armed forces once communicated among themselves – via military media ... – they now share the info-share with civilians everywhere. In information warfare, segregation presents many new challenges.”

# Incitement in international criminal law

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## Abstract

*The author critically analyses in this article the status of incitement in international criminal law. After a discussion of the relevant judgments by the Nuremberg Tribunal and related courts, including German de-Nazification courts, the travaux préparatoires of the Genocide Convention and the case-law of the International Criminal Tribunals, the international approach is criticized, particularly its practice of regarding only direct and public incitement to genocide as inchoate, whilst instigation generally is treated as not inchoate. The author recommends the adoption of an approach modelled on German and Swiss domestic law and argues that instigation per se should also be regarded as an inchoate crime.*

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In 1920, thirteen years before Hitler came to power in Germany, the so-called *Protocols of the Elders of Zion* was published in Germany for the first time, amidst a flurry of other anti-Semitic writings. They purportedly consisted of the minutes of a fabricated meeting of Jewish elders in Berne in 1897, and contained allegations of a Jewish conspiracy to rule the world and enslave Christians.<sup>1</sup> Viciously anti-Semitic, by 1933 they had gone through thirty-three editions.<sup>2</sup> An eyewitness

\* This article is based on part of the author's thesis for her LL.M. degree at the UCIHL, for which she was awarded the 2006 Henry Dunant Prize. The views expressed here are those of the author and do not necessarily reflect the views of the Prosecutor's Office of Bosnia-Herzegovina.

writing in 1920 described the effect in Germany of the publication of the pamphlet:

In Berlin I attended several meetings which were entirely devoted to the *Protocols*. The speaker was usually a professor, a teacher, an editor, a lawyer or someone of that kind. The audience consisted of members of the educated class, civil servants, tradesmen, former officers, ladies, above all students .... Passions were whipped up to the boiling point. There, in front of one, in the flesh, was the cause of all ills – those who had made the war and brought about the defeat and engineered the revolution, those who had conjured up all our suffering .... I observed the students. A few hours earlier they had perhaps been exerting all their mental energy in a seminar under the guidance of a world-famous scholar. ... Now young blood was boiling, eyes flashed, fists clenched, hoarse voices roared applause or vengeance.<sup>3</sup>

On the night of 15–16 April 1993 Dario Kordić, at the time president of the Croatian Democratic Union of Bosnia and Herzegovina, the principal Bosnian Croat political party, convened a meeting at his house at which a decision was taken by several politicians, including Kordić, to plan an attack on Ahmici, aimed at “cleansing” the area of its Muslim inhabitants. The meeting approved an order to kill all men of military age, expel the civilians and set the houses on fire.<sup>4</sup> A witness had testified that Kordić’s comment on hearing that civilians might get killed was “so what?”<sup>5</sup> The trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that by these and similar actions, Kordić had planned, instigated and ordered various war crimes and crimes against humanity.<sup>6</sup>

On 4 June 1994, in one of many similar broadcasts on Radio-Télévision Libre des Mille Collines (RTLM), Kantano Habimana called for 100,000 young men to be “recruited rapidly”, who

should all stand up so that we will kill the Inkotanyi and exterminate them ... [T]he reason that we will exterminate them is that they belong to one ethnic group. Look at the person’s height and his physical appearance. Just look at his small nose and then break it.<sup>7</sup>

Incitement such as this spurred on the massacres which made up the Rwandan genocide of 1994. Its effectiveness is evidenced in the testimony of a former *génocidaire*:

1 A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, New York University Press, New York, 2002, p. 20.

2 *Ibid.*, p. 21.

3 Cited in *ibid.*, p. 22.

4 *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgement (Trial Chamber), 26 February 2001, para. 631.

5 *Ibid.*, para. 627.

6 *Ibid.*, para. 834.

7 *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence (Trial Chamber), 3 December 2003, para. 396.

They kept saying Tutsis were cockroaches. Because they had given up on them we started working and killed them.<sup>8</sup>

These accounts illustrate that incitement or instigation (which is often considered to be synonymous with incitement), can be committed in public as well as in private, and can be direct and explicit as well as indirect. They indicate, as this article will demonstrate, that the danger of public incitement is different from that of incitement in private. Whilst public incitement such as that described in the first and last accounts regarding Nazi Germany and Rwanda is primarily dangerous because it leads to the creation of an atmosphere of hatred and xenophobia and entails the exertion of influence on people's minds, incitement in private is dangerous because the instigator succeeds in triggering a determination in the instigatee's mind to commit a particular crime.

This article will begin with a brief technical discussion of the notion of inchoate crimes. An understanding of the rationale underlying the criminalization of such acts is indispensable for an analysis of the speech acts dealt with in this article, as a considerable part of the debate centres around whether they are inchoate or not. The status of incitement and instigation in international law is then outlined, followed by a critical analysis of the international approach. Ways in which the shortcomings of the international approach can be improved will be indicated.

## Inchoate crimes

The word "inchoate" denotes something that has "just begun" or is "under-developed",<sup>9</sup> "partially completed" or "imperfectly formed".<sup>10</sup> Inchoate offences are thus incomplete offences, which are deemed to have been committed despite the fact that the substantive offence, that is, the offence whose commission they were aiming at, is not completed and the intended harm is not realized. *Black's Law Dictionary* describes such an offence as "A step toward the commission of another crime, the step in itself being serious enough to merit punishment".<sup>11</sup> In English common law there are three general inchoate offences: attempt, conspiracy and incitement (or solicitation in US law). All of them may incur criminal liability even though the crime they were intended to bring about does not materialize.<sup>12</sup> In the case of incitement, the crime is completed despite the fact that the person incited fails to commit the act to which he or she has been incited.

8 F. Keane, "Deliver us from evil", *Independent Magazine*, 3 April 2004, p. 16.

9 A. Ashworth, *Principles of Criminal Law*, 4th edn, Oxford University Press, Oxford, 2003 p. 445.

10 B. A. Garner (ed.), *Black's Law Dictionary*, 7th edn, West Group, St. Paul, Minn., 1999, p. 765.

11 *Ibid.*, p. 1108.

12 *Ibid.* *Black's Law Dictionary* names the term "choate" as the antonym of "inchoate", meaning "complete in and of itself" and "having ripened or become perfected": p. 234. However, this term does not appear to be generally used to denote preparatory criminal acts which, in order to give rise to individual criminal responsibility, need to be followed by the crime sought to be brought about.

Since the intended harm does not actually result, the question is why inchoate offences should incur individual criminal responsibility at all. As Ashworth explains, one rationale lies in the fact that “the concern [in criminal liability] is not merely with the occurrence of harm but also with its prevention”.<sup>13</sup> In terms of moral culpability, there is no difference between an individual who attempts to commit a crime and fails and another who succeeds; the outcome in both cases is a matter of chance. As criminal law should concern itself with culpability rather than “the vagaries of fortune”,<sup>14</sup> it follows that both the unsuccessful attempter and the individual who successfully completes the crime should be punished. The American Law Institute similarly fails to distinguish between attempts and completed crimes, reasoning that the punishment should orient itself by the degree of anti-social behaviour, which is the same in both cases.<sup>15</sup>

Although it is certainly debatable whether the punishment for attempts and other inchoate crimes ought to be exactly the same as for the crime sought to be brought about, this approach in any case appears to accord full respect to individual autonomy in the Kantian sense. In his *Grundlegung zur Metaphysik der Sitten*,<sup>16</sup> Kant postulates that as beings endowed with the capacity to reason, humans enjoy autonomy of the will, that is, they are able to regard themselves as general lawgivers, that is, of laws that have the potential to be valid for everyone at all times.<sup>17</sup> All rational beings must always be treated as ends in themselves, and never merely as means to an end, in order to accord full respect to their dignity, which is the dignity of rational beings who do not obey any law except the law which they simultaneously give themselves.<sup>18</sup> This means also that for practical reasons the will of rational beings must be free, as only under the idea of freedom is it possible to conceive of their will as their “own will”.<sup>19</sup> This idea of the human being as free and autonomous would seem to imply that in punishing an individual for an inchoate crime, one merely respects his or her free choice to bring about the commission of a criminal act and punishes him or her accordingly.<sup>20</sup>

Arthur Ripstein regards the denial of the rights of others as an essential reason for punishing individuals for certain acts. Those committing inchoate crimes thereby violate the autonomy of others and deny their rights.<sup>21</sup> In order to

13 Ashworth, above note 9, p. 446.

14 Ibid.

15 *Model Penal Code and Commentaries*, official draft and revised comments, adopted by the American Law Institute on 24 May 1962, American Law Institute, 1985, Section 5.05 (1). See A. Ripstein, *Equality, Responsibility, and the Law*, Cambridge University Press, Cambridge, 1999, p. 219.

16 I. Kant, *Grundlegung zur Metaphysik der Sitten*, Reclam, Stuttgart, 1961.

17 Ibid., pp. 82–83.

18 Ibid., p. 87.

19 Ibid., p. 106.

20 See also Ashworth, above note 9, p. 472.

21 Ripstein, above note 15, p. 241.

incur criminal responsibility, however, they must do so intentionally or at least knowingly: the act must speak for itself – *res ipsa loquitur* – in disclosing a criminal intent.<sup>22</sup>

Additionally, a consequentialist justification for penalizing inchoate crimes can be found in the fact that such criminalization permits law enforcement officers and the judiciary to become involved before any harm has occurred, and thus serves to reduce the incidence of harm.<sup>23</sup> In cases where there is a substantial likelihood of harm occurring, and where that harm is of a particularly egregious nature, this justification is especially pertinent.

## Incitement in international law

### Nuremberg: Streicher, Fritzsche

Incitement to genocide first became a crime under international law when the International Military Tribunal (IMT) at Nuremberg passed judgment on the accused Julius Streicher and Hans Fritzsche in 1946. While the term “incitement to genocide” was not yet known as such and the accused were instead charged with crimes against humanity, this charge was based on acts which would today fall within the definition of incitement to genocide. Both Streicher and Fritzsche were furthermore charged with crimes against peace, and Fritzsche with war crimes.

Julius Streicher was the founder and editor of the anti-Semitic weekly magazine *Der Stürmer*, the aim of which, according to Streicher himself, was to “unite Germans and to awaken them against Jewish influence which might ruin our noble culture”.<sup>24</sup> In its judgment, the IMT described how in leading articles and letters, some of them written by Streicher himself, Jewish people were depicted as “a parasite, an enemy, and an evil-doer, a disseminator of diseases” or “swarms of locusts which must be exterminated completely”.<sup>25</sup> The Tribunal found that by means of such hate propaganda, Streicher “incited the German people to active persecution”,<sup>26</sup> as well as to “murder and extermination”, acts which in the IMT’s view represented a crime against humanity,<sup>27</sup> of which Streicher was convicted and was sentenced to death by hanging.<sup>28</sup>

The Tribunal found it to have been proved beyond reasonable doubt that Streicher had had “knowledge of the extermination of the Jews in the Occupied Eastern Territory”, but did not specify whether such knowledge was part of the

22 *The King v. Barker* [1924] NZLR 865 *per* Salmond, J. See also *D.P.P. v. Stonehouse* [1978] AC 55 *per* Lord Diplock. See also Ashworth, above note 9, p. 472.

23 Ashworth, above note 9, p. 446.

24 As explained to Leon Goldensohn, prison psychiatrist of the IMT jail at Nuremberg in 1946. R. Gellately (ed.), *The Nuremberg Interviews conducted by Leon Goldensohn*, Alfred A. Knopf, New York, 2004, p. 252.

25 (1946) 22 *Trial of German Major War Criminals*, p. 501.

26 *Ibid.*

27 *Ibid.*, p. 502.

28 *Ibid.*, p. 529. See also T. Taylor, *The Anatomy of the Nuremberg Trials*, Little, Brown, Toronto, 1992, pp. 376–80.

required *mens rea* of the offence. It has been argued that the Tribunal’s holding that “Streicher’s incitement to murder and extermination at a time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds ..., and constitutes a Crime against Humanity”<sup>29</sup> indicated that the crime in question – that is, a crime against humanity in the form of incitement to murder and extermination – required proving the existence of a causal link between the incitement and the substantive crime, which meant in turn that “both inciting words and the physical realization of their message” had to be established.<sup>30</sup> This would of course mean that the incitement in question would not be an inchoate offence. However, the IMT did not explicitly state that the substantive crime must follow or that there must be a causal link between the incitement and the crime;<sup>31</sup> instead, it dwelt on the effect that Streicher’s propaganda had on the minds of the Germans: Streicher “infected the German mind with the virus of anti-Semitism” and “injected” poison “into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination”.<sup>32</sup> Consequently, even though the Tribunal made reference to the extermination and persecution which was then perpetrated as a result of such influencing of people’s minds, it nonetheless did not leave any *explicit* precedent determining incitement to genocide not to be an inchoate crime.

Hans Fritzsche was a senior official in Goebbels’s Ministry of Popular Enlightenment and Propaganda as well as head of the ministry’s Radio Division from 1942 onwards.<sup>33</sup> Under the count of crimes against humanity, he was accused of having “incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities”.<sup>34</sup> Here, also, the Tribunal emphasized the effect of the incitement on the minds of the Germans – that is, the addressees of the incitement, which suggests that the Tribunal regarded it as an important element of the crime.

Fritzsche was acquitted, the Tribunal reasoning that his “position and official duties were not sufficiently important ... to infer that he took part in originating or formulating propaganda campaigns”; that his speeches “did not urge persecution or extermination of Jews”; that the evidence had shown that he twice tried to stop publication of *Der Stürmer* (albeit unsuccessfully); and that it

29 (1946) 22 *Trial of German Major War Criminals*, p. 502.

30 J. F. Metz, “Rwandan genocide and the international law of radio jamming”, (1997) 91 *AJIL* 628, p. 637.

31 K. J. Madders, “War, use of propaganda in”, in *Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law 2000, Vol. 4, pp. 1394–5; G. S. Gordon, ““A war of media, words, newspapers, and radio stations”: The ICTR media trial verdict and a new chapter in the international law of hate speech”, *Virginia Journal of International Law*, No. 45, 2004, p. 139, at p. 144.

32 (1946) 22 *Trial of German Major War Criminals*, p. 502.

33 Gellately, above note 24, p. 47; see also Taylor, *Anatomy*, above note 28, pp. 460–2.

34 (1946) 22 *Trial of German Major War Criminals*, p. 526.

had not been proven that he knew the news he transmitted to have been falsified.<sup>35</sup> The Tribunal was “not prepared to hold that [his broadcasts] were intended to incite the German people to commit atrocities on conquered peoples”.<sup>36</sup> Its comments strongly suggest that its reasons for acquitting Fritzsche lay in the fact that, first, he lacked the necessary intent or such intent had not been proved to the Tribunal’s satisfaction<sup>37</sup> and, second, his speeches were not sufficiently direct or unequivocal in calling for the murder of the Jewish people.

### Fritzsche revisited: prosecution by the *Spruchkammer I* in Nuremberg and appeal to the *Berufungskammer I*

Following his acquittal before the IMT at Nuremberg, Hans Fritzsche was prosecuted before a German court, the *Spruchkammer I* in Nuremberg, in connection with the de-Nazification trials which were then being conducted in post-Second World War Germany. The court decided that Fritzsche belonged to the category of “*Gruppe I – Hauptschuldige*”, that is, the first group of Nazi criminals comprising those most guilty, and sentenced him to nine years of forced labour for his participation as a *Hauptschuldiger* in the criminal Nazi regime.<sup>38</sup> The judges pointed out that throughout his career with the German broadcasting service, Fritzsche’s speeches corresponded to the Nazi ideology; moreover, after 1942, when he was given responsibility for the political direction of the German broadcasting service and appointed head of the Propaganda Ministry’s Radio Division with the rank of *Ministerialdirektor*, Fritzsche’s influence on the formation of public opinion increased considerably.<sup>39</sup> The court concluded that Fritzsche developed an altogether “außerordentliche Propaganda für die NS-Ideologie”.<sup>40</sup> He was “einer der einflussreichsten und aktivsten Propagandisten der Nazi-Ideologie”.<sup>41</sup> The court held that Fritzsche therefore belonged to the group of those primarily responsible. He was given the highest penalty, as he had been an “*intellektueller Urheber*”<sup>42</sup> who influenced wide circles of the German people through his propagandistic activity and convinced them of the Nazi ideology.<sup>43</sup>

Fritzsche subsequently appealed to *Berufungskammer I*, which rejected the appeal and confirmed the lower court’s decision. The appeals chamber’s judgment is interesting in that it offers elaborate reasons for its decision on the one hand and, on the other hand, makes reference to the judgment of the IMT at Nuremberg, explaining why its conclusion differs from that of the international

35 Ibid.

36 Ibid.

37 *Nahimana*, above note 7, para. 982; L. J. Martin, *International Propaganda: Its Legal and Diplomatic Control*, University of Minnesota Press, Minneapolis, 1958, p. 206; Madders, above note 31, p. 1395.

38 *Hans Fritzsche Judgment*, Aktenzeichen I/2398, *Spruchkammer I*, Stadtkreis Nürnberg, 31 January 1947, Staatsarchiv München, SpKa Karton 475, p. 1.

39 Ibid., p. 3.

40 “Extraordinary propaganda for the NS ideology” (all translations are by the author). Ibid.

41 “One of the most influential and active propagandists of the Nazi ideology”. Ibid., p. 4.

42 “Intellectual originator”. Ibid.

43 Ibid.

tribunal. The court stressed that through his radio speeches, Fritzsche exercised an extraordinarily strong influence over a large part of the German people.<sup>44</sup>

As for Fritzsche's use of anti-Semitic propaganda, the chamber underlined that he incited hatred against the Jewish people, repeatedly describing them as those responsible for the war, and claiming that the war was about "die Herrschaft des Judentums – und ... die Vernichtung des deutschen Volkes".<sup>45</sup> He alleged that Jewish people were encouraging the US and British military and profiting immensely from the so-called liberated peoples, and predicted that Jews would soon be killed everywhere as they were being killed in Europe, as it was "hardly to be assumed that the nations of the New World [would] forgive the Jews the misery of which the Old World did not acquit them".<sup>46</sup> Though acknowledging the findings of the IMT Nuremberg that his broadcasts did not specifically call for the persecution or extermination of the Jewish people, the chamber observed that Fritzsche's propaganda intensified the hatred which the Nazis had fomented against the Jewish people. Furthermore,

Wenn er auch nicht direkt zur Verfolgung oder Ausrottung der Juden aufgefordert hat, so half er doch in hervorragendem Masse mit, im deutschen Volke eine Stimmung zu schaffen, welche der Verfolgung und Ausrottung des Judentums günstig war.<sup>47</sup>

The essence of his criminal conduct, therefore, was the fact that through his propaganda he knowingly contributed to the creation of a certain "mood" among Germans, which "favoured" or made possible the persecution and annihilation of the Jewish people. The German court went a step further than the Nuremberg Tribunal in that it held Fritzsche criminally responsible for anti-Semitic propaganda per se, without additional calls for acts of violence, but the overall effect of which was the creation of a violent atmosphere or state of mind among the future perpetrators and bystanders. The chamber thus acknowledged the dangers of such general hate propaganda and drew what it appears to have regarded as the logical consequence: that criminalization of such propaganda was necessary to prevent mass murders and genocides.

The chamber stressed that when engaging in anti-Semitic propaganda, Fritzsche knew that Germans had been "systematisch gegen die Juden aufgehetzt"<sup>48</sup> through the Nazi press and the entire party apparatus, and that there were concentration camps in which prisoners were treated inhumanly.<sup>49</sup> *Berufungskammer I* emphasized that the number of Germans who

44 *Hans Fritzsche Appeals Judgment*, Ber.-Reg.-Nr. BKI/695, Berufungskammer I, Nürnberg-Fürth, 30 September 1947, Staatsarchiv München, SpKa Karton 475, p. 8.

45 "The domination by the Jews – and ... the destruction of the German people". *Ibid.*, p. 10.

46 The original reads, "kaum anzunehmen, dass die Nationen dieser Neuen Welt den Juden das Elend, von dem die Alte Welt sie nicht frei sprach, verzeihen werden". *Ibid.*

47 "Even though he did not directly call for the persecution or extermination of the Jews, he nonetheless helped to an extraordinary extent to create amongst the German people a mood which was favorable to the persecution and extermination of Jewry." *Ibid.*

48 "Systematically incited against the Jews". *Ibid.*, p. 15.

49 *Ibid.*

were influenced by Fritzsche's propaganda in favour of Nazism could not easily be overestimated.<sup>50</sup>

### Convictions under Control Council Law No. 10: the case of Otto Dietrich

To prosecute those Nazi conspirators and criminals who could not be dealt with by the Nuremberg Tribunal itself, the Allies enacted Control Council Law No. 10, which had essentially the same content as the Nuremberg Charter. In the *Ministries* case before the US Military Tribunal,<sup>51</sup> one of the accused was Otto Dietrich, a Nazi propagandist who held the post of Reich press chief from 1937 and State Secretary of the Ministry of Public Enlightenment and Propaganda under Goebbels from 1938 until 1945.<sup>52</sup> Dietrich, not Goebbels, had control over the press section in that ministry.<sup>53</sup> The Tribunal recognized the important influence which press propaganda had in garnering support for the Nazi regime, stating that it was "one of the bases of Hitler's rise to power and one of the supports to his continuation in power".<sup>54</sup> It dwelt on the anti-Semitism rife in press and periodical directives, which instructed newspaper and magazine editors and contributors to "*especially ... indicate the noxiousness of the Jews*";<sup>55</sup> stress "[t]he anti-Semitic campaign still more ... as an important propagandistic factor in the world struggle";<sup>56</sup> and "keep ... awake in the German people the feeling that Judaism constitutes a world danger".<sup>57</sup> It quoted a directive enjoining periodicals to "treat ... this subject [i.e., the "propaganda against Jewry"] in the framework of the *rousing of feelings* of hatred",<sup>58</sup> and held that "a well thought-out, oft-repeated, persistent campaign to *arouse the hatred* of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich".<sup>59</sup> The Tribunal concluded that

[The directives'] clear and expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to

50 Ibid., p. 17. On 10 August 1950, however, the Minister for Political Liberation in Bavaria decided to shorten by four years the term of imprisonment in a labour camp to which Fritzsche had been condemned. Fritzsche's imprisonment therefore ended on 29 September 1950. The minister reasoned that the penalty imposed currently appeared "unusually harsh" compared with more recent judgments against other accused with a similar degree of responsibility. "Entscheidung, Betrifft Erlass der Arbeitslagerhaft für Hans Fritzsche, Ministerialdirektor a.D. im früheren Reichspropagandaministerium, verwahrt im Lager Eichstätt", Minister für politische Befreiung in Bayern, Munich, 10 August 1950, 33/6711 F 1232, m/St./6373, Staatsarchiv München, SpKa Karton 475.

51 See R. A. Blasius, "Fall 11: Der Wilhelmstraßen-Prozeß gegen das Auswärtige Amt und andere Ministerien", in G. R. Ueberschär (ed.), *Der Nationalsozialismus vor Gericht: Die alliierten Prozesse gegen Kriegsverbrecher und Soldaten 1943–1952*, 2nd edn, Fischer Taschenbuch Verlag, Frankfurt am Main, 2000, pp. 187–98.

52 14 TWC 314, pp. 565–76.

53 Ibid., p. 566.

54 Ibid., p. 569.

55 Ibid., p. 572 (emphasis in original).

56 Ibid., p. 573.

57 Ibid.

58 Ibid., p. 575 (emphasis in original).

59 Ibid. (emphasis in original).

subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.

By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews.<sup>60</sup>

It thus effectively recognized that Dietrich's incitement to hatred amounted to crimes against humanity committed against the Jewish people, without specifying that his guilt depended on any further persecutory measures having been carried out.

### The Genocide Convention: *travaux préparatoires*

The Genocide Convention was inspired by the need to prevent a crime as abominable as the Holocaust from ever being committed again. The drafters were acutely aware of the dangers of doctrines such as Nazism, which propagated racial, national and religious hatred. Several delegations referred to the perceived link between genocide and "Fascism-Nazism and other similar race "theories" which preach racial and national hatred, the domination of the so-called "higher" races and the extermination of the so-called "lower" races".<sup>61</sup>

The Draft Convention for the Prevention and Punishment of Genocide, prepared by the UN Secretariat,<sup>62</sup> criminalized "direct public incitement to any act of genocide, whether the incitement be successful or not".<sup>63</sup> In its comments on the draft Convention, the Secretariat made it clear that "direct public incitement" referred to "direct appeals to the public by means of speeches, radio or press, inciting it to genocide".<sup>64</sup> As the draft specified that it was irrelevant for the purposes of liability "whether the incitement be successful or not", the crime of incitement to genocide was regarded as inchoate.

Subsequently, the Economic and Social Council (ECOSOC) established an Ad Hoc Committee composed of the ECOSOC members China, France, Lebanon, Poland, United States, the USSR and Venezuela to prepare a draft Genocide Convention.<sup>65</sup> The Ad Hoc Committee was to take into consideration

60 Ibid., p. 576.

61 Article I, "Basic Principles of a Convention on Genocide (Submitted by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948)", UN Doc. E/AC.25/7, 7 April 1948 (hereinafter "Basic Principles"). See also UN Doc. E/AC.25/W.1/Add.3, 30 April 1948, p. 6: "Crimes of genocide have found fertile soil in the theories of Nazism and Fascism and other similar theories preaching racial and national hatred" (proposed Lebanese amendment to the Preamble of the draft Convention drawn up by the Ad Hoc Committee); Ad Hoc Committee, Summary Records of the 22nd Meeting (27 April 1948), UN Doc. E/AC.25/SR.22, 5 May 1948, pp. 3–4 (Mr Morozov and Mr Azkoul); Sixty-fifth Meeting of the Sixth Committee of the General Assembly, UN Doc. A/C.6/SR.65, 2 October 1948, p. 26 (Mr Kovalenko, Ukrainian Soviet Socialist Republic).

62 UN Doc. E/447, 26 June 1947 (hereinafter "Secretariat Draft").

63 Ibid., p. 7 (Article II (II)(2)).

64 Ibid., p. 31.

65 ECOSOC Res. No. 117 (VI), 3 March 1948.

the Secretariat Draft and comments by governments on that draft, as well as all other drafts submitted by member governments.<sup>66</sup>

Commenting on the Secretariat Draft, the United States suggested reformulating the provision dealing with incitement in the following manner:

Direct and public incitement of any person or persons to any act of genocide, whether the incitement be successful or not, when such incitement takes place under circumstances which may reasonably result in the commission of acts of genocide ...”<sup>67</sup>

This proposal is remarkable, given the US delegation’s staunch opposition to the inclusion of any incitement provision later on in the debates.<sup>68</sup> It is also remarkable in that it represented a more detailed provision on incitement than those submitted by other delegations; the French draft Convention on Genocide, for instance, simply stated that “Any attempt, provocation or instigation to commit genocide is also a crime.”<sup>69</sup> Interestingly, therefore, the US draft at this stage was not significantly different from the draft submitted by the USSR, which provided for the criminalization of “[d]irect public incitement to commit genocide, regardless of whether such incitement had criminal consequences”.<sup>70</sup> The USSR was very aware of the dangers of hate propaganda and the effect it had had in Nazi Germany,<sup>71</sup> stating at one point during the debates in the Ad Hoc Committee that

The recent war had revealed in a disturbing manner the very pernicious nature of the influence of the hitlerite Press on people’s minds. That Press could be held responsible for the death of several million human beings.<sup>72</sup>

The Lebanese delegation supported the USSR stance, “urg[ing] the necessity of mentioning in the Convention acts of propaganda constituting in some way a psychological preparation for the crime of genocide”.<sup>73</sup> The effect of propaganda on the minds of the audience in creating a certain state of mind or genocidal climate is here underscored as a reason for sanctioning such speech acts.

The draft Convention formulated by the Ad Hoc Committee eventually provided for individual criminal responsibility for “direct incitement in public or

66 UN Doc. E/AC.25/2.

67 UN Doc. E/623, 30 January 1948, p. 14. This proposal by the United States was considered to be “commendable” by the Netherlands: UN Doc. E/623/Add.3, 22 April 1948, p. 1.

68 See below.

69 UN Doc. E/623/Add.1, 5 February 1948; see also the Chinese draft, which declared it to be “illegal to conspire, attempt, or incite persons, to commit [genocide]”: Article I, “Draft Articles for the Inclusion in the Convention on Genocide proposed by the Delegation of China on 16 April 1948”, UN Doc. E/AC.25/9, 16 April 1948.

70 Basic Principles, Article V(2), above note 61.

71 See e.g. Principle I, *ibid.*, p. 1.

72 Ad Hoc Committee, Summary Records of the 5th Meeting (8 April 1948), UN Doc. E/AC.25/SR.5, 16 April 1948, p. 13.

73 *Ibid.*, p. 10 (Mr Azkoul).

in private to commit genocide whether such incitement be successful or not”.<sup>74</sup> The commentary on the Ad Hoc Committee Draft reveals that the qualification “in public or in private” was adopted by five votes, with two abstentions,<sup>75</sup> which signifies that it enjoyed a fair amount of support among the delegates. Public incitement is defined as incitement in the shape of “public speeches or ... the press, ... the radio, the cinema or other ways of reaching the public”, while incitement was considered private when “conducted through conversations, private meetings or messages”.<sup>76</sup> Private incitement would seem to correspond to instigation or solicitation as defined in domestic jurisdictions.<sup>77</sup> The addition of the qualification “in private” in the draft Convention appears rather bizarre, considering that the term was eventually taken out again. It originated in a proposal by the Venezuelan delegate, who argued that it would “obviate the need to insert further particulars, such as “press, radio, etc.””.<sup>78</sup> The French delegate expressed his agreement, remarking that in French law, “the term “incite” covered both public and private incitement”.<sup>79</sup>

The commentary on the Ad Hoc Committee Draft further identifies *direct* incitement as “that form of incitement whereby an individual invites or urges other individuals to commit genocide”.<sup>80</sup> While this explanation does not particularly appear to clarify the term “direct”, it presumably expresses the idea that the perpetrator clearly and unmistakably communicates to the addressees the need for them to commit genocide. In his commentary on the Genocide Convention, Nehemiah Robinson submits that direct incitement is “incitement which *calls* for the commission of acts of Genocide, not such which *may result* in such commission”.<sup>81</sup>

It is furthermore worthy of note that while it was decided to retain the qualification “whether such incitement be successful or not”, certain delegations regarded these words as superfluous,<sup>82</sup> considering that incitement was *per definitionem* an inchoate crime. Thus the Lebanese delegate stated that he regarded this qualification as “unnecessary and even tautological”, but would not oppose it.<sup>83</sup> However, other delegations argued that the inclusion of the phrase would

74 Article IV(c) of the Draft Convention on Prevention and Punishment of the Crime of Genocide, UN Doc. E/AC.25/12, 19 May 1948 (hereinafter “Ad Hoc Committee Draft”). See also “Report of the Committee and Draft Convention drawn up by the Committee”, UN Doc. E/794, 24 May 1948, p. 20.

75 Addendum, “Commentary on articles adopted by the Committee”, UN Doc. E/AC.25/W.1/Add.1, 27 April 1948, p. 2.

76 *Ibid.*

77 See below.

78 Ad Hoc Committee, Summary Records of the 16th Meeting (22 April 1948), UN Doc. E/AC.25/SR.16, 29 April 1948, p. 2 (Mr Perez-Perozo).

79 *Ibid.* (Mr Ordonneau).

80 Commentary, above note 75, p. 1.

81 N. Robinson, *The Genocide Convention*, Institute of Jewish Affairs, New York, 1960, p. 67 (emphasis in original).

82 Commentary, above note 75, p. 2.

83 E/AC.25/SR.16, (Mr Azkoul). Both the French and the US representatives agreed in considering the phrase unnecessary. *Ibid.* p. 3.

stress the preventive purpose of the Convention,<sup>84</sup> and it was eventually adopted by four votes to none, with three abstentions.<sup>85</sup>

The US delegation finally voted against the whole paragraph criminalizing incitement to genocide,<sup>86</sup> declaring that

Any “direct incitement” to achieve the forbidden end and which might be feared would provoke by its very nature the committing of this crime would generally partly constitute an attempt and/or a conspiracy to permit [*sic*] the crime. To make such incitement illegal it is sufficient to make the attempt and the conspiracy illegal without their [*sic*] being any need to list specifically in the Convention acts constituting direct incitement.<sup>87</sup>

This approach reflects the conventional US reluctance to restrict freedom of speech, but constituted a significant shift from its earlier agreement “to the principle of suppressing propaganda for genocide”, provided that such propaganda involved a violation of the rights of others and that “American courts were the judges” over such propaganda.<sup>88</sup>

The Ad Hoc Committee Draft was then discussed by ECOSOC<sup>89</sup> and transmitted without change to the General Assembly, which discussed it under consideration of several proposed amendments. During the ECOSOC discussions, the Polish and Soviet delegates again underlined the importance of punishing propaganda for racial, national or religious hatred “as a method of forestalling outbreaks of genocide”,<sup>90</sup> while the US delegation criticized the provision dealing with direct incitement.<sup>91</sup> The Soviet Union submitted a proposed amendment to the General Assembly, again including a provision penalizing propaganda for hatred and genocide.<sup>92</sup> The Belgian delegation submitted a proposal amending the incitement provision to read “[d]irect and public incitement to commit genocide”,<sup>93</sup> and Iran proposed deleting Article IV(c) on incitement to genocide altogether.<sup>94</sup>

84 *Ibid.*

85 *Ibid.*

86 Ad Hoc Committee, Summary Records of the 24th Meeting (28 April 1948), UN Doc. E/AC.25/SR.24, 12 May 1948, p. 7.

87 Ad Hoc Committee, meeting held on 30 April 1948, portions of report adopted in first reading, UN Doc. E/AC.25/W.4, 3 May 1948, p. 12. See also Ad Hoc Committee, Summary Records of the 26th Meeting (30 April 1948), UN Doc. E/AC.25/SR.26, 12 May 1948, p. 13 (original wording deleted and replaced by UN Doc. E/AC.25/SR.26/Corr.1 (1 June 1948)) (Mr Maktos); Ad Hoc Committee, Summary Records of the 28th Meeting (10 May 1948), UN Doc. E/AC.25/SR.28, 9 June 1948, p. 7 (Mr Maktos). The US continued to hold this view during the debates in the Sixth Committee of the General Assembly: see Eighty-fourth Meeting, UN Doc. A/C.6/SR.84, 26 October 1948, p. 213 (Mr Maktos).

88 Above note 72, p. 8.

89 ECOSOC, Official Records, 7th Session (1948), UN Docs. E/SR.218 (26 August 1948) and E/SR.219 (27 August 1948).

90 E/SR.218, *ibid.*, p. 714 (Mr Katz-Suchy, Poland); see also E/SR.219, *ibid.*, p. 720 (Mr Pavlov, USSR).

91 *Ibid.*, p. 725 (Mr Thorp, United States).

92 Article IV(f), “Union of Soviet Socialist Republics: amendments to the draft convention on genocide (E/794)”, UN Doc. A/C.6/215/REV.1, 9 October 1948.

93 “Belgium: amendments to the draft convention on genocide (E/794)”, UN Doc. A/C.6/217, 5 October 1948.

94 “Iran: amendments to the draft convention on genocide (E/794) and draft resolution”, UN Doc. A/C.6/218, 5 October 1948.

The Sixth Committee of the General Assembly then discussed the Ad Hoc Committee Draft between 21 September and 10 December 1948.<sup>95</sup> The UK representative remarked that “[w]hen a man was accused of conspiring, inciting, or committing a crime, perpetrated for political, racial or national reasons, he was punishable under the laws of any country”.<sup>96</sup>

During the discussions of the Belgian amendment, the Belgian representative explained that in order to “clarify article IV and to make it juridically sound”, his delegation’s amendment omitted the phrases “or in private” and “whether such incitement be successful or not”.<sup>97</sup> Interestingly, the US delegate declared that there was “no great difference between the Belgian amendment and the Ad Hoc Committee text”,<sup>98</sup> suggesting that it was evident that such incitement was an inchoate offence. The Venezuelan delegation stressed that “[a]ll legislations regarded incitement to crime as punishable”; while some considered it to be a form of complicity, “others, such as the Venezuelan legislation, regarded it as a special offence, regardless of the results it produced”<sup>99</sup> – that is, Venezuela also regarded incitement as an inchoate offence. The delegate moreover stressed the need to punish those who committed this crime, as genocide was “usually the result of hatred instilled in the masses by inciters”.<sup>100</sup> He then opposed the deletion of the term “in private”, arguing that incitement could also be committed “through individual consultation, by letter or even by telephone”.<sup>101</sup> He also vigorously opposed the deletion of the phrase “whether such incitement be successful or not”, which in his opinion was “anything but superfluous”, since in the case of legislation treating incitement as a form of complicity, “the person concerned might escape punishment if the crime to which he incited others, could not have been committed”.<sup>102</sup> Despite this comment by the Venezuelan delegate, most delegations appear to have regarded the qualification as unnecessary, as they considered the inchoate nature of incitement to be self-evident. Thus the Iranian delegate argued that the phrase was superfluous “for if incitement were successful, the idea of complicity would be involved”.<sup>103</sup>

The Yugoslav delegate reiterated the need to criminalize incitement to genocide. Referring to General Assembly Resolution 96(I) and its demand that the Convention address both the prevention and the punishment of genocide, he explained that “the first stage of those crimes [of genocide] had been the preparation and mobilization of the masses, by means of theories disseminated

95 Official Records of the 3rd Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings, 21 September to 10 December 1948.

96 Sixty-fourth Meeting, UN Doc. A/C.6/SR.64, 1 October 1948, p. 17 (Sir Hartley Shawcross).

97 Eighty-fourth Meeting, above note 87, p. 207.

98 Ibid.

99 Ibid., p. 208 (Mr Pérez Perozo).

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid., p. 214 (Mr Abdoh).

through propaganda”, and concluded that, therefore, “[t]he first step in the campaign against genocide would be to prevent incitement to the crime”.<sup>104</sup> Addressing the US delegation’s concern regarding freedom of speech, the French delegate denied that the latter was involved, as “that freedom could not in any way imply a right to incite people to commit a crime”.<sup>105</sup> Instead, the retention of the incitement provision was necessary, because “[i]t was precisely in connexion with genocide that the suppression of propaganda was absolutely essential”.<sup>106</sup> He also favoured punishing unsuccessful incitement, indicating that the French Penal Code included “measures for the suppression of propaganda in favour of abortion, whether that propaganda was successful or not”.<sup>107</sup> Later, he specified that “all national legislation treated incitement to crime, *even if not successful*, as a separate and independent breach of the law”.<sup>108</sup> The Haitian delegate equally favoured retaining the article punishing incitement to genocide, “whether successful or not”.<sup>109</sup>

The UK delegate, while agreeing that in theory incitement “could be considered as a separate act”, said that in practice, given the large-scale and long-term nature of genocide, incitement would in almost all cases eventually result in conspiracy, attempt or complicity. That being the case, it was unnecessary to punish genocide at as early a stage as incitement.<sup>110</sup> Disagreeing with these arguments, the Australian and Swedish delegates both objected to the deletion of sub-paragraph (c).<sup>111</sup> Similarly, the Cuban delegate pronounced himself to be against the deletion of the incitement provision, arguing that incitement to genocide should be criminalized “because of the essential part it played in the commission of the crime”.<sup>112</sup>

The intrinsic danger of incitement was also stressed by the Danish delegate as a reason for criminalizing incitement,<sup>113</sup> while the Czechoslovakian delegate emphasized that “[d]irect incitement to murder” was a crime “in all countries”.<sup>114</sup> The Uruguayan delegate also favoured retention of the provision, submitting that “to punish incitement to genocide was the best method of preventing the perpetration of that crime”. He furthermore considered the phrase “whether such incitement be successful or not” to be superfluous, as “incitement was a crime in itself only when it was not successful”; otherwise it would be equivalent to complicity.<sup>115</sup> The Egyptian delegate, the delegate from the

104 Ibid., p. 216 (Mr Bartos).

105 Ibid. (Mr Spanien).

106 Ibid.

107 Ibid.

108 Eighty-fifth Meeting, UN Doc. A/C.6/SR.85, 27 October 1948, p. 227 (Mr Spanien) (emphasis added).

109 Eighty-fourth Meeting, above note 87, p. 217 (Mr Demesmin).

110 Ibid., p. 218 (Mr Fitzmaurice).

111 Ibid., pp. 218–19 (Mr Dignam and Mr Petren, respectively).

112 Ibid., p. 219 (Mr Dihigo).

113 Eighty-fifth Meeting, above note 108, p. 220 (Mr Federspiel).

114 Ibid., p. 221 (Mr Zourek).

115 Ibid., p. 222 (Mr Manini y Ríos).

Philippines and the Ecuadorian delegate were also in favour of retaining the incitement provision.<sup>116</sup>

The US amendment proposing the deletion of sub-paragraph (c) was rejected by twenty-seven votes to sixteen, with five abstentions.<sup>117</sup> The deletion of the words “or in private” was adopted by twenty-six votes to six, with ten abstentions.<sup>118</sup> Finally, the deletion of the words “whether such incitement be successful or not” was also adopted, albeit by a narrower margin, with nineteen votes for and twelve votes against the deletion, and fourteen abstentions.<sup>119</sup> Both the UK and Polish delegates emphasized that they did not consider that the deletion of this phrase would have “any effect from the legal point of view” – incitement would be punishable whether successful or not.<sup>120</sup> The South African representative agreed with this view.<sup>121</sup> This has led Nehemiah Robinson to conclude that “incitement is punishable generally regardless of the results, unless only successful incitement is explicitly declared punishable”.<sup>122</sup>

Article IV in its entirety was finally adopted as amended by thirty-five votes to none, with six abstentions.<sup>123</sup> Subsequently the text of the articles of the Convention, as well as two resolutions, was submitted to the Drafting Committee, which in turn submitted a report to the Sixth Committee on 23 November 1948.<sup>124</sup> The report and revised text were considered by the Sixth Committee from the 128th to the 134th Meetings, and a definitive text was adopted.<sup>125</sup> This text was then submitted to the Plenary Meeting of the General Assembly, together with the report of the Sixth Committee<sup>126</sup> and amendments by the USSR and Venezuela,<sup>127</sup> and was discussed during the General Assembly’s 178th and 179th Meetings. Thereafter the text of the Genocide Convention was adopted unanimously and without abstentions by the General Assembly on 9 December 1948.<sup>128</sup>

## Incitement as interpreted by the International Criminal Tribunals

The International Criminal Tribunals have generally drawn a distinction between incitement or instigation generally and direct and public incitement to genocide. In the following discussion, the term “incitement” will be used to refer to *public* incitement, and “instigation” to describe incitement in the more general sense.

116 *Ibid.*, pp. 223–4, 229 (Mr Raafat, Mr Inglés, and Mr Correa, respectively).

117 *Ibid.*, p. 229.

118 *Ibid.*, p. 230.

119 *Ibid.*, p. 232.

120 *Ibid.*, p. 231.

121 *Ibid.*, p. 232.

122 Robinson, above note 81, p. 67.

123 Ninety-first Meeting, UN Doc. A/C.6/SR.91, 4 November 1948, p. 301.

124 UN Doc. A/C.6/288.

125 Official Records of the Third Session of the General Assembly, Sixth Committee, Summary Records of Meetings, 21 September to 10 December 1948.

126 UN Docs. A/760 & A/760 corr. 2.

127 UN Docs. A/766 & 770, respectively.

128 UN Doc. A/PV.179.

Instigation has been considered to be punishable only where it leads to the commission of the substantive crime, which means that it is not an inchoate crime;<sup>129</sup> the instigation must be causally connected to the substantive crime in that it must have contributed significantly to the commission of the latter, the instigator must act intentionally or be aware of the substantial likelihood that the substantive crime will be committed, and he must intend to bring about the crime instigated. By contrast, direct and public incitement has been held to be an inchoate crime, which is applicable only in connection with the crime of genocide.

Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have addressed instigation – provided for in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, which lists forms of individual criminal responsibility – in several cases. In *Blaškić*, an ICTY trial chamber defined instigating as “prompting another to commit an offence”,<sup>130</sup> while the ICTR understood it to mean “urging, encouraging or prompting” another person to commit a crime.<sup>131</sup> There must be a “causal connection between the instigation and the *actus reus* of the crime”;<sup>132</sup> this has been held to mean that the instigation must have “directly and substantially contributed” to the other person’s commission of the substantive offence,<sup>133</sup> or must at least have been a “clear contributing factor”.<sup>134</sup> However, “but for” causation is not required, that is, the Prosecutor need not prove that the crime would not have been committed had it not been for the accused’s acts.<sup>135</sup>

As regards the required *mens rea*, the instigator must act intentionally, that is, must have “intended to provoke or induce the commission of the crime”, or must at least have been “aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts”.<sup>136</sup> At the same time the accused must again be proven to have “directly or indirectly intended that the crime in question be committed”.<sup>137</sup>

129 See also W. A. Schabas, “Le génocide”, in H. Ascencio, E. Decaux & A. Pellet (eds.), *Droit international pénal*, Éditions A. Pedone, Paris, 2000, p. 319, at p. 326.

130 *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement (Trial Chamber), 3 March 2000, para. 280; see also *Kordić and Čerkez* Trial Judgment, above note 4, para. 387; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Trial Chamber), 2 August 2001, para. 601.

131 *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (Trial Chamber), 15 May 2003, para. 381.

132 *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement (Trial Chamber), 7 June 2001, para. 30; see also *Blaškić* Trial Judgment, above note 130, para. 278; *Semanza*, above note 131, para. 381; *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-A-T, Judgement and Sentence (Trial Chamber), 22 November 2004, para. 593; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgement and Sentence (Trial Chamber), 28 April 2005, para. 504; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence (Trial Chamber), 1 December 2003, para. 762.

133 *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I, Judgement and Sentence (Trial Chamber), 15 July 2004, para. 456.

134 *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement (Trial Chamber), 2 November 2001, para. 252.

135 *Kvočka et al.*, *ibid.*, para. 252; *Kordić and Čerkez*, Trial Judgment, above note 4, para. 387.

136 *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgement (Trial Chamber), 31 March 2003, para. 60; see also *Kvočka et al.*, above note 134, para. 252.

137 *Blaškić* Trial Judgment, above note 130, para. 278; see also *Kordić and Čerkez* Trial Judgment, above note 4, para. 386; *Bagilishema*, above note 132, para. 31.

There has been a certain amount of confusion in the case-law with regard to the relationship between instigation and incitement. In *Rutaganda* and, later, in *Musema*, the ICTR held that “incitement to commit an offence, under Article 6(1), involves instigating another, directly and publicly, to commit an offence”.<sup>138</sup> Similarly, in the *Akayesu* trial chamber judgment it was found that “instigation under Article 6(1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide”.<sup>139</sup> In its later judgment in the same case, the Appeals Chamber of the ICTR, however, found that this view was mistaken, and that there was no need for instigation generally to be direct and public in order to be punishable.<sup>140</sup> Therefore, unlike direct and public incitement to commit genocide, as will be discussed below, instigation need not be direct and public.<sup>141</sup> An omission, as well as an act, can constitute instigation,<sup>142</sup> and mere presence at the time and place where a crime is being committed can amount to instigation or encouragement, particularly where the accused occupies a position of authority.<sup>143</sup>

Lastly, instigation in accordance with the International Criminal Tribunals’ jurisprudence is not an inchoate crime, but is “punishable only where it leads to the actual commission of an offence intended by the instigator”.<sup>144</sup>

By contrast, direct and public incitement to genocide has been interpreted differently. The ICTR has addressed and defined the elements of the crime of direct and public incitement to genocide in a number of decisions. In the *Akayesu* Trial Judgment, the ICTR emphasized the inchoate nature of the crime by declaring that

Genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.<sup>145</sup>

Considering that in the same judgment the trial chamber held that, in contrast to direct and public incitement to genocide, instigation in general was not

138 *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement and Sentence (Trial Chamber), 6 December 1999, para. 38; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement (Appeals Chamber), 27 January 2000, para. 120.

139 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 481.

140 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement (Appeals Chamber), 1 June 2001, paras. 478–83.

141 *Ibid.*; *Kamuhanda*, above note 132, para. 593.

142 *Kordić and Čerkez*, Trial Judgement, above note 4, para. 387; *Blaškić* Trial Judgement, above note 130, para. 280.

143 *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement and Sentence (Trial Chamber), 27 January 2000, para. 865; see also *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgement (Trial Chamber), 7 May 1997, para. 690.

144 *Musema* Appeal Judgement, above note 140, para. 120; *Rutaganda*, above note 138, para. 38; *Ndindabahizi*, above note 133, para. 456; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal (Trial Chamber), 2 February 2005, para. 17. See also W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge, 2006, pp. 299–300.

145 *Akayesu* Trial Judgement, above note 139, para. 562.

inchoate, it would appear that it regarded direct and public incitement as much more dangerous than instigation in general.

In the same case the Tribunal also outlined the *mens rea* elements of the offence: the inciter must possess “the intent to directly prompt or provoke another to commit genocide” and must also have the specific intent to destroy, in whole or in part, a protected group.<sup>146</sup>

In *Ruggiu*, the ICTR again stressed that incitement to genocide was inchoate.<sup>147</sup> It moreover compared the accused, who had been a radio commentator on RTLM engaging in incendiary broadcasts, to Julius Streicher, commenting that “the accused, like Streicher, infected peoples’ minds with ethnic hatred and persecution”. The Tribunal found Ruggiu guilty of both direct and public incitement to commit genocide and the crime against humanity of persecution, holding that in the instant case, his acts of incitement themselves constituted persecution:

Those acts were direct and public broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.<sup>148</sup>

The “direct” element in incitement to genocide was explained in *Akayesu* (trial chamber), where the ICTR began by stating that it should be considered “in the light of its cultural and linguistic content”, because it depended on the audience whether a certain utterance would be perceived as direct or not.<sup>149</sup> Thus, a statement could be implicit yet still direct.<sup>150</sup> The Tribunal therefore considered it necessary to determine on a “case-by-case basis” if, “in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not”.<sup>151</sup> The Tribunal concluded that in the particular case at hand, the accused had been shown to possess “the intent to directly create a

146 *Ibid.*, para. 560. See also *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Tharcisse Muvunyi’s Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (Trial Chamber), 13 October 2005, para. 61; J. R. W. D. Jones, “The inchoate forms of genocide: attempts, direct and public incitement and conspiracy”, in L. Burgogue-Larsen (ed.), *La Répression Internationale du Génocide Rwandais*, Bruylant, Brussels, 2003, 281, p. 287.

147 *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence (Trial Chamber), 1 June 2000, para. 16.

148 *Ibid.*, para. 22.

149 *Akayesu*, Trial Judgement, above note 139, para. 557.

150 *Ibid.*

151 *Ibid.*, para. 558. In the indictment of Simon Bikindi, a composer and singer of inflammatory songs, the Prosecutor submitted that the accused’s exhortation of Hutus to “work” represented a “coded reference advocating the extermination of the Tutsi”: *Prosecutor v. Bikindi*, Case No. ICTR-2001-72-I, Amended Indictment Pursuant to Decision of 11 May 2005, 20 May 2005, para. 34. Similarly, in *Prosecutor v. Kambanda*, the ICTR quoted the accused’s “incendiary phrase ... “you refuse to give your blood to your country and the dogs drink it for nothing””: Case No. ICTR-97-23-S, Judgement and Sentence (Trial Chamber), 4 September 1998, para. 39(x).

particular state of mind in his audience necessary to lead to the destruction of the Tutsi group”.<sup>152</sup> It is notable that the Tribunal refers to the creation of a certain state of mind, an element which, as we have seen, has also been of importance before the International Military Tribunal at Nuremberg and the German courts in the trial of Fritzsche, as well as during the Genocide Convention debates.

In *Nahimana et al.*, the ICTR again addressed the crime of direct and public incitement to genocide. The three accused all had leading positions in the media before and during the genocide of 1994. Ferdinand Nahimana and Jean-Bosco Barayagwiza were co-founders of the notorious radio station Radio Télévision Libre des Mille Collines (RTLM) and Barayagwiza was in addition a founding member of the Coalition pour la Défense de la République (CDR) party, while Hassan Ngeze, a journalist, was the founder and editor-in-chief of the newspaper *Kangura*, and also a founding member of the CDR party. In this case, known as the “Media Case”, the chamber made several important pronouncements with regard to the elements of the crime of incitement to genocide. First of all, dismissing objections by the defence that certain allegations of crimes mentioned in the indictment fell outside the temporal jurisdiction of the Tribunal, which was by its Statute limited to the period from 1 January 1994 to 31 December 1994, the chamber held that, where the incitement was successful, the crime of incitement continued until the commission of the acts incited. Therefore acts of incitement committed before 1 January 1994 would come within the ICTR’s jurisdiction unless the substantive crime had been committed before that date. The Chamber argued that the choice of 1 January 1994 rather than 6 April 1994 – the day when the genocide began – as the starting date for the ICTR’s jurisdiction, which had been made in order to include the planning stage of the crimes, showed “an intention that is more compatible with the inclusion of inchoate offences that culminate in the commission of acts in 1994 than it is with their exclusion”.<sup>153</sup> Although the chamber’s analysis in this regard has been criticized for “turn[ing the drafters’] reasoning upside down”,<sup>154</sup> it is submitted that this characterization of direct and public incitement as a continuing crime makes sense as it reflects the long-term insidious effect which such incitement has on people’s minds. It properly acknowledges the tendency of incitement to create a certain state of mind, which the Tribunal had recognized in its earlier case-law.

The chamber also reiterated that a causal relationship between the incitement and the acts incited was not required in order to hold an individual responsible for direct and public incitement to genocide, emphasizing that it was “the potential of the communication to cause genocide that makes it incitement”. Where this potential was “realized”, both the crime of genocide and the crime of incitement to genocide had been committed.<sup>155</sup>

152 *Ibid.*, para. 674.

153 *Nahimana et al.*, above note 7, para. 104. See also para. 1017.

154 G. Della Morte, “De-mediatizing the *Media case*”, JICJ, Vol. 3, 2005, p. 1019, at p. 1024.

155 *Nahimana et al.*, above note 7, para. 1015.

Finally, the Tribunal distinguished incitement from hate propaganda, explaining that broadcasts such as one alleging about the Tutsi that “they are the ones who have all the money” did not constitute direct incitement, as they did “not call on listeners to take action of any kind”.<sup>156</sup> The Tribunal also highlighted the importance of the context in which the utterances in question were made for determining whether they constituted incitement or not:<sup>157</sup>

A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement.<sup>158</sup>

## The Rome Statute

During the Diplomatic Conference in Rome the drafters rejected the suggestion that the incitement provision be extended to apply also to crimes against humanity, war crimes and aggression.<sup>159</sup> There were also proposals to provide for solicitation, which was to be defined thus: with the purpose of “encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime”, “command[ing], [order[ing]], request[ing], counsel[ing] or incit[ing] the *other* person to engage [or participate] in the

<sup>156</sup> *Ibid.*, para. 1021.

<sup>157</sup> While direct and public incitement to genocide has thus been discussed extensively in the jurisprudence of the ICTR, it has not played any significant role in ICTY proceedings, and there have been no decisions or judgments discussing this crime. However, it is interesting to note that in its pleadings before the International Court of Justice (ICJ) in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1996 ICJ Rep., Bosnia and Herzegovina submitted that certain acts for which Serbia could be held responsible amounted to incitement to genocide: *Memorial of the Government of the Republic of Bosnia and Herzegovina*, 15 April 1994, para. 5.4.2.1. Interestingly, its submissions on this issue mirror somewhat the reasoning employed by the ICTR. Thus, it is alleged that “[i]n their desire to create ethnically pure Serbian areas, and to realise their nationalistic and territorial ambitions, the Serb forces used TV, Radio and Newspapers extensively to vilify Muslims and Croats. This in turn resulted in an *atmosphere* in which hatred initially led to discrimination in many areas .... Inevitably, this turned to violence against Muslims and Croats. For example, in Banja Luka (which had a population of 30,000 Muslims), a local leader of Serb forces stated on television that there was room for only 1,000 Muslims, and that the other 29,000 would have to leave, “one way or another””. *Ibid.*, para. 2.2.6.1 (emphasis added). Moreover, it is pleaded that “[i]ncitement to ethnic and religious hatred and genocide is combined with strategic plans aiming at realizing the “Greater Serbia” through killing, deportation, expulsion, ill-treatment or rape of non-Serbs and, particularly, members of the Muslim population”. *Ibid.*, para. 6.4.2.3. However, in its Judgment the ICJ did not make any pronouncement on these allegations.

<sup>158</sup> *Ibid.*, para. 1022.

<sup>159</sup> W. A. Schabas, *An Introduction to the International Criminal Court*, 2nd edn, Cambridge University Press, Cambridge, 2004, p. 30; Schabas, above note 130, p. 326; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/ Conf.183/2/Add.1, 1998, p. 59, in M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Ardsley, New York, 1998, p. 142.

commission of such crime”. The crime would not have been inchoate.<sup>160</sup> In the end, however, solicitation was included in the Rome Statute without defining it in any way.<sup>161</sup> As indicated above, incitement was included only with regard to genocide, and was formulated in the same way as in the Genocide Convention, namely as “direct” and “public” incitement to commit genocide.<sup>162</sup>

## Other preparatory acts and their relationship to incitement

As indicated above, during the Genocide Convention deliberations the US representative suggested that the provision relating to direct and public incitement to genocide was superfluous in that the preparatory act which it was meant to describe was already sufficiently covered by the provisions on attempt and conspiracy, as any direct incitement “would generally partly constitute an attempt and/or a conspiracy to [commit] the crime”.<sup>163</sup> Similarly, the Uruguayan delegate argued that the phrase “whether such incitement be successful or not” was unnecessary, since “incitement was a crime in itself only when it was not successful”; if it was successful, it would be equivalent to complicity.<sup>164</sup> The UK delegate also submitted that while incitement could in theory be regarded as a separate act, in practice, because of the large-scale and long-term nature of genocide, incitement would in almost all cases result in conspiracy, attempt or complicity.<sup>165</sup>

These considerations can be summarized in the form of two questions: first, what are the legal distinctions between incitement to commit genocide on the one hand and attempt, conspiracy and complicity to commit genocide on the other?; and, second, is it necessary to have a separate provision criminalizing incitement to genocide?

The ICTR has defined conspiracy as an “agreement between two or more persons to commit an unlawful act”;<sup>166</sup> conspiracy to commit genocide is therefore an agreement between several individuals to commit genocide, with the common genocidal intent.<sup>167</sup> Each member of the conspiracy must have acted intentionally and must possess the specific genocidal intent.<sup>168</sup> Moreover, while the contributions of the various conspirators may differ, they are all equally responsible for the

160 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), G.A., 51st Sess., Supp. No. 22, UN Doc. A/51/22, 1996, p. 56, in Bassiouni, *ibid.*, p. 483.

161 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9\*, entered into force 1 July 2002, Article 25(3)(b).

162 *Ibid.*, Article 25(3)(e).

163 E/AC.25/W.4, above note 87, p. 12.

164 Eighty-fifth Meeting, above note 109, p. 222 (Mr Manini y Ríos). See also remarks to the same effect by the Iranian delegate: Eighty-fourth Meeting, above note 87, p. 214 (Mr Abdoh).

165 *Ibid.*, p. 218 (Mr Fitzmaurice).

166 *Musema* Appeal Judgement, above note 138, para. 187; *Nahimana et al.*, above note 7, para. 1045.

167 *Musema* Appeal Judgement, above note 138, para. 191.

168 *Ibid.*, para. 192; *Nahimana et al.*, above note 7, para. 1042.

acts of their co-conspirators. Furthermore, conspiracy is an inchoate offence: the mere agreement to commit genocide is punishable.<sup>169</sup> The underlying reasoning for this lies in the fact that the crime which is the subject of the conspiracy is of exceptional gravity, as well as in the need to prevent such a crime.<sup>170</sup> Similarly, an attempt to commit genocide is necessarily inchoate, and in order to convict someone of an attempt, the individual in question must have acted with the intent to commit genocide. Article 25(3)(f) of the Rome Statute defines “attempt” as the beginning of the commission of the crime “by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions”.<sup>171</sup>

While the definitions of conspiracy and attempt are thus fairly clear, the meaning of complicity has given rise to certain complications in the case-law of the ad hoc Tribunals. In *Semanza*, the ICTR defined complicity as “aiding and abetting, *instigating*, and procuring”.<sup>172</sup> Complicity in genocide has been held to refer to “all acts of assistance and encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide”.<sup>173</sup> In *Krstić*, the ICTY Appeals Chamber explained the difference between “aiding and abetting” and “conspiracy”, stating that “the terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting”.<sup>174</sup> “Aiding and abetting” is thus included in the notion of complicity, which, however, also prohibits conduct broader than aiding and abetting. While a conviction for complicity generally requires proof of the specific intent to commit genocide, a consistent line of ICTY and ICTR case-law holds that where an accused is merely charged with aiding and abetting, he or she must only be shown to have had knowledge of the principal perpetrator’s intent.<sup>175</sup> Furthermore, an individual can only be held liable for complicity in genocide where the crime of genocide has actually been committed. Complicity in genocide is thus not an inchoate crime.<sup>176</sup>

Several points are of interest when one compares incitement and complicity. First, as indicated above, the ICTR has used the word “instigation”, *inter alia*, to define complicity. This is in line with its treatment of instigation *per se* as a crime which is not inchoate. Second, where instigation has been charged

169 *Musema* Appeal Judgement, above note 138, para. 193; see also *Bagosora* et al., Decision on Motions for Judgement of Acquittal, above note 144, para. 12.

170 G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005, p. 253.

171 See *ibid.*, p. 257.

172 *Semanza*, above note 131, para. 393 (emphasis added).

173 *Ibid.*, para. 395.

174 *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement (Appeals Chamber), 19 April 2004, para. 139.

175 *Ibid.*, para. 140; *Akayesu* Trial Judgement, above note 139, para. 545; *Musema* Appeal Judgement, above note 138, para. 181; *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement (Appeals Chamber), 13 December 2004, para. 501. This interpretation has, however, been criticized repeatedly in the academic literature: see e.g. W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2000, p. 221; Mettraux, above note 170, pp. 212–14.

176 *Akayesu* Trial Judgement, above note 139, para. 530.

before the ICTY or ICTR, this has always been done in connection with planning and ordering, as well as aiding and abetting.<sup>177</sup> Furthermore, there have been no convictions solely for instigation. This tends to support to a certain extent the remarks by the Uruguayan delegate during the Genocide Convention deliberations cited above, in that a separate crime of instigation or incitement, if it is not inchoate, would always be equivalent to complicity and it would consequently be pointless to have such a separate crime. Support for this view can also be found in the way in which this issue has been treated in the criminal law of several countries; in US law, for example, solicitation can be a basis for accomplice liability where the substantive offence is subsequently committed. In such a case, if the accused is convicted and punished for the substantive crime as an accomplice, he would not be punished for solicitation, as the offence of solicitation would be regarded as having merged with the substantive offence.<sup>178</sup> While incitement to genocide has of course been unequivocally recognized as an inchoate crime and there is therefore no overlap between that specific form of incitement and complicity, it is submitted that incitement or instigation *per se* should also be regarded as an inchoate crime. Aside from the fact that this would be a more coherent approach, the inherently dangerous nature of acts of instigation, in that they set things in motion and plant the idea of the crime in the principal perpetrator's mind, would appear to favour such an interpretation. Moreover, this would also correspond to the way in which many domestic legal systems approach the matter. This idea will be further developed in the following section.

### Critique of the international approach to incitement

As indicated above, it would appear that the terms “instigation” and “incitement” *per se* are interchangeable; where it is public, however, incitement takes on a different meaning. This is the case, as has been seen, in the way in which the International Criminal Tribunals have interpreted these crimes; they considered both terms to refer to the same speech act, which was punishable only when the substantive crime incited was committed. Only public incitement has been interpreted by the international courts as being an inchoate offence. According to

<sup>177</sup> See the following indictments: *Semanza*, above note 131, Case No. ICTR-97-20-I, Third Amended Indictment, 12 October 1999; *Bagilishema*, above note 132, Case No. ICTR-95-1A-I, Amended Indictment, 17 September 1999; *Muhimana*, above note 132, Case No. ICTR-95-1B-I, Indictment, 3 February 2004; *Kajelijeli*, above note 132, Case No. ICTR-98-44A-I, Amended Indictment Pursuant to the Tribunal Order Dated 25 January 2001, 25 January 2001; *Ndindabahizi*, above note 133, Case No. ICTR-2001-71-I, Amended Indictment, 7 July 2003; *Rutaganda*, above note 138, Case No. ICTR-96-3-I, Indictment, 12 February 1996; *Akayesu*, above note 139, Case No. ICTR-96-4-I, Amended Indictment; *Blaškić*, above note 130, Case No. IT-95-14-I, Second Amended Indictment, 25 April 1997, para. 6.0; *Kordić and Čerkez*, above note 4, Case No. IT-95-14/2-I, First Amended Indictment, 30 September 1998, paras. 19 & 21; *Krstić*, above note 130, Case No. IT-98-33-I, Amended Indictment, 27 October 1999, para. 18; *Kvočka*, above note 134, Case No. IT-98-30/1-I, Amended Indictment, 21 August 2000, para. 16; *Naletilić and Martinović*, above note 136, Case No. IT-98-34-PT-I, Second Amended Indictment, 16 October 2001, para. 23.

<sup>178</sup> *Lewis v. State*, 404 A.2d 1073, 1083 (Md. 1979); see also J. Dressler, *Understanding Criminal Law*, 2nd edn, Matthew Bender & Co., Inc., New York / San Francisco, 1995, p. 387.

Kai Ambos, the difference between instigation and incitement ordinarily “lies in the fact that the former is more specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general”.<sup>179</sup> Albin Eser similarly sees the main difference in the fact that while instigation is addressed to a particular individual or particular individuals, incitement is directed towards an undefined group of people.<sup>180</sup> The same author submits that while instigation is penalized because of “the participation of the inciter (as an accessory) in the criminal act of another”, public incitement is criminalized because of “the special dangerousness associated with the incitement of an indeterminate group of people”.<sup>181</sup> Incitement is particularly dangerous, since “the more [it] carries over into the social sphere and into the general public”, the more it “lead[s] to a ... decrease in the controllability of the spoken and written word”.<sup>182</sup> Once they are disseminated in public, words of hatred and incitement tend to spread rapidly and become impossible to control. As Mordechai Kremnitzer and Khaled Ghanayim submit, the potential danger “in a frenzied and excited crowd is obvious, and there is also the chance of further provocation, pouring oil on the flames, so to speak”.<sup>183</sup> They stress the potential inherent in acts of public incitement “to create an overall environment conducive to criminal activity and violence, where terror and subversion of the rule of law and the democratic order reign”.<sup>184</sup> Therefore the longer public incitement is allowed to continue, the greater the influence which the inciter holds over the incitees becomes, as well as the incitement’s effectiveness and the likelihood of criminal acts being committed as a result.<sup>185</sup> Public incitement thus seriously jeopardizes the “peaceful coexistence of free individuals”, which it is the function of criminal law to guarantee,<sup>186</sup> and must consequently be proscribed through criminal sanctions.

The creation of an atmosphere conducive to the later commission of criminal acts inspired by hatred is a recurrent justification for the criminalization of public incitement. As has been noted above, during the debates on the Genocide Convention several delegates stressed the intrinsic danger of incitement to hatred and genocide, and argued that it prepared the ground for the commission of the crime of genocide. Thus, the Soviet delegate stated that the inciters of genocide were in fact those mainly responsible for the eventual commission of genocide,<sup>187</sup>

179 K. Ambos, “Article 25”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 486.

180 A. Eser, “Individual criminal responsibility”, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford University Press, Oxford, 2002, p. 767, at p. 804.

181 A. Eser, “The law of incitement and the use of speech to incite others to commit criminal acts: German law in comparative perspective”, in D. Kretzmer and F. K. Hazan (eds.), *Freedom of Speech and Incitement against Democracy*, Kluwer Law International, The Hague, 2000, p. 119, at p. 124.

182 *Ibid.*, p. 146.

183 M. Kremnitzer and K. Ghanayim, “Incitement, not sedition”, in *ibid.*, p. 147, at p. 163.

184 *Ibid.*, p. 164.

185 *Ibid.*

186 *Ibid.*, p. 150.

187 Eighty-fourth Meeting, above note 87, p. 219 (Mr Morozov).

implying that without the creation of a public mood of hatred and aggression the commission of the crime would be unlikely. Similarly, in the jurisprudence of the ICTR reference has repeatedly been made, for instance in *Akayesu*, to the creation of a particular state of mind in the audience that would induce its members to commit genocidal acts. In *Nahimana et al.*, the Tribunal emphasized the continuing influence of incitement on the audience, which in its view persisted until the substantive crime was committed. The ICTR has repeatedly underscored the “utmost gravity” of the crime of direct and public incitement to genocide, and has stressed that “the media ... was a key tool used by extremists in Rwanda to mobilize and incite the population to genocide”, a view which led it to deny an application by Georges Ruggiu for early release.<sup>188</sup>

Moreover, while the general context in which the speech is made and the prevailing circumstances at the time have to be taken into account when considering whether an act of incitement is direct, the same requirement does not apply to instigation.

German and Swiss law also distinguish instigation from incitement, using the “private versus public” dichotomy. Instigation requires the “determination” or inducement of the perpetrator – that is, the instigator must succeed in convincing the addressee to take a conscious decision to commit the substantive crime. This approach is commendable for various reasons and deserves to be looked at in greater detail. In German law, instigation (*Anstiftung*) is penalized in §26 of the German Penal Code (*Strafgesetzbuch*, StGB):<sup>189</sup>

Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat.<sup>190</sup>

Under German law the reason for punishing an instigator lies in the fact that the instigator, in influencing the will of the perpetrator of the act instigated, is deemed originally responsible for the commission of the main act. At the same time, instigation also constitutes an offence in itself:<sup>191</sup> the crime of instigation has been committed as soon as the instigation has brought about in the perpetrator’s mind the decision to commit the crime (“Entschluß zur Tat”).<sup>192</sup> Furthermore, where the person instigated – the main perpetrator – fails to commit the crime the instigator sought to bring about or commits a lesser act, the instigator will be guilty of attempted instigation, punishable under §30 of the German Penal Code, which provides that the attempt to convince another person to commit a crime or to instigate a crime is also punishable. The difference between the crime of instigation and the crime of attempted instigation lies in whether the instigator

188 *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-S (Trial Chamber), Decision of the President on the Application for Early Release of Georges Ruggiu, 12 May 2005.

189 Version of 13 November 1998 (BGBl. I S. 3322), BGBl. III/FNA 450-2, last changed through the law of 24 August 2004 (BGBl. I S. 2198).

190 “Whosoever has intentionally persuaded another to deliberately commit an illegal act shall, as instigator, be punished in the same way as a perpetrator.”

191 Cramer and Heine, *Schönke & Schröder: Strafgesetzbuch*, 26th edn, 2001, §26, para. 1/2.

192 *Ibid.*, para. 4.

succeeds in inducing in the perpetrator the decision to commit the crime, in which case the crime of instigation has been committed. For the *actus reus* of instigation to be complete it should therefore not matter whether or not external circumstances ultimately prevent the commission of the crime. Where the instigator does not succeed for various reasons in causing the perpetrator to decide to commit the crime and the crime is not committed, he or she would be guilty of attempted instigation and would be punished less harshly. It is submitted that this is sensible, as in such a case the danger of harm occurring is obviously considerably less than where the main perpetrator has made the concrete decision to commit the crime in question. Similarly, where the instigatee has made the decision to commit the crime, the danger is present whether or not he or she then goes on to commit the crime or is prevented by external circumstances from doing so. However, as mentioned above, it is clear from the wording of §26 that instigation as such is penalized only where it has been successful,<sup>193</sup> whereas instigation which is not followed by commission of the substantive crime is punished as attempted instigation.

In contrast to §26 and §30, §111 of the German Penal Code punishes the “öffentliche Aufforderung zu Straftaten”,<sup>194</sup> and provides that whosoever publicly, in an assembly or through the distribution of writings, invites others to commit a crime, shall be punished on the same terms as an instigator. The decisive difference between this provision and §26 criminalizing instigation lies in the fact that §111 does not call for another person as “Bestimmungsobjekt” – that is, there is no need for there to be another individual who must be caused selectively to decide to commit the crime.<sup>195</sup> This makes sense, as the danger in public incitement is that it can quickly become uncontrollable, as pointed out above.

The Swiss Penal Code (*Schweizerisches Strafgesetzbuch*) stipulates that “Whoever intentionally encourages or directs or plans a completed felony or misdemeanour shall be punished equally with the principal. Whoever attempts to induce another to commit a felony shall be punished for the attempt of this felony.”<sup>196</sup>

Similar to the German provision on instigation, under Swiss law instigation occurs when it has brought about the decision to commit the crime in question (the “*Tatentschluss*”) in the main perpetrator.<sup>197</sup> This requirement that, for instigation to be successful, it needs to induce the instigatee to decide to commit the substantive crime (the *Entschluß zur Tat* or *Tatentschluss*), is

193 R. Maurach, F.-C. Schroeder and M. Maiwald, *Strafrecht: Besonderer Teil, Teilband 2: Straftaten und Gemeinschaftswerte*, 7th edn, C. F. Müller Juristischer Verlag, Heidelberg, p. 360.

194 “Public invitation to commit crimes”.

195 Maurach, above note 193, p. 361.

196 “Wer jemanden zu dem von ihm verübten Verbrechen oder Vergehen vorsätzlich bestimmt hat, wird nach der Strafandrohung, die auf den Täter Anwendung findet, bestraft. Wer jemanden zu einem Verbrechen zu bestimmen versucht, wird wegen Versuchs dieses Verbrechens bestraft.” Article 24(5)(1) and (2) of the Swiss Penal Code. English translation from Hartwig Roggemann (ed.), *Sources of Comparative Law*, East European Institute of the Free University of Berlin, Vol. 59.

197 *Botschaft betreffend das Übereinkommen über die Verhütung und Bestrafung des Völkermordes sowie die entsprechende Revision des Strafrechts*, No. 99.033, 31 March 1999, p. 5340.

reminiscent of the language used by the International Military Tribunal at Nuremberg to describe the effect that Streicher's propaganda had on the minds of the German people,<sup>198</sup> as well as the phrase "making another person decide" in the *travaux préparatoires* of the Rome Statute.<sup>199</sup>

The Swiss Federal Council, after examining what amendments were needed for the Swiss Penal Code to comply with the requirements of the Genocide Convention, concluded that "direct and public incitement" was covered by two different provisions of the Penal Code, one being Article 24, criminalizing instigation,

wenn eine derartige öffentliche Aufreizung eine solche Intensität erreicht, dass sie zur "Bestimmung" (d.h. zum Hervorrufen eines Tatentschlusses) eines oder mehrerer anderer zur Begehung eines Genozids genügt.<sup>200</sup>

Where the incitement remains below the threshold of inducement actually to commit a crime, but, owing to its form and content, is nonetheless sufficiently insistent to "influence the addressee's will", the act would fall within the crime of "öffentliche Aufforderung zu einem Verbrechen oder zur Gewalttätigkeit"<sup>201</sup> pursuant to Article 259 of the Criminal Code.<sup>202</sup> Consequently, the Swiss legislators view "direct and public incitement to commit genocide" as covering not only situations in which the inciter succeeds in *instigating* his addressees, that is, he convinces them to decide to commit the crime, but also situations in which, although he fails to bring about such a decision, the inciter nevertheless "influences their will". It is therefore broader than instigation, encompassing both instigation and acts which are even "more" inchoate in that the addressee does not even need to make the actual decision to commit the crime. The idea of "influencing someone's will" is, of course, somewhat vague and unclear; it does, however, appear to express an idea akin to the argued effect of propaganda according to the proponents of a propaganda provision in the Genocide Convention debates, namely the creation of a certain state of mind or atmosphere in which the addressees were able to take the decision to commit genocidal acts. This is very interesting, as it would seem to make it possible to include acts of hate propaganda for genocide in the definition of direct and public incitement to genocide.<sup>203</sup>

What is particularly appealing about the German and Swiss approach is the idea that instigation is regarded as having been committed as soon as the decision to commit the criminal act (*Tatentschluss*) has been planted in the

198 See p. 828 above; this language was also cited by the ICTR in *Nahimana et al.*, above note 7, para. 981.

199 See p. 843 above.

200 "When such a public incitement reaches such an intensity that it suffices for the "inducement" (i.e. the formation of a decision to commit the crime) of another person or persons to commit genocide": *Botschaft*, above note 197, p. 5340.

201 "Public invitation / encouragement to commit a crime or violence".

202 *Botschaft*, above note 197, p. 5340.

203 For a development of this idea see W. K. Timmermann, "The relationship between hate propaganda and incitement to genocide: A new trend in international law towards criminalization of hate propaganda?", *LJIL*, Vol. 18, 2005, p. 257.

instigatée's mind. As soon as this occurs the danger is present, and only external circumstances or events will prevent the commission of the crime. At this stage the instigator is to be considered guilty of instigation and punished. It is submitted that instigation in international criminal law ought to be considered an inchoate crime. This also accords with what appears to be a general trend in the criminal law of many countries, which consider instigation a crime whether or not the substantive crime is subsequently committed or not.<sup>204</sup> Furthermore, as noted above, during the Genocide Convention debates many delegates considered incitement to be an inchoate crime and often cited their national laws as illustration. It appears that when they put forward this argument, they were not referring specifically to direct and public incitement, but rather to instigation generally. There is therefore no obvious reason for considering it as not inchoate under international law, whereas there are conversely important reasons for considering it to be an inchoate crime. One of these reasons is found in the rationale underlying the criminalization of instigation, namely the need, as in the case of incitement, to obviate the inherent danger of other crimes being committed. In the case of incitement, this danger is a result of creating a certain atmosphere or state of mind among a large group of people, in public, which after the incitement becomes uncontrollable. In the case of instigation, the danger lies in the specific urging and instructing of another specific person to commit a crime. As an international crime is *per definitionem* one of the worst crimes – genocide, for one, having been repeatedly described as the “crime of crimes”,<sup>205</sup> it appears to make little sense not to punish instigation to such crimes in cases where the substantive crime does not follow. Of course, once it is accepted that instigation in general is inchoate, then it should for reasons of consistency also be accepted that direct and public incitement, as a specific form of instigation, ought to apply to all international crimes and not merely genocide.<sup>206</sup>

204 See e.g. Germany (§30 StGB); Switzerland (Swiss Penal Code, Art. 24(5)(2)); United States (*US v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *US v. Barnett*, 667 F.2d 835, 842–43 (9th Cir. 1982); *People v. Bottger*, 142 Cal. App. 3d 974, 191 Cal. Rptr. 408 (5th Dist. 1983); *Morgan v. Robinson*, 156 F. Supp. 2d 1133 (C.D. Cal. 2001); *People v. Burt* (1955) 45 Cal.2d 311, 288 P.2d 503, 51 A.L.R.2d 948; *State v. Hudon* (1930) 103 Vt. 17, 151 A. 562; *State v. Quinlan* (1914) 86 N.J.L. 120, 91 A. 111, aff'd on reh. 87 N.J.L. 333, 93 A. 1086; *State v. Ysea*, (1998) 191 Ariz. 372, 956 P.2d 499; *Lopez v. State*, 864 So. 2d 1151 (Fla. Dist. Ct. App. 2d Dist. 2003); *McGann v. State*, 30 S.W.3d 540 (Tex. App. Fort Worth 2000); *Branche v. Com.*, (1997) 25 Va. App. 480, 489 S.E.2d 692; Canada (s. 464(a) Criminal Code); *R. v. Ford*, [2000] 145 C.C.C. (3d) 336 (Ont. C.A.), para. 28; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, para. 56; Mexico (Article 209, *Código Penal para el Distrito Federal*, Mexico: Editorial Porrúa, 59th edn, p. 57); United Kingdom (*R. v. Marlow*, [1997] Crim. L.R. 897; *R. v. Goldman*, [2001] Crim. L.R. 822); Italy (§12.11.1. – L. 9 October 1967, n. 962, *Prevenzione e repressione del delitto di genocidio* (G.U. 30 October 1967, n. 272)); Korea (Korean Criminal Code, Art. 31, in G. O. W. Mueller (ed.), *The Korean Criminal Code*, Sweet & Maxwell, London, 1960, p. 39); Rwanda (s. 91(4) *Code Pénal Rwandais*); South Africa (South African Constitution, Art. 16(2)).

205 *Kambanda*, above note 151, para. 16; *Prosecutor v. Serashugo*, Case No. ICTR-98-39-S, Sentencing Judgement (Trial Chamber), 2 February 1999, para. 15.

206 In practice, this is unlikely to be accepted in the foreseeable future: as pointed out above, this proposal was decisively rejected during the drafting sessions on the Rome Statute.

## Conclusion

During the debates on the Genocide Convention, the Soviet delegate forcefully argued that

It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so .... He asked how, in those circumstances, the inciters and organizers of the crime should be allowed to escape punishment, when they were the ones really responsible for the atrocities committed. The peoples of the world would indeed be puzzled if the Committee, basing its decision on purely political arguments of doubtful validity, were to state that the instigators of genocide, those who incited others to commit the concrete acts of genocide, were to remain unpunished.<sup>207</sup>

Since then, the events that occurred in Rwanda in 1994 have shown this view to be correct. As has been repeatedly recognized, *inter alia* by the ICTR, incitement by the media and individuals alike played an important role in triggering and spurring on the atrocities committed in the months after 6 April 1994. The dangers of incitement – be it public, where its effect is to create an atmosphere of violence and hatred, or private, where it results in the instigatee's determination to commit the crime the instigator seeks to bring about – are tangible and undeniable. The omnipresence of the Internet and the opportunities it offers for spreading inciting messages have considerably aggravated this danger.<sup>208</sup>

207 Eighty-fourth Meeting, above note 87, p. 219 (Mr Morozov).

208 The international terrorist group al Qaeda, for instance, recently started to offer weekly television "news" shows ready to download from the Internet and designed to inspire support for the terrorist organization. Y. Musharbash, "Al-Qaida startet Terror-TV", SPIEGEL ONLINE, 7 October 2005, available at <[www.spiegel.de/politik/ausland/0,1518,378445,00.html](http://www.spiegel.de/politik/ausland/0,1518,378445,00.html)> (last visited 30 November 2006).

# International treaties against terrorism and the use of terrorism during armed conflict and by armed forces

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## **Abstract**

*During the second half of the twentieth century the international community, facing the terrorist phenomenon, reacted with the adoption of a series of treaties concerning specific types of terrorist acts, and the obligations of states with regard to them. Alternatively terrorism-oriented legislation, which initially covered only acts affecting civilians, has gradually expanded to cover some acts of terrorism against military personnel and installations. This contribution attempts to assess the repercussions of this evolution on the status and the protection of armed forces engaged in the so-called "war on terrorism" by examining the existing dynamic between these regulations and international humanitarian law.*

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Terrorism is not a new phenomenon. During the second half of the twentieth century many countries in Europe, Latin America, Africa and Asia confronted movements of the most diverse kinds that had in common the willingness to resort to the use of violence against innocent civilians to obtain their goals. In some, the victims were numbered in the tens of thousands. In response, the international community began to adopt a series of treaties concerning specific types of terrorist act and the obligations of states with regard to them. There are now thirteen international treaties against terrorism, as well as numerous regional treaties, and

the process of drafting a general treaty against international terrorism is nearly complete.

Various conflicts around the world have been described as part of a “war on terrorism”. If regular armies are indeed engaged in armed conflict with terrorists, what protection do they derive from the international treaties against terrorism? To what extent are international treaties against terrorism applicable to acts committed by armed forces during an armed conflict or occupation? To what extent do these treaties protect armed forces from terrorist attacks in times of peace, and to what extent do they apply to abuses committed in peacetime by military forces? What is the relationship between this branch of international law and international humanitarian law?

## The international treaties concerning terrorism, their content and scope of application

### International treaties against terrorism

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Tokyo in 1963, is considered to be the first international treaty against terrorism.<sup>1</sup>

Five more were adopted during the 1970s: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,<sup>2</sup> the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,<sup>3</sup> the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,<sup>4</sup> the 1979 International Convention against the Taking of Hostages<sup>5</sup> and the 1979 Convention on the Physical Protection of Nuclear Material.<sup>6</sup> Three treaties were adopted in 1988: the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,<sup>7</sup> a Protocol to that Convention for the Suppression of Unlawful Acts

1 704 UNTS 10106. This Convention entered into force on 4 December 1969 and has 180 states parties, according to the website of the UN Counter-Terrorism Committee (CTC) <[www.un.org/sc/ctc/law.shtml](http://www.un.org/sc/ctc/law.shtml)>, last viewed 6 February 2007 (but note the webpage was last updated 8 March 2006).

2 Done at The Hague on 16 December 1970, 860 UNTS 12325. This Convention entered into force on 14 October 1971 and has 181 states parties, according to the website of the UN CTC (*supra*, note 1).

3 Done at Montreal on 23 September 1971, 974 UNTS 14118. This Convention entered into force on 26 January 1973 and has 183 states parties, according to the website of the UN CTC (*ibid.*).

4 Adopted by the UN General Assembly by resolution 3166 (XXVIII) of 14 December 1973, 1035 UNTS 15410. This Convention entered into force on 20 February 1977 and has 159 states parties, according to the website of the UN CTC (*ibid.*).

5 Adopted by the UN General Assembly by resolution 34/145 (XXXIV) of 17 December 1979, 1316 UNTS 205. This Convention entered into force on 3 June 1983 and has 153 states parties, according to the website of the UN CTC (*ibid.*).

6 Adopted by the UN General Assembly by resolution A/34/146 of 17 December 1979, 1456 UNTS 24631. This Convention entered into force on 8 February 1987 and has 116 states parties, according to the website of the UN CTC (*ibid.*).

7 Done in Rome on 10 March 1988, IMO Document SUA/CONF/15/Rev.1. This Convention entered into force on 1 March 1992 and has 134 states parties, according to the website of the UN CTC (*ibid.*).

against the Safety of Fixed Platforms Located on the Continental Shelf,<sup>8</sup> and a Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.<sup>9</sup> The 1990s saw the adoption of the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection,<sup>10</sup> the 1997 International Convention for the Suppression of Terrorist Bombings<sup>11</sup> and the 1999 International Convention for the Suppression of Financing of Terrorism.<sup>12</sup> The most recent addition is the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the UN General Assembly on 13 April 2005.<sup>13</sup>

These treaties define nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of “bombs” or nuclear materials, and two crimes concerning the financing of terrorism. There is a tendency to consider these treaties as establishing a sort of evolving code of terrorist offences. The most significant evidence of this trend is the 1999 Convention against the financing of terrorism, which establishes the crime of donating or collecting funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”.<sup>14</sup> The duties of states parties to this Convention with respect to the crime of financing the activities defined in the treaties listed in the annex is independent of their ratification of them, although it does allow states that are not party to one or more of the listed treaties to make reservations limiting the scope of their obligations under the 1999 Convention with respect to the financing of the activities prohibited by any unratified treaty or treaties.<sup>15</sup> In 2002 the Organization of American States adopted a second treaty against terrorism, which uses the same approach. The Inter-American Convention against Terrorism establishes a series of obligations for states parties with respect to the crimes defined in ten treaties: the 1999 Convention against the financing of terrorism and the nine international

8 Done in Rome on 10 March 1988, IMO document SUA/CONF/15/Rev.1. This Convention entered into force on 1 March 1992 and has 123 states parties, according to the website of the UN CTC (ibid.).

9 Done at Montreal on 24 February 1988, ICAO document 9518. This Convention entered into force on 6 August 1989 and has 156 states parties, according to the website of the UN CTC (ibid.).

10 Adopted by the International Civil Aviation Organization on 1 March 1991. The treaty entered into force on 21 June 1998 and has 123 states parties, according to the website of the UN CTC (ibid.).

11 Adopted by the UN General Assembly on 15 December 1997 by resolution A/52/164. This Convention entered into force on 23 May 2001 and has 145 states parties, according to the website of the UN CTC (ibid.).

12 Adopted by the UN General Assembly on 9 December 1999 by resolution A/54/109. This Convention entered into force on 10 April 2002 and has 150 states parties, according to the website of the UN CTC (ibid.).

13 Adopted by the UN General Assembly on 13 April 2005 by resolution A/59/290. It has 100 signatories but no Parties, according to the website of the UN CTC (ibid.).

14 Article 2(1). (Article 2(1)(b) contains a general provision concerning other terrorist acts. See below.)

15 Article 2(2).

treaties listed in the annex thereto.<sup>16</sup> The 1977 European Convention for the Suppression of Terrorism as amended by the Protocol of 2003 adopts a similar approach, establishing a series of obligations concerning acts of terrorism as defined in ten international treaties.<sup>17</sup> UN Security Council Resolution 1566 also supports that idea that the crimes recognized by existing international treaties form part of a code of terrorist offences.<sup>18</sup>

## The obligations established by the international treaties against terrorism

The principal obligation set forth in the international treaties against terrorism is to incorporate the crimes defined in the treaty in question into the domestic criminal law, and to make them punishable by sentences that reflect the gravity of the offence.<sup>19</sup> The states parties to these treaties also agree to participate in the construction of “universal jurisdiction” over these offences,<sup>20</sup> that is, to take the

16 Article 2(1). (Article 2(2), like Article 2(2) of the Convention against the financing of terrorism, allows reservations with regard to the crimes defined in unratified treaties.)

17 The obligations set forth in the European Convention as amended apply only insofar as the states parties also have ratified the listed treaties against terrorism, and the states party to the European Convention may opt to accept certain of the obligations established therein with respect to two offences defined without reference to other treaties, namely, other serious acts of violence against the life, physical integrity or liberty of a person and serious acts against property that pose a collective danger for persons (Article 2). The OIC Convention and the SAARC Convention (see note 79, below) also incorporate by reference the definitions contained in universal treaties, in addition to generic definitions of terrorism they contain (Article 1 in each instance).

18 Operative paragraph 2.

19 Article 2 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 3 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 2(1) and (2) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 2 of the 1979 International Convention against the Taking of Hostages; Article 7(1) and 7(2) of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 5 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 5 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Articles 4 and 5 of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 4 of the 1999 International Convention for the Suppression of Financing of Terrorism.

20 Strictly speaking, the term “universal jurisdiction” refers to the rule or principle of international law that confers on “any nation which has the custody of the perpetrators” the right to prosecute them for “crimes [that] are so universally condemned that the perpetrators are the enemies of all people”. *Demjanjuk v. Petrovsky*, 1982, 776 F.2d 571, at 582, cited in “State consent regime v. universal jurisdiction”, ICRC, 1997, available at <[www.icrc.org/web/eng/siteeng0.nsf/html/57JPEC](http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPEC)>, consulted 10 February 2007. For all practical purposes, jurisdiction based on the mere presence of an accused in the national territory, when added to more traditional grounds for jurisdiction, is the functional equivalent of universal jurisdiction. There is a tendency, particularly on the part of activists, to use the term more broadly to refer to the legal regime that binds all the parties to a treaty that contains provisions obliging them to establish extraterritorial jurisdiction over certain offences, and in some cases to view the *aut dedere aut judicare* rule as part of this concept. See e.g. Human Rights Watch, “Universal jurisdiction in Europe: The state of the art”, at <[www.hrw.org/reports/2006/ij0606](http://www.hrw.org/reports/2006/ij0606)> (“The exercise of universal jurisdiction is commonly authorized, or even required, by an international convention to which the state is a party. For example, the Convention against Torture ...”). See also Amnesty International, “Universal jurisdiction: the duty of states to enact and enforce legislation”, at <[www.amnesty.org/pages/uj-memorandum-eng](http://www.amnesty.org/pages/uj-memorandum-eng)> (“Indeed, almost every treaty imposing an *aut dedere aut judicare* obligation expressly requires states to provide for universal jurisdiction in the event that extradition is not possible”, citing as an example the Convention against Torture), consulted 10

necessary measures to give their courts very broad jurisdiction over the offences in question, including jurisdiction based on territoriality, jurisdiction based on the nationality of the offender and the victims and, according to most of these treaties, jurisdiction based on the mere presence of a suspect in the territory of the state.<sup>21</sup> In addition, they accept the obligation either to extradite any suspected offenders found in their territory or to begin criminal proceedings against them.<sup>22</sup> In order to facilitate extradition these treaties invariably provide that the offences in question shall not be considered political offences, which are not extraditable under most treaties on extradition.<sup>23</sup> In addition, these treaties require various types of co-operation among the states parties, ranging from co-operation in

February 2007. As Professor Higgins points out, “The right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under general international law.” R. Higgins, *Problems & Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, p. 58. Three of the oldest treaties against terrorism are in force for 180 states or more, and four others, including the Convention against financing terrorism, are in force for at least 150 states (notes 1–5, 9 and 12, above). The near-universal ratification of the earliest treaties suggests that universal jurisdiction may already exist for at least the terrorist offences defined therein. Whether sufficient grounds exist to claim that universal jurisdiction may also exist for some of the offences defined in other treaties is beyond the scope of this article, but the intent of the drafters of these treaties is clearly to construct universal jurisdiction through the process of ratification and accession, a process that may ultimately transform these norms into customary law. Repeated calls by the UN Security Council and General Assembly for ratification of all these treaties clearly evidences the intent to create a legal regime that gives all members of the international community jurisdiction over these offences. (See e.g. S/RES/1373, para. 3(d) and A/RES/60/43, paras. 9–10.)

- 21 Article 4 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (jurisdiction based on the registration of the aircraft and the presence of the suspect); Article 5 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and Article III of the Protocol for the Suppression of Unlawful Acts of Violence at Airports; Article 3 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 5 of the 1979 International Convention against the Taking of Hostages; Article 8(1) and 8(2) of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 3 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Article 6 of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 7 of the 1999 International Convention for the Suppression of Financing of Terrorism.
- 22 Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 7 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 7 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 8(1) of the 1979 International Convention against the Taking of Hostages; Article 10 of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 10(1) of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 4 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Article 8(1) of the 1997 International Convention for the Suppression of Terrorist Bombings and Article 10(1) of the 1999 International Convention for the Suppression of Financing of Terrorism.
- 23 Article 8 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 8 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 8 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 10 of the 1979 International Convention against the Taking of Hostages; Article 11 of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 11 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Articles 9 and 11 of the 1997 International Convention for the Suppression of Terrorist Bombings; Articles 13 and 14 of the 1999 International Convention for the Suppression of Financing of Terrorism; and Articles 14 and 17 of the draft general convention against international terrorism.

preventing terrorist acts to co-operation in the investigation and prosecution of the relevant offences.

Most of these treaties also contain dispositions concerning the protection of human rights. Such dispositions are of three kinds: general provisions indicating that the obligations set forth in the treaty are without prejudice to other international obligations of the state party; provisions concerning the right of accused or detained persons to due process, and provisions establishing conditions regarding extradition and the transfer of prisoners.

The clauses concerning the right to due process contained in some of the earlier treaties are rather vague. Article 9 of the 1973 Convention on internationally protected persons, for example, provides simply that “Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment in all stages of the proceedings.” Similar provisions are found in the 1979 Convention against hostage-taking, the 1979 Convention on nuclear material and the 1988 Convention on maritime navigation.<sup>24</sup> The 1997 Convention against terrorist bombings and the 1999 Convention against the financing of terrorism contain the following, more comprehensive formula:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.<sup>25</sup>

Many of these treaties also recognize the right of a foreign detainee to communicate with, and in some cases to receive the visit of, his or her consular representative.<sup>26</sup> Like the right to due process, this right is stated in more generous terms in more recent treaties. The 1997 Convention against terrorist bombings and 1999 Convention against the financing of terrorism provide that a detainee has the right to be informed of his or her right to contact a consular representative.<sup>27</sup> With regard to the right to asylum, the saving clause contained in the 1973 Convention on internationally protected persons and the 1979 Convention against hostage-taking provides that “The provisions of this

24 Articles 8(2), 12 and 10(2), respectively. (The 1970 and 1971 Conventions on civil aviation do not contain provisions of this kind.)

25 Articles 14 and 17, respectively.

26 Article 6(3) of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 6(3) of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 6(2) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 6(3) of the 1979 International Convention against the Taking of Hostages; Article 11.6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Article 7(3) of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 9(4) of the 1999 International Convention for the Suppression of Financing of Terrorism.

27 Articles 7(3) and 9(2).

Convention shall not affect the application of the Treaties on Asylum, in force as of the date of the adoption of this Convention, as between the States which are parties to those Treaties".<sup>28</sup> The Convention against hostage-taking also contains an important provision that, in substance, reaffirms the principle of *non-refoulement*, a cornerstone of international refugee law.<sup>29</sup> The 1997 Convention against terrorist bombings and 1999 Convention against the financing of terrorism not only recognize this principle, but also extend it to mutual legal assistance.<sup>30</sup>

Recent treaties also contain a provision that in effect prohibits the practices known as "rendition" and "extraordinary rendition",<sup>31</sup> whose links to torture, denial of access to competent courts, incommunicado detention and other human rights violations have been documented. Article 13(1) of the Convention against terrorist bombings provides:

A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of testimony, identification or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met: (a) The person freely gives his or her informed consent; (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

28 Articles 12 and 15, respectively.

29 Article 9(1). This saving clause appears to be inspired by Article 5 of the 1977 European Convention on the Suppression of Terrorism.

30 Article 12 of the Convention against terrorist bombings is substantially identical.

31 There does not yet appear to be any precise and broadly accepted definition of these two terms. Rendition can be understood to mean transfer of a prisoner or detainee to a country where he or she is wanted for questioning, or to give testimony, but where they are not accused of a crime, in which case extradition would be the usual procedure. See A. Khan, "Partners in crime: friendly renditions to Muslim torture chambers", Washburn University School of Law, 2005, available at <papers.ssrn.com/sol3/papers.cfm?abstract\_id=937130>. CIA documents in the public domain use the term "rendition" to refer to the transfer of prisoners to the United States or to US custody. This seems to be consistent with a presidential directive No. 36 of 21 June 1995, which provides that "If we [the United States government] do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government". Available at <www.fas.org/irp/offdocs/pdd39.htm>. Extraordinary rendition appears to be a more recent concept that is most often used to describe either the capture of a suspected terrorist by US forces in a foreign country and the transfer of that person to another foreign country, or the transfer by US forces of a person in the custody of a government other than that of the United States to another country other than the United States, primarily or exclusively for purposes of interrogation. A common element in both cases is the absence of legal formalities. The term "detention" in Article 13(1) and similar clauses of other treaties is very broad: it means being in the custody of an official body (*New Oxford Dictionary of English*, 1998) but does not imply that the deprivation of liberty is authorized by law, much less judicially authorized. In this broad sense, almost any transfer of a person from one country to another by an official agency without the consent of the person concerned by definition involves detention. In practice, in most reported cases such persons are detained for days, weeks or even longer, prior to their transfer. See the Marty Report, "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states", Parliamentary Assembly, AS/Jur (2006) 16, Part II, 7 June 2006, paras. 92–214 (describing nine cases, in eight of which the victims were detained by national authorities prior to being transferred by the US operatives to a third country).

Article 16.1 of the Convention against the financing of terrorism and Article 17.1 of the Convention against nuclear terrorism are substantially identical, although the latter adds that a prisoner must “freely” consent to his transfer to another country.

## The scope of international treaties against terrorism

Since treaties concerning terrorism have been elaborated mainly in order to combat international terrorism, their scope is generally limited to acts that have an international dimension. The conventions on the safety of civil aviation expressly apply only to international flights and international airports.<sup>32</sup> The Convention on maritime navigation contains a provision indicating that it applies only to acts affecting ships scheduled to travel in international waters, although an exception indicates that it also applies when the suspected author of one of the crimes recognized in the treaty is found in a state other than that of the ship's registration.<sup>33</sup> The provisions of the 1973 Convention on crimes against internationally protected persons that concern crimes against heads of state and government, ministers of foreign affairs and their family members apply only when such persons are abroad.<sup>34</sup> The other persons protected by this treaty include diplomatic personnel and international civil servants on mission and their family members.<sup>35</sup> Article 13 of the 1979 Convention against hostage-taking specifies that it “shall not apply where the offence is committed within a single state and the hostage and alleged offender are nationals of that state and the alleged offender is found in the territory of that State”. Article 3 of the Convention against terrorist bombings and Article 3 of the Convention against financing terrorism contain substantially identical language, followed by certain exceptions, including one concerning the extradition of accused persons who have fled abroad. The only treaties that are generally applicable to acts committed within the territory of a state by a national of that state are the Convention on the Physical Protection of Nuclear Material and the Protocol on continental platforms.<sup>36</sup>

The three most recent conventions, adopted by the same working group that is now attempting to finalize a draft general convention against terrorism, establish two legal regimes. All of the obligations established by the Convention against terrorist bombings, the Convention against the financing of terrorism and the Convention against nuclear terrorism, including the penal provisions, apply to

32 Article 3(3) of the Convention for the Suppression of Unlawful Seizure of Aircraft; Article 4(2) of the Convention on the Safety of Civil Aviation; Article 1 of the Protocol for the Suppression of Unlawful Acts of Violence at Airports; and Article 4(1) of the Convention on the Safety of Maritime Navigation.

33 Article 4(1) and (2).

34 Article 1(a).

35 Article 1(b), which refers implicitly to the Vienna Convention on Diplomatic Relations, the Convention on the Privileges and Immunities of the United Nations and similar instruments, as well as customary international law on diplomatic immunity.

36 Articles 2(1) and 2(1), respectively. (The penal provisions of these instruments are applicable to the acts committed within the territory of a state by a national, regardless of the nationality of the victim, if any. Most of these crimes do not require injury to a person.)

acts that have an international dimension; a more limited regime applies to acts that lack an international dimension. The latter includes the duty of the states parties to prevent the use of their territory for acts aimed at the commission of offences in other states; the duty to co-operate with other states in obtaining evidence; the duty not to consider acts of terrorism as political offences for purposes of extradition; and certain obligations concerning the human rights of persons suspected of direct or indirect links with terrorism.<sup>37</sup>

Most acts of terrorism recognized by existing treaties involve crimes against the person. When acts affecting aircraft or ships are criminalized, it is usually with the express requirement that the act represents a danger to flight or navigation, which implies a danger to the life of the crew and passengers. The provisions of the treaty on the protection of nuclear materials that criminalize the theft of such materials are an exception, but the dangers inherent in misuse of nuclear materials is such that one may presume that a threat to life is inherent in all the acts criminalized by this treaty. The provision of the treaty against financing terrorism that criminalizes the financing of acts other than those criminalized by previous treaties applies only to acts that represent a threat to life.<sup>38</sup> The principal exception to this rule thus far is the Convention against terrorist bombings, which criminalizes the use of explosives and other deadly devices against public places and infrastructure with the intent to cause serious destruction or great economic loss.<sup>39</sup>

Another important characteristic of these treaties concerns the specific intent with which an act is committed. The treaties on the safety of civil aviation and the 1988 Convention on maritime navigation criminalize certain acts without any specific requirement as to the intent with which they are committed. In contrast, motive is a key element of the only act criminalized by the 1979 Convention against hostage-taking, whose Article 1(1) provides:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.

Other treaties criminalize certain acts regardless of the intent with which they are committed, and criminalize other acts, in particular those that do not involve an act of violence, only if they are committed with the requisite intent. The 1979 Convention on nuclear material, for example, criminalizes categorically the

37 Articles 10–15 of the Convention on terrorist bombings and Articles 12–18 of the Convention on financing terrorism. (Article 13 of the latter also prohibits classifying the crimes defined therein as fiscal offences.) The obligations concerning human rights are described below.

38 Article 2(1)(b).

39 *Ibid.* See also Article 1(b) of the Protocol on unlawful acts of violence at airports, which criminalizes the total or partial destruction of an airport or an unoccupied aircraft.

theft of such materials and their threatened use, but criminalizes the threat of theft of nuclear materials only when there is the intent to “compel a natural or legal person, international organization or State to do or to refrain from doing any act”.<sup>40</sup> The Convention on maritime navigation and the Protocol on platforms on the continental shelf also criminalize acts of violence without any requirement as to intent, but incorporate threats into the legal regime they establish only when made with the specific intent to force a natural or legal person to do or not to do something.<sup>41</sup>

The 1999 Convention against the financing of terrorism criminalizes the donation or collection of funds to support “Any other act intended to cause death or serious bodily injury ... when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.<sup>42</sup> This represents a milestone in the development of international law on terrorism, because it is the first treaty provision to refer to the purpose of terrorism as recognized by international humanitarian law, namely, to terrorize the population. Unlike some earlier treaties, it does not criminalize acts intended to coerce private persons or corporations.<sup>43</sup> This limitation helps to distinguish terrorism from ordinary crime and underline the uniqueness of the threat it poses to peace and security.

The older treaties protect primarily civilians and civilian property. The 1970 and 1971 conventions concerning the safety of civil aviation expressly provide that they are not applicable to military, police or customs aircraft, and the scope of application of the Protocol to the 1971 convention is limited to “airports serving international civil aviation”.<sup>44</sup> The 1988 Convention on maritime navigation contains a provision expressly excluding its application to warships and police and customs vessels, and the 1988 Protocol applies exclusively to platforms on the continental shelf used for economic purposes.<sup>45</sup> The Convention on crimes against internationally protected persons would protect only a very limited category of military personal, namely those in diplomatic posts or on assignment with international organizations. The provisions of the treaty on the physical protection of nuclear materials that criminalize the dispersal or threat of use of nuclear materials against persons or property are an exception. The treaty applies only to nuclear material intended for peaceful civilian use, but makes no distinction as to the civilian or military nature of the persons or installations targeted or threatened.<sup>46</sup>

40 Article 7(1)(a), (b), (c) and (d)(i) and 7(1)(d)(i), respectively.

41 Articles 2(c) and 2(2)(c), respectively.

42 Article 2(1)(b).

43 Compare Article 7(1)(b) of the Convention on the protection of nuclear materials, Article 2(c) of the Convention on the safety of maritime safety and Article 2(2)(c) of the Protocol on continental platforms.

44 Articles 3(2), 4(1) and 1, respectively.

45 Article 2(1)(a) and (b) and Article 1(3), respectively.

46 Articles 2 and 7(1)(a)(e) and (i), respectively.

The most recent conventions against terrorism, as we shall see below, mark a departure from this trend, and provide some protection to military as well as civilian personnel and installations. The scope of their applicability in this regard, as we shall also see, is generally circumscribed by reference to international humanitarian law.

### **Act of terrorism, war crime or act of state? The interplay between international humanitarian law, international law concerning terrorism and international human rights law**

International humanitarian law contains several provisions that expressly prohibit acts of terrorism. Article 33 of the Fourth Geneva Convention provides in part that “Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” A similar provision is found in the two Additional Protocols to the four 1949 Geneva Conventions: Article 51(2) of Protocol I on international armed conflict and 13(2) of Protocol II on non-international armed conflict provide in part that “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Article 4(2) of Additional Protocol II provides that “acts of terrorism” against civilians and non-combatants “are and shall remain prohibited at any time and in any place whatsoever”. International humanitarian law also contains provisions which, without using the term “terrorism”, prohibit acts that – depending on the intent, the nationality of the perpetrator and victim(s) and other such considerations – may be prohibited by one of the treaties against terrorism. The prohibition in Article 3 common to the four Geneva Conventions of acts of violence against “persons taking no active part in hostilities”, for example, would apply to some acts of terrorism. Similarly, the prohibition of attacks against nuclear power plants in Article 56 of Additional Protocol I would apply to some acts prohibited by the 2005 Convention against nuclear terrorism.

Four of the treaties against terrorism – the 1979 Convention against hostage-taking, the 1997 Convention against terrorist bombings, the 1999 Convention against the financing of terrorism and the 2005 Convention against nuclear terrorism – contain provisions referring to international humanitarian law, or to concepts derived from it. Most of them are exclusionary clauses, designed to ensure that acts that in principle come within the scope of both international humanitarian law and international law against terrorism are governed by one or the other.<sup>47</sup> What are the scope and implications of these clauses?

Article 12 of the 1979 Convention against hostage-taking provides that this treaty is inapplicable to acts of hostage-taking covered by the Geneva Conventions and their Protocols. The taking of hostages is prohibited by Article 34

47 The exception is Article 2(1)(b) of the Convention against the financing of terrorism.

of the Fourth Geneva Convention on the protection of the civilian population, by Article 75(2)(c) of Additional Protocol I and Article 4(2)(c) of Additional Protocol II, and by Common Article 3 of the Geneva Conventions – provisions that protect all persons, whether civilian or military. The language of the said Article 12 suggests that the drafters were particularly interested in excluding the application of the Convention to movements involved in the struggle for self-determination or against foreign occupation. However, Article 12 provides that only acts that a state has an obligation to prosecute (or extradite) under the Geneva Conventions or one of their Protocols are excluded.<sup>48</sup> The scope of this exclusionary clause therefore is relatively straightforward: if a state has an obligation to prosecute or extradite a hostage-taker under one of the Geneva Conventions or Protocols, then the Convention against hostage-taking will not be applied; but if no such obligation exists, then the Convention against hostage-taking must be applied. It should be noted that, although the prohibition of the taking of hostages is considered a rule of customary international humanitarian law,<sup>49</sup> this exclusionary clause would not prevent the Convention against hostage-taking from being applied to an act of hostage-taking covered by customary international humanitarian law, but not by one of the Conventions or Protocols.

The 1997 Convention against terrorist bombings prohibits the unlawful and intentional delivery, placement, or detonation of an explosive or other lethal device in or against a place of public use, public transportation system or a state or government facility with the intent to cause death or serious bodily injury or extensive destruction that results in, or is likely to result in, major economic loss.<sup>50</sup> The term “lethal device” includes chemical, biological and radioactive weapons. The material elements of the acts criminalized by this treaty, in contrast to those of most earlier treaties, do not distinguish between acts affecting civilian or military targets. Consequently, since the use of explosive devices is an intrinsic part of warfare, the exclusionary clauses are of particular importance for this treaty. It is useful to analyse the scope of these clauses from three perspectives: their relevance for acts committed by armed forces during an armed conflict; their relevance for acts against armed forces during an armed conflict; and their relevance for acts committed by armed forces in the absence of an armed conflict.

### Acts committed by armed forces during an armed conflict

The first of two exclusionary clauses contained in Article 19.2 of the Convention against terrorist bombings excludes “The activities of armed forces during an

48 The article provides in part “in so far as States Parties to this Convention are bound under those conventions [the Geneva Conventions and Protocols I and II] to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts”.

49 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005, I, p. 334.

50 Article 2(1). (This provision also includes the placement or use of such devices against infrastructure facilities, but the definition of this term in Article 1(6) would appear to preclude military facilities.)

armed conflict, as those terms are understood under international humanitarian law, which are governed by that law”.<sup>51</sup> In contrast to Article 12 of the Convention against hostage-taking, which refers only to the Geneva Conventions and their Additional Protocols I and II, this exclusionary clause refers to international humanitarian law in general, thus including customary law.

International humanitarian law comprises numerous rules applicable to the use of explosives and other “lethal devices” of the sort covered by the Convention against terrorist bombings. One of the most relevant rules, although it does not refer expressly to the use of devices of this kind, is the prohibition of all attacks against the civilian population.<sup>52</sup> Indeed, humanitarian law recognizes, implicitly, that attacks against the civilian population can be considered acts of terrorism. The Protocols to the Geneva Conventions contain a common provision that states: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>53</sup>

Other rules of humanitarian law prohibit the use of certain types of lethal devices even during armed conflict, or restrict the way in which explosive devices may be used against enemy forces during armed conflict. The First Geneva Convention, for example, prohibits attacks of any kind against hospitals or other medical facilities or personnel.<sup>54</sup> The prohibition of acts of perfidy, including feigning civilian status in order to carry out an attack, applies to the use of explosive devices.<sup>55</sup> The 1980 Protocol on the use of mines and other explosive devices prohibits a number of perfidious uses of explosive devices, such as hiding them in toys, food, medical equipment and human remains.<sup>56</sup> The use of certain types of devices or substances is banned by treaties adopted for that specific purpose, such as the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction; and the 1997 Convention

51 Article 2(1).

52 This is one of the most elemental rules of customary international humanitarian law. See Henckaerts and Doswald-Beck, above note 49, pp. 25–29.

53 Article 51(2) of AP I and Article 13(2) of AP II.

54 See GC I, Articles 19–21, 24–25 and 35–36. This is another elemental rule of customary international humanitarian law, which Henckaerts and Doswald-Beck consider binding in both international and non-international armed conflicts. Above, note 49, pp. 79–84 and 91–102.

55 Article 37(1) of AP I contains the following definition: “Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.” Henckaerts and Doswald-Beck consider that killing an enemy by resort to perfidy is a norm of customary international humanitarian law applicable to both international and non-international armed conflicts. Above, note 49, pp. 221–5.

56 This Protocol to the 1980 Conventional Weapons Convention has 89 Parties, according to the ICRC website <[www.icrc.org/ihl.nsf/INTRO?OpenView](http://www.icrc.org/ihl.nsf/INTRO?OpenView)>, consulted 10 Feb. 2007. Henckaerts and Doswald-Beck consider that “The use of booby-traps which are in any way attached to or associated with objects entitled to special protection [e.g. medical equipment and human remains] or with objects that are likely to attract civilians [e.g. food, toys] is prohibited” by customary international humanitarian law applicable to both international and non-international armed conflicts. Above, note 49, pp. 278–9.

on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction.<sup>57</sup> However, compliance with these rules of humanitarian law is immaterial for the purposes of this exclusionary clause: if the act is committed by an armed force during an armed conflict, the Convention against terrorist bombings is not applicable regardless of whether the device is prohibited by humanitarian law or is used in a way that is consistent with humanitarian law.

### Acts targeting armed forces

The first exclusionary clause – unlike the second, which refers to “the armed forces of a State” – applies to any armed force, and provides expressly that the meaning of this term is to be determined by reference to international humanitarian law. This clearly means that acts committed by irregular forces are excluded from the scope of the Convention against terrorist bombings, provided that they satisfy the definition of an “armed force”.

The question of how the term “armed forces” is defined has long been a sensitive one.<sup>58</sup> The first definition adopted by the international community is that found in the Hague Regulations respecting the Laws and Customs of War on Land, which provides:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.<sup>59</sup>

The Regulations also provide that the inhabitants of a territory that spontaneously take up arms at the approach of invading enemy forces are entitled to be regarded as “belligerents”, provided that they carry their arms openly and respect the laws and customs of war.<sup>60</sup> The Third Geneva Convention reaffirms

57 The Protocol on chemical and biological weapons has 134 states parties, the Convention on chemical weapons has 181 parties and the 1997 Ottawa Convention has 152 parties, according to the website of the International Committee of the Red Cross (above, note 56), consulted 10 February 2007. Henckaerts and Doswald-Beck consider that the use of poisons and chemical and biological weapons is a norm of customary international humanitarian law applicable to both international and non-international armed conflicts. Above, note 49, pp. 251–4 and 256–65.

58 See the commentary on Article 3 common to the Geneva Conventions in Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 3, ICRC, Geneva, 1958, p. 35, also available at <[www.icrc.org](http://www.icrc.org)>.

59 Article 1 of the Regulations, contained in the Annex to Hague Convention (II) with Respect to the Laws and Customs of War on Land.

60 Article 2.

these four conditions as criteria for determining when “militias” or “organized resistance movements” are entitled to protection.<sup>61</sup>

The evolution of the strategies and tactics of warfare since 1949 convinced the international community of the need to adapt the definition of armed forces to contemporary forms of conflict. This was done by the adoption in 1977 of two Protocols to the Geneva Conventions. Protocol I, relating to the protection of victims of international armed conflicts, was drafted in part to adapt the law of armed conflict to the realities of national liberation struggles. It contains the following definition:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.<sup>62</sup>

The structure of this provision and the content of the second sentence imply that, although compliance with humanitarian law is an obligation binding upon all armed forces, it is not an element of the definition of an armed force.<sup>63</sup> Article 44 of Protocol I also supports the idea that respect for humanitarian law is no longer an element of the definition of an armed force. The second paragraph of this article provides that

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war ...

The paragraph following recognizes that in certain types of conflicts combatants cannot permanently distinguish themselves from the civilian population.<sup>64</sup> When this is the case, a combatant retains his or her status as a combatant provided that he or she carries arms openly during each military engagement and while deploying in preparation for an attack.<sup>65</sup> Protocol II applies to non-international

61 Article 4.A(2).

62 Article 43(1).

63 This conclusion finds some additional support in Article 4(2) of AP I, which provides, “While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his [*sic*] right to be a combatant”.

64 It will be recalled that AP I applies not only to armed conflict between independent states, but also to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” (Article 1(4)). The reference in Article 44(3) to situations in which combatants cannot distinguish themselves from the civilian population is an implicit reference to guerrilla conflicts. (See paragraph 1684 of the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, The Hague, 1987.) Article 44(7) warns that this provision “is not intended to change the generally accepted practice of states with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict”.

65 Article 44(3).

conflicts, in which the status of irregular forces is a crucial element. The threshold for application of Protocol II does not require the existence of a conflict between a state and an armed group that respects humanitarian law, but it does require the non-state armed force to “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.<sup>66</sup> It also requires that such groups be “organized” and “under responsible command”, but these requirements are not linked expressly to compliance with the laws and customs of war.<sup>67</sup>

To consider compliance with humanitarian law to be an essential part of the definition of the term “armed force” would greatly narrow the scope of the exclusionary clauses. This is significant because, while it is vitally important to create incentives for irregular armed groups to respect humanitarian law, the tactics that irregular forces are often obliged to adopt in asymmetrical warfare should not be assimilated indiscriminately to terrorism. As a matter of policy, it would seem desirable to be able to apply the international treaties against terrorism to groups that indiscriminately detonate explosives in public places. However, applying the Convention against terrorist bombings to irregular groups would mean that almost any use of explosives against enemy military forces could be considered an act of terrorism, which would weaken the incentive for such groups to distinguish between acts that target civilians and those that target military objectives. Moreover, it would in effect hold them to a higher standard than regular armed forces, since the indiscriminate use of explosives against civilian targets by regular armed forces (for example) would not prevent them from benefiting from the exclusionary clause.

It should be noted that the first exclusionary clause of the Convention against terrorist bombings applies only to acts committed during an armed conflict, and not to other situations in which international humanitarian law is applicable, such as occupation. Hence the use of explosive or other lethal devices by non-state forces against an occupying power would not be excluded from the scope of the Convention against terrorist bombings, if resistance to occupation does not rise to the level of an armed conflict. However, the use of explosives during an occupation by the armed forces of a state, including an occupying power, would be excluded under the second exclusionary clause, which applies to acts undertaken by state forces in their official capacity, even those that violate humanitarian law.

The correct interpretation of the exclusionary clauses would seem to be that this treaty (as well as the Convention against nuclear terrorism, which contains an identical clause in Article 4(2)) is not applicable to acts of terrorism committed during an armed conflict by an armed group that is organized and under responsible command, and that exercises sufficient control over territory to be able to mount sustained military operations and apply humanitarian law – provided, of course, that the act of terrorism committed also violates

66 Article 1(1).

67 *Ibid.*

international humanitarian law. It would be applicable to acts of terrorism committed by individuals who do not form part of an armed group, or by armed groups that are not organized or are not under responsible command, or by armed groups that do not control sufficient territory to be able to mount sustained military operations and apply humanitarian law.

The 1999 Convention against the financing of terrorism takes a different approach. It does not contain an exclusionary clause, but the provision concerning support for acts not criminalized by earlier treaties applies to “Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict”.<sup>68</sup> The absence of an express reference to humanitarian law means that the identity of the perpetrator and his or her status with respect to an armed conflict is immaterial. Consequently, collecting or donating funds knowing that they will be used to finance attacks on military forces participating in an armed conflict, with the requisite intent (e.g. forcing a government to withdraw its troops from a conflict) would not be terrorism, regardless of the means used to kill the combatants and regardless of the status of the perpetrator vis-à-vis the conflict. Such acts would be considered terrorism, however, if the persons killed or injured are civilians or, in the event of an armed conflict, other persons not taking an active part in hostilities.

The terms “civilian” and “armed conflict” and the concept of “direct participation” obviously allude to humanitarian law, and should be interpreted in the light of such law. The term “civilian” means “any person who does not belong” to the armed forces.<sup>69</sup> The term “other persons who do not participate directly in hostilities” therefore must be understood as referring to members of an armed force. Under international humanitarian law there are two categories of members of the armed forces who do not participate directly in hostilities: non-combatants, that is, medical and religious personnel, and combatants who have laid down their arms or are unable to fight due to injury, illness or capture.<sup>70</sup> “Direct participation” is a term of art; members of the armed forces who belong to logistical or administrative services have no right to special protection. The mercenary is a special case, neither civilian nor a member of the armed forces.<sup>71</sup> However, since a mercenary by definition participates directly in hostilities, financing acts aimed at killing or injuring mercenaries (with the specific intent required by this treaty) would not be considered acts of terrorism under Article 2.1 of this Convention.

Article 2(1)(b) of the Convention against the financing of terrorism therefore means that the killing of non-combatant members of the armed forces or combatants *hors de combat* can be considered an act of terrorism, provided that it

68 Article 2(1)(b). (This provision also requires intent to “intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”)

69 AP I, Article 50.

70 GC I, Articles 24–25, and Common Article 3.

71 AP I, Article 47. See also the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

is done with the requisite intent, even if the act occurs during an armed conflict.<sup>72</sup> The killing of military personal outside the context of an armed conflict also could be considered a terrorist act under this provision, if done with the requisite intent, regardless of the means employed.<sup>73</sup> This Convention thus criminalizes the financing of such acts, but not the financing of attacks against combatants during an armed conflict.

### Acts committed by armed forces in the absence of an armed conflict

The second exclusionary clause of the Convention against terrorist bombings provides that “the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention”.<sup>74</sup> There are various ways in which explosive or chemical devices may be used by military forces in the absence of an armed conflict.<sup>75</sup> Mines are sometimes used to limit access to restricted facilities; explosives are used to obtain entrance to a fortified room or building, and certain gases to control riots, to incapacitate dangerous individuals or to force someone to surrender. Armed forces sometimes participate in activities falling short of armed conflict in which such devices could be used. The armed forces of repressive regimes have been known to use explosives to destroy the offices of opposition groups or the media, to assassinate political leaders and to punish communities suspected of support for opposition movements. If explosives are used against persons in exile, or if those responsible for such acts travel abroad or eventually go into exile themselves, the Convention against terrorist bombings could be applicable. States also sometimes use explosives against targets in foreign countries in isolated acts not forming part of an armed conflict. The bombing by members of the French armed forces that sank the *Rainbow Warrior* in 1985 is one example; the destruction of a factory in Sudan by the United States in 1998 is another. The second exclusionary clause would prevent the application of the

72 The language of Article 2(1)(b) of the Convention against the financing of terrorism echoes Common Article 3(1) of the Geneva Conventions, which uses the term “[p]ersons taking no active part in the hostilities” to refer to “members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”. The term “persons taking no active part in the hostilities” is a term of art; international humanitarian law considers all members of the armed forces other than medical and religious personnel to be combatants, and all combatants to be legitimate military targets, unless they are *hors de combat*, i.e. incapable of fulfilling their duties due to illness, injury or capture.

73 Under international humanitarian law the killing of combatants *hors de combat* or non-combatant military personnel during an armed conflict constitutes a war crime, regardless of the specific intent with which it is committed. The penal provisions common to the Geneva Conventions provide that intentional homicide (among other acts) of protected persons (including medical and religious personnel of the armed forces and combatants *hors de combat*) that is not justified by military necessity and is committed on a large scale is a grave breach of the Conventions; GC I, Article 50; GC II, Article 51; GC III, Article 130; and GC IV, Article 147.

74 Article 19(2).

75 Article 1(3). (It also covers devices that release radiation or bacteriological agents.)

Convention to such acts, provided only that the perpetrators act in an official capacity.

In contrast to the 1979 Convention against hostage-taking, which excludes acts of hostage-taking only if states have an obligation to prosecute the perpetrator or hand him over to a state that intends to do so, the exclusionary clauses of the Convention against terrorist bombings apply to acts “governed by” international humanitarian law or other international law. The Convention therefore is inapplicable to such acts, whether they are permitted or prohibited under the applicable international standards. When armed forces detonate explosives in the territory of another state, rules of international law such as the prohibition of aggression apply. International human rights law also would be applicable in most cases, whether the perpetrators act within their own country, in an occupied territory or elsewhere.<sup>76</sup> Hence, human rights violations that would otherwise be considered acts of terrorism – such as war crimes or crimes of aggression that meet the definition of acts of terrorism – cannot be dealt with under this Convention.

The exclusionary clauses are preceded by a provision to the effect that “Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.”<sup>77</sup> However, while the exclusionary clauses do not affect the legality of acts of terrorism, they make some acts of terrorism exempt from the system of international co-operation developed through these treaties as the central element of the international struggle to eliminate terrorism. Both international human rights law and international law concerning aggression and violations of territorial integrity focus on state responsibility, not the criminal responsibility of the individual. Only one international human rights treaty, the Convention against Torture, contains provisions on universal jurisdiction similar to those contained in the treaties against terrorism.<sup>78</sup> Consequently, while states that have jurisdiction over acts of terrorism committed with explosives may have an obligation under international human rights law to investigate, identify the perpetrators and prosecute them, other states may not have any legal obligation to extradite the perpetrators to a state having jurisdiction or to co-operate in the investigation of the acts of terrorism.

76 See e.g. the “Concluding Observations of the Human Rights Committee concerning the responsibility of Israel for violations of the International Covenant on Civil and Political Rights in the Gaza Strip and West Bank”, in CCPR/CO/78/ISR (2003), para. 11, the “Concluding Observations of the Committee against Torture on the responsibility of the United Kingdom for the activities of its forces in Afghanistan and Iraq”, in CAT/C/CR/33/3 (2004), para. 4(b), and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion of the International Court of Justice, [2004] ICJ Rep., n. 33, para. 111.

77 Article 19(1).

78 Articles 5–9.

## The draft comprehensive convention against international terrorism

Although some regional treaties contain a generic definition of terrorism,<sup>79</sup> the UN bodies that have taken on this task have thus far failed to reach agreement on such a definition. The International Law Commission, which spent years preparing the draft Code on Crimes against Peace and the Security of Humanity, was obliged to abandon the effort to include the crime of terrorism because it could not agree on a definition.<sup>80</sup> In 1996 the UN General Assembly established an Ad Hoc Committee to support the efforts of the Sixth Committee to draft new treaties against terrorism. Since 2000 the Ad Hoc Committee has focused on the drafting of a treaty against nuclear terrorism and a comprehensive convention against terrorism, and since 2005 it has focused exclusively on the latter. Agreement on a universally acceptable definition of the term, however, remains problematic.

The difficulties that have been encountered in seeking agreement on a generic, universally valid definition of terrorism can be appreciated by comparing the definitions of terrorist acts contained in existing treaties. Some definitions require these crimes to cause death or injury to persons, but others require only damage to certain types of property. Of the crimes involving damage to or destruction of property that may constitute acts of terrorism, most are required to cause damage to or destruction of public property or property used by the public. Some acts, including most crimes against civil aviation and crimes involving the use of bombs and other lethal devices, are defined as terrorist crimes per se, irrespective of the intent with which they are committed; other acts, including the taking of hostages, constitute terrorist crimes only if committed with a specific intent. Where specific intent is an element of the crime, the intent required is usually that of terrorizing the public or obliging a state or international organization to take a certain course of action. The Convention on the Physical Protection of Nuclear Material contains definitions that depart even further from these parameters: it criminalizes any use or disposal of nuclear materials that causes serious damage to property of any kind, defines theft per se as a crime and, in a provision that requires specific intent, recognizes as sufficient the intent to oblige a private entity to adopt a certain course of action. While many acts are classified as terrorist crimes only if they affect civilian facilities or installations, others are classified as terrorism if they affect military personnel or facilities in peacetime or if they take place during an armed conflict but are not covered by humanitarian law.

The working definition of terrorism under consideration by the Ad Hoc Committee of the General Assembly is the following:

79 See the definitions contained in Article 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism; Article 1 of the 1999 Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism; Article 1(3) of the 1999 OAU Convention on the Prevention and Combating of Terrorism, and Article 1(e) of the South Asian Association for Regional Cooperation's 1987 Regional Convention on the Suppression of Terrorism.

80 Report of the Special Rapporteur on Terrorism and Human Rights, E/CN.4/Sub.2/2003/WP.1, para. 53.

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
  - (a) Death or serious bodily injury to any person; or
  - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
  - (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.
2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.<sup>81</sup>

The draft treaty is intended to supplement existing standards, not replace them. The material element of the draft definition does not encompass certain acts outlawed by existing treaties against terrorism, such as the taking of hostages, hijacking or the theft of nuclear materials. The draft definition does not represent a radical departure from existing international standards. The inclusion of a requirement of specific intent recognizes that acts that by their very nature constitute such a grave danger to public security that they deserve to be considered as terrorist acts per se are exceptional. Expanding the material element to include serious damage to private property of any kind is a significant departure from existing definitions, since the main thrust of existing international standards against terrorism is to safeguard the public interest.<sup>82</sup> The impact of this provision would be limited, however, by the requirement of the specific intent to terrorize the public or influence the behaviour of governments and international organizations. This version of the intent requirement, used in most of the existing treaties that have an intent requirement, avoids inflating the concept of terrorism by extending it to actions intended to influence private players. Recognition of serious damage to the environment as a material element of the definition may be the most significant innovation contained in the present draft.

81 “Report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism held from 25 to 29 July 2005” (hereinafter “Report of the coordinator”), A/59/894, Appendix II. (The third and fourth paragraphs of this draft article cover attempts, abetting and conspiracy.)

82 The generic definition proposed recently by the Secretary-General’s High-Level Panel on Threats, Challenges and Change does not include any acts against property other than those recognized by earlier instruments. It is “any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.” “A more secure world: Our shared responsibility”, 2 December 2004, para. 164(d).

Article 3 of the draft reflects the principle that treaties against terrorism apply mainly to acts having an international dimension. The general rule contained in draft Article 3 is that “This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State [and] the alleged offender is found in the territory of that State”. A number of exceptions are recognized, as for example when the act affects an embassy, a consulate or a ship or aircraft registered in a third country, or when the intent is to coerce a third country. Like the earlier conventions drafted by the Ad Hoc Committee, the draft convention would establish two legal regimes: a comprehensive one that includes the obligation to criminalize terrorism and the “prosecute or extradite” rule, and a more limited set of obligations that include the duty to prevent acts of terrorism, especially preparations for terrorist acts to be carried out in a third country, the duty to co-operate in the investigation of terrorism (referred to as “reciprocal judicial assistance”), the duty to respect the right to due process and humane treatment of persons detained or subject to extradition proceedings related to terrorism, the duty not to extradite persons to a state where they would be exposed to persecution and the duty not to deliver a person without his or her consent to a third state for purposes of interrogation or to obtain testimony against a person accused of terrorism.<sup>83</sup>

Recent reports of the Ad Hoc Committee mention two differences of opinion concerning the definition of terrorism. Some states insist that acts of terrorism should be distinguished from the legitimate struggle of peoples for self-determination and against foreign occupation, and that the definition of terrorism should include state terrorism.<sup>84</sup> Although these concerns are described as concerning the definition of terrorism, in practical terms they concern the draft exclusionary clauses more than the draft definition as such. Some states consider that the first concern could be satisfied by a preambular paragraph on the right to self-determination of the kind contained in many other treaties and UN resolutions concerning terrorism. Others maintain that it requires the adoption of an exclusionary clause proposed by the member states of the Organization of the Islamic Conference (OIC) that refers to acts committed during an occupation (see below). The concern of some states regarding the way in which the term “terrorist” is sometimes applied indiscriminately to any organization that engages in or supports armed struggle, as if terrorism was an end in itself and not a tactic employed to defend objectives that may or may not be legitimate under international law, is a valid one. However, if it is wrong to label an organization “terrorist” simply because it uses or advocates armed struggle, it is no less wrong to employ methods of armed struggle that are illegal under humanitarian law and international penal law, no matter how legitimate the cause may be. This principle is universally recognized. A resolution adopted by the UN Security Council in 2004 declares that acts of terrorism “are under no circumstances justifiable by

83 Articles 8 and 12–16.

84 Report of the coordinator, above note 81, p. 3; see also the Report of the Ad Hoc Committee for 2005, A/59/37, Annex I, para.15.

considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”.<sup>85</sup> Basically, it should not be difficult to reconcile this principle with the right of peoples to self-determination. Whether it will be possible to reach a compromise on the reference to occupation in the draft exclusionary clause proposed by states belonging to the OIC is a more difficult question.

The term “state terrorism” has two meanings. One refers to the adoption by a state of a policy of systematic use of violence and intimidation, including practices such as torture, extrajudicial execution and enforced disappearances, in order to eradicate a political or other opposition movement.<sup>86</sup> The other, broader meaning includes any deliberate resort by a state to acts that *a priori* satisfy the legal definition of terrorism, such as the taking of hostages or the use of explosives in ways described by the relevant international treaties. Ironically, such acts are often undertaken with the avowed aim of combating terrorism. The Convention against terrorist bombings tacitly accepts certain forms of state terrorism by excluding acts committed by the military forces of a state. Whether or not a similar clause will be included in the future comprehensive convention against terrorism, or whether acts committed by states will be excluded from the scope of the convention only if they are compatible with international law, is the most important unresolved issue concerning the draft treaty.

The main issue preventing adoption of the draft convention thus concerns two paragraphs of draft Article 20 on the relationship between the future convention and international law, in particular international humanitarian law. Two versions of this article are under consideration: a working draft prepared by a group of “Friends of the Chairman” and an alternative proposed by states belonging to the OIC. Each contains four paragraphs, of which the first and last are identical. The paragraphs on which there is agreement are as follows:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.
4. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.<sup>87</sup>

The other two paragraphs exclude the application of the future Convention to acts governed by international humanitarian law and other acts committed by military forces, similar to the exclusionary clauses contained in the Convention against terrorist bombings and the Convention against nuclear

85 S/RES/1566 (2004), para. 3.

86 The Commission for Historical Clarification (Truth Commission) of Guatemala, for example, concluded that “throughout the armed confrontation the Army designed and carried out a strategy to create terror in the population”. *Guatemala: Memoria del Silencio*, UNOPS, Guatemala City, 1999, Vol. 5, para. 44 (my translation).

87 Report of the coordinator, above note 81.

terrorism. The version of these two paragraphs prepared by the Friends of the Chairman on the basis of the deliberations of the Working Group is as follows:

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.<sup>88</sup>

The alternative proposed by the states belonging to the OIC is as follows:

2. The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are in conformity with international law, are not governed by this Convention.<sup>89</sup>

The version of paragraph 2 proposed by the Islamic states is broader in two respects. The first and most obvious difference is that it appears to be designed to exclude from the scope of the future Convention acts that occur during foreign occupation in the absence of armed conflict. Interpreted literally, the language simply indicates that acts are excluded if they take place in any armed conflict, including those that occur during an occupation. However, if one assumes that any clause included in a treaty is intended to have some specific meaning, the intent would seem to be to assimilate occupation to armed conflict so that the same consequence flows from both. The concern expressed by these states to distinguish the struggle for self-determination from terrorism supports this interpretation. In reality, since the actions taken by military forces of a state during an occupation would be excluded by draft paragraph 3, this provision would in effect tend to put non-state armed forces on a more even footing with state forces, insofar as situations of occupation are concerned. However, the scope of acts excluded under draft paragraph 2 is not limited to those that are in conformity with international law, but extends to all acts “governed by” international humanitarian law, whether legal or illegal. The advantage of this formula is that, by exempting both state and non-state forces, it gives the latter an incentive to accept and abide by international standards; the disadvantage is that it excludes acts that violate international humanitarian law as well as those that comply with it. Paragraph 2 of the “Friends of the Chairman” version shares this disadvantage, but only with respect to acts committed during armed conflict, not acts occurring during an occupation.

The second difference is that, while the unofficial draft would exclude acts committed by armed forces, the alternative supported by the Islamic states would

88 Ibid., Appendix II.

89 Report of the Ad Hoc Committee, A/58/37, Annex IV, 11 February 2002.

exclude the activities of a party to a conflict or an occupation. This would exclude from the scope of the Convention the acts of agents of a party other than its armed forces. Whilst regulation of the activities of armed forces is clearly one of the main objectives of humanitarian law, other agents also can violate humanitarian law, especially during an occupation. This provision appears designed to circumvent the application of the definition of armed forces recognized by humanitarian law – that is, to ensure that the activities of any irregular force that participates in hostilities or struggles against an occupying power would be excluded, even if they do not meet the accepted definition of an “armed force”.<sup>90</sup> One certain consequence of this proposed draft would be that if a party to a conflict employs groups that do not form part of its armed forces to commit acts that violate humanitarian law – to torture prisoners or to assassinate civilians, for example – international humanitarian law would be applicable and those acts would be excluded from the scope of the future Convention.

The question that is less clear has to do with the requirements for being recognized as a party to a conflict. Under humanitarian law, an armed force that does not belong to a state can be a party to a conflict.<sup>91</sup> The question that arises from the types of conflict that have occurred recently is whether an armed group or movement that is not under the control of a state can be considered a party to a conflict, even if it does not meet the definition of an armed force.<sup>92</sup> If it can, then the language proposed by the OIC member states would open a significant gap in the scope of application of the future Convention against terrorism.

The other exclusionary clause that continues to be an obstacle to approval of the draft convention concerns acts committed by the military forces of a state in the absence of an armed conflict or occupation. The draft prepared by the Friends of the Chairman would exclude such acts “inasmuch as they are governed by other rules of international law”, whereas the draft proposed by the member states of the OIC would exclude them “inasmuch as they are in conformity with international law”. Two of the most relevant parts of international law, as indicated above, are international human rights law and international law prohibiting aggression and the violation of sovereignty. By excluding acts committed by state military forces merely because they are governed by international human rights standards or basic principles of international law recognized by the UN Charter, the informal draft would create an unacceptably broad limitation on the scope of the future Convention. Acts of terrorism committed by the military forces of a state during peacetime in the exercise of their official duties should be treated with the entire rigour that the conventions on terrorism require, and should not be excluded simply because they also could be considered human rights violations or violations of the UN Charter.

90 This inference is supported by an alternative draft proposed by Jordan in 2005, which refers simply to “activities” without any subject – language that other states objected to on the grounds that it would “exclude a broad range of non-State actors from the scope of the convention”. *Ibid.*, p. 5.

91 See Article 1(1) of AP II.

92 For example, because it does not control territory or is not under responsible command.

It is unfortunate that the exclusionary clauses contained in two earlier treaties exclude terrorist acts committed with certain types of weapons, such as explosives, from the scope of international law against terrorism for reasons of this kind. This precedent is no reason to widen the loophole and exclude other acts of terrorism from the scope of international law against terrorism. The version of draft Article 20(3) proposed by the OIC member states, which would preclude the application of the future Convention only to acts committed by military forces in peacetime that do not violate international human rights law or other basic principles of international law, is a more appropriate way of ensuring the complementarity of these branches of international law. It is, indeed, more in harmony with the rule of law, because it comes closer to applying the same rules to all acts of terror, regardless of the identity of the perpetrator. If the struggle against terrorism is to be seen as the defence of universal values and not the defence of narrower interests, every effort must be apply the same law to all terrorists, regardless of the uniform they wear or the cause they defend.

## Conclusion

International treaty law concerning terrorism, which initially covered only acts affecting civilians, has gradually expanded to cover some acts of terrorism against military personnel and installations. The taking of military personnel hostage is, in principle,<sup>93</sup> covered by the Convention against hostage-taking, if the act in question is not covered by the Geneva Conventions or their Additional Protocol I or II, for example, because it does not occur during an armed conflict or occupation. The use of explosives or certain other lethal devices in a public place or against a state facility to cause death, serious injury or serious economic loss is, in principle,<sup>94</sup> covered by the Convention against terrorist bombings, even if the target is a military one, when the act does not take place during an armed conflict, or when it does take place during an armed conflict but the perpetrator is not part of an armed force. Using nuclear material or a nuclear device with the intent to cause death, serious injury or substantial damage to property, or damaging a nuclear facility or device in a way that entails a risk of releasing radioactive material, is, in principle,<sup>95</sup> covered by the Convention against nuclear terrorism whether the target is civilian or military, provided that act is not committed by an armed force during an armed conflict. Financing activities intended to kill or injure members of an armed force during peacetime, or to kill non-combatants during an armed conflict is, in principle,<sup>96</sup> covered by the Convention against financing terrorism.

93 Assuming that the other elements, including specific intent, are met.

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Expanding the concept of terrorism to include attacks against military targets – like expanding it to cover attacks against property as well as attacks against the person – weakens somewhat the moral opprobrium attached to it. Crimes against civilians are generally more widely and passionately condemned than those against military personnel. The consequences of this trend are limited, to the extent that new international instruments expand the concept to include attacks against military personnel and facilities committed during times of peace. They are more far-reaching when these instruments apply to attacks committed against military forces, during an armed conflict or occupation, by irregular forces that may not meet the criteria for application of international humanitarian law. The use of the term “terrorist” as a propaganda tool has a long history, and expanding the legal definition of terrorism so that it applies to certain attacks that may be used by irregular forces against enemies who enjoy an overwhelming technological advantage facilitates such abuse. If the aim is to treat all parties to an unequal conflict equally, exclusionary clauses that may allow the treaties against terrorism to apply to some parties, but not to others, because of their status rather than their actions, should be interpreted and applied narrowly.

The newer treaties against terrorism also provide members of armed forces with a degree of immunity for certain acts.<sup>97</sup> The Convention against terrorist bombings is not applicable to any member of an armed force who commits an act of terrorism using an explosive device when his or her act is governed by international humanitarian law, even if they violate such law. Members of the armed forces of a state enjoy even broader protection: the Convention against terrorist bombings is not applicable to them, provided only that they have committed an act of terrorism in the exercise of their official duties, even if that act is not covered by international humanitarian law. This means that the Convention is inapplicable to them even for acts of terrorism committed with explosive devices during peacetime. The former exemption is at least even-handed, and its practical consequences are mitigated to some extent by universal jurisdiction over war crimes. The latter is even more objectionable, because it applies only to the armed forces of states, and there is no comparable basis to exercise extraterritorial jurisdiction. Exemption from the important regime of “mutual legal assistance” for investigating and prosecuting terrorist crimes, which has no equivalent in international humanitarian law, also is regrettable.

If the possibility that the Convention against terrorist bombings may be applied to irregular groups participating in armed conflict, but not to regular forces who commit similar acts, is unfortunate, the exemption for acts of terrorism committed by the armed forces of states even when international humanitarian law is inapplicable is an affront to the rule of law. It can only be hoped that the

97 The observations that follow also apply to the Convention against nuclear terrorism; the Convention against financing terrorism would appear to be of little relevance to actions committed by members of armed forces, unless they were to finance the activities of irregular groups.

draft general convention against terrorism will not be adopted, unless the scope of the exemption clauses is limited to acts that are compatible with international law, including international humanitarian law.

# The right to life in armed conflict: does international humanitarian law provide all the answers?

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## **Abstract**

*This article describes the relevant interpretation of the right to life by human rights treaty bodies and analyses how this might influence the law relating to the use of force in armed conflicts and occupations where international humanitarian law is unclear. The concurrent applicability of international humanitarian law and human rights law to hostilities in armed conflict does not mean that the right to life must, in all situations, be interpreted in accordance with the provisions of international humanitarian law. The author submits that the human rights law relating to the right to life is suitable to supplement the rules of international humanitarian law relating to the use of force for non-international conflicts and occupation, as well as the law relating to civilians taking a “direct part in hostilities”. Finally, by making reference to the traditional prohibition of assassination, the author concludes that the application of human rights law in these situations would not undermine the spirit of international humanitarian law.*

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It is now generally recognized, even by the most sceptical, that international human rights law continues to apply during all armed conflicts alongside international humanitarian law (IHL). The tendency, however, has been to consider that human rights can only add some clarification to situations outside

the conduct of hostilities, such as further detail to the right to a fair trial. When it comes to the actual use of force, however, it is generally considered that human rights law must be interpreted in a way that is totally consistent with IHL. This is particularly so with the case of the right to life. Typically, the Advisory Opinion of the International Court of Justice in the *Nuclear Weapons* case<sup>1</sup> is cited as support for this proposition.

However, this approach oversimplifies the situation in two ways. First, as international human rights treaties allow for the right to individual petition, which is so far not the case for IHL, it has fallen to human rights treaty bodies to analyse whether there have been violations to the right to life during hostilities. These bodies can only use the provisions of the treaties which created them, and therefore they have interpreted whether there has been a violation of the right to life without reference to IHL.<sup>2</sup> Second, this approach presupposes that IHL is crystal clear as to when and how force can be used in all situations of armed conflict. This is not the case. The International Committee of the Red Cross (ICRC) and the Asser Institute have already held four expert meetings in order to try to determine when civilians can be attacked because they take a “direct part in hostilities”.<sup>3</sup> To date, the divergence in views of the participants reflects the lack of coherence in state practice in this regard. Another area which is totally unclear, since it is not provided for in the relevant treaties, is at what point the IHL rules relating to the conduct of hostilities are applicable to quell serious violence during a military occupation.

These issues, and others relevant to the relationship between the right to life under human rights law and the use of force under IHL, were the subject of an expert meeting organized by the University Centre for International Humanitarian Law (UCIHL).<sup>4</sup> This article will outline the analysis and conclusions of this expert

1 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, in which the Court stated that Article 6 of the International Covenant on Civil and Political Rights is applicable to a use of nuclear weapons, but that “what is an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”. ICJ Rep. 1996, § 25.

2 The only exception was a direct use of IHL by the Inter-American Commission of Human Rights, in particular in the case of *Abella v. Argentina* (Report No. 55/97, Case 11.137, 18 November 1997, §§ 152–189). However, the Inter-American Court in the later case of *Las Palmeras v. Colombia* specified that the use of IHL was not possible since the Court is only empowered by States Parties to interpret human rights provisions (Preliminary Objections, Judgment of 4 February 2000, § 33), although in the case of *Bamaca-Velasquez v. Guatemala* it conceded that “the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention” (Judgment of 25 November 2000, § 209). Although the UN Human Rights Committee stated in its General Comment 31 that “more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant Rights” (26 May 2004, § 11), in practice it has not referred to IHL in its case law relating to the right to life in armed conflicts.

3 A summary of these meetings as well as a copy of the reports are to be found on the following website address: <[www.icrc.org/web/eng/siteeng0.nsf/iwplList575/459B0FF70176F4E5C1256DDE00572DAA](http://www.icrc.org/web/eng/siteeng0.nsf/iwplList575/459B0FF70176F4E5C1256DDE00572DAA)> (last visited 30 January 2007).

4 Report of the expert meeting on the right to life in armed conflicts and situations of occupation, University Centre for International Humanitarian Law, Geneva, 1–2 September 2005, <[www.uci.hl.org/communication/Right\\_to\\_Life\\_Meeting\\_Report.pdf](http://www.uci.hl.org/communication/Right_to_Life_Meeting_Report.pdf)> (last visited 30 January 2007). As from October 2007, the UCIHL will become the “Geneva Academy of International Humanitarian Law and Human Rights”.

meeting as well as certain thoughts of this author. The article will briefly describe the relevant interpretation of the right to life by human rights treaty bodies and then see how this might influence the law relating to the use of force in armed conflicts and occupations where IHL is unclear. Finally, the question will be asked whether the application of human rights law would involve a major change in the spirit, if not the letter, of IHL, by making particular reference to the traditional prohibition of assassination.

## The right to life under human rights law

### Conditions regulating the use of force

Three of the four major human rights treaties<sup>5</sup> specify that no one may be “arbitrarily” deprived of life without further explanation. The European Convention, however, gives more guidance as follows:

Deprivation of life shall not be regarded as inflicted in contravention of the Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.<sup>6</sup>

Under all four treaties the right to life is non-derogable.<sup>7</sup> The European Convention does make an exception for “deaths resulting from lawful acts of war”.<sup>8</sup> Thus far this exception has not been used, despite the fact that the European Court has heard a number of cases relating to deaths during hostilities. No state has so far tried to use this exception when depositing its notice of a state of emergency.<sup>9</sup> In the opinion of this author, “lawful acts of war” refers to international armed conflicts. The reference to the use of force to quell an “insurrection” in sub-paragraph (c) quoted above shows that the provision as it stands is meant to apply to non-international conflicts; the provision already

5 Article 6(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR); Article 4(1) of the American Convention on Human Rights, 1969 (ACHR); Article 4 of the African Charter on Human and Peoples’ Rights, 1981 (ACHPR).

6 Article 2(2) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR).

7 Article 4(2) ICCPR; Article 27(2) ACHR; Article 15(2) ECHR. The African Charter does not have a derogation clause.

8 Article 15(2) ECHR.

9 For example, Turkey did not do so in relation to the armed conflict and occupation of Northern Cyprus. In other situations, i.e. Northern Ireland, south-east Turkey and Chechnya, the states concerned denied that there was an armed conflict and therefore by definition could not try to use this exception. In the case of Russia, it has not even used the provision allowing for derogations during a state of emergency.

provides for the need to use force for this purpose and the modalities for doing so. This was also the view of a number of experts at the UCIHL meeting.<sup>10</sup>

How have human rights treaty bodies interpreted these provisions? In many cases the result was the same as if IHL had been used. Thus in cases relating to armed hostilities between rebels and governmental forces, the treaty bodies have examined whether sufficient precautions were taken to avoid civilian casualties. The most relevant cases before the European Court of Human Rights (ECHR) to this effect are the cases of *Ergi v. Turkey*,<sup>11</sup> which concerned the use of force by Turkish forces against Kurdistan Workers' Party (PKK) rebels and the cases of *Isayeva, Yusupova and Bazayeva v. Russia*<sup>12</sup> and *Isayeva v. Russia*,<sup>13</sup> which concerned the use of force against Chechen rebels. In all these cases the European Court found that insufficient precautions were taken during the planning and prosecution of the activities to avoid or minimize civilian casualties. These cases were brought by relatives of the civilians who were killed and not by the relatives of the rebels themselves. Therefore the degree of force used against them directly was not considered. In this regard it is significant that the Court accepted the necessity for the use of potentially lethal force in order to quell an insurrection in two cases concerning aerial bombardments in Chechnya:

The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.<sup>14</sup>

It is unlikely that a case brought by a rebel complaining about the use of lethal force during hostilities in which he is taking an active part would even be declared admissible. One of the experts at the UCIHL meeting pointed out such a case is unlikely to even arise before the European Court, since the state will always be able to claim that its forces had reason to believe that the rebels killed were using or were about to use force, and the burden would be on the rebels to prove that this was not the case. Another expert cited the practice of Colombia, which regularly bombs Revolutionary Armed Forces of Colombia (FARC) camps even

10 Report of the expert meeting, above note 4, Section B.3.b.

11 In this case the European Court of Human Rights stated that the right to life may be violated where states "fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising incidental loss of civilian life", Judgment of 28 July 1998, § 79.

12 *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, §§ 171 and 199.

13 *Isayeva v. Russia*, Judgment of 24 February 2005, §§ 187–189.

14 *Ibid.*, at § 180, and *Isayeva v. Yusupova and Bazayeva v Russia*, above note 12, at § 178.

when the rebels are not at that time actively involved in hostilities. No one has attempted to argue that this is contrary to human rights law since it is understood that rebels who are organized, armed and assembled cannot be arrested.<sup>15</sup>

Cases in which the degree of force against rebels themselves has been considered all concerned situations that were *not* actual armed hostilities. The common thread in all of these decisions is that if an arrest can easily be effected, then a use of lethal force would be “more than absolutely necessary”. The most significant case is that of *Guerrero v. Colombia* before the United Nations Human Rights Committee. This concerned the suspicion by the government that a “guerrilla organization” had kidnapped a former ambassador and was holding him hostage at a house. When the house was visited no hostage was found, but the government forces nevertheless waited for the return of the rebels and shot each of them at point-blank range, even though they were not armed at that time. The Committee began by reaffirming that the state of emergency that existed in Colombia at the time could not have the effect of derogating from the right to life. It then found the use of force to be a violation of the right to life, since an arrest would have been possible in these circumstances. It came to this conclusion by taking into account the following factors:

[T]he police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned.<sup>16</sup>

Several cases before the ECHR have underlined a distinction between the planning of a police operation and the actual use of force by police officers. The most significant of these is the case of *McCann v. United Kingdom*, which concerned the killing of members of the Irish Republican Army (IRA) in Gibraltar. The Court found that the action of the police officers who fired on them was not a violation of the right to life since they genuinely thought that the IRA members were on the point of detonating a car bomb.<sup>17</sup> On the other hand, the Court found a violation of this right by the United Kingdom because it had had sufficient opportunity beforehand on the same day to arrest the persons (especially when they crossed the border into Gibraltar) and therefore the government had not planned the operation in a such way as to minimize the need to use force against them. In particular the Court did not accept the government’s argument that it waited until the last moment in order to ensure that it had enough evidence against them:

15 Report of the expert meeting, above note 4, Section B.7.

16 Human Rights Committee, Communication No. R.11/45, Views, 31 March 1992, UN Doc. Supp. No. 40(A/37/40). § 13.2.

17 *McCann v. United Kingdom*, European Court of Human Rights, Judgment of 5 September 1995, § 200.

[T]he danger to the population of Gibraltar – which is at the heart of the Government's submissions in this case – in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial.<sup>18</sup>

The mere suspected presence of rebels is not enough to justify the use of lethal force. In the case of *Güleç v. Turkey*, in which the police used a machine gun to restore order during a demonstration, the Court did not accept the argument of the government that the demonstration had lapsed into insurrection because of the presence of members of the PKK who had fired at random.<sup>19</sup> It held that not only was there no evidence that members of the PKK were present but also that the use of force under Article 2(2)(c) of the Convention requires a balance to be struck between the aim pursued and the means employed. In particular, a state of emergency existed in the province concerned. As the authorities should have expected disorder, it should have had the necessary equipment such as truncheons, riot shields, water cannon, rubber bullets or tear gas.<sup>20</sup>

In several cases treaty bodies have considered that the use of lethal force against persons who are not dangerous to be excessive, even in situations where arrest is not possible. The most significant of these are the *Brothers to the Rescue* case, in which Cuban forces shot down a small civilian plane that had allegedly violated Cuban airspace,<sup>21</sup> and the case of *Nachova v. Bulgaria*, in which persons who were absent without leave from the army (and who had previously had convictions for theft) were shot whilst trying to escape.<sup>22</sup> These cases did not concern events in situations of armed conflict, but since human rights law does not make a distinction between armed conflict and peace, this proportionality principle would apply at all times. The finding that the use of lethal force was excessive was explained in the *Nachova case* in the following terms:

[T]here can be no [necessity to put human life at risk] where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.<sup>23</sup>

An *a contrario* reading of this case would be that if they had posed a threat to life or limb or were suspected of having committed a violent offence, then the use of force would not have been a violation if the opportunity to arrest them would have been lost without such use of force.

Finally, a significant document under human rights law, often referred to by treaty bodies, is the United Nations Basic Principles on the Use of Force and

18 Ibid., at § 205.

19 *Güleç v. Turkey*, European Court of Human Rights, Judgment of 27 July 1998, § 67.

20 Ibid., at §§ 71–73.

21 Case of *Armado Alejandro Jr. and Others v. Cuba (Brothers to the rescue)*, Inter-American Commission on Human Rights, Case No. 11.137, Report No. 86/99, 29 September 1999, §§ 37–45.

22 *Nachova v. Bulgaria*, European Court of Human Rights, Judgment of 6 July 2005.

23 Ibid. § 95.

Firearms by Law Enforcement Officials. Principle 9 of this document limits the use of force to that which is strictly necessary

in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.<sup>24</sup>

It should be noted that these grounds for the possible use of force are alternatives and not cumulative. Therefore the possible use of force is not limited to the imminence of the threat but to the real necessity and proportionality of such use. The footnote to these Principles specifies that they also apply to military personnel when such persons “exercise police powers”.

### The requirement to investigate

Although a duty to investigate is not included in the treaties themselves, human rights treaty bodies have stated that in cases of deaths resulting from the use of lethal force, including those occurring during armed clashes, the right to life requires an investigation by state authorities.<sup>25</sup> This conclusion is based on their interpretation of the requirement of states to “ensure respect” of the rights – that is, positive measures are needed to ensure that the rights are respected. An investigation is needed to establish whether the use of force was unlawful and, if so, to prosecute the persons concerned. Although not stated as such by these treaty bodies, another valid reason is that such an investigation allows authorities to learn from any mistake and avoid violations in the future.

The Inter-American Court of Human Rights stated that since states must adopt measures to protect and preserve the right to life, it is essential to investigate extra-legal executions through an effective official investigation and to punish persons responsible; not to do so creates a climate of impunity.<sup>26</sup>

The conditions spelled out for such investigations have been explained by the European Court of Human Rights in the following terms:

[T]he authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ...

24 Adopted by the UN General Assembly in Resolution 45/166, 18 December 1999.

25 For example, European Court of Human Rights cases: *Mahmut Kaya v. Turkey*, Judgment of 19 February 1998, § 91, and *Isayeva v. Russia*, above note 13, at § 209; African Commission on Human and Peoples’ Rights case: *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Com. 74/92, Decision of 11 October 1995, § 22; Inter-American Court of Human Rights cases: *Mynra Mack Chang v. Guatemala*, Judgment of 25 November 2003, §§ 152–158 and *Humberto Sanchez v. Honduras*, Judgment of 7 June 2003, §§ 107–113; UN Human Rights Committee case: *Baboeram v. Suriname*, Com. No. 146, and 148–154/1983, Views, 4 April 1985, § 14.

26 Case of *Mynra Mack Chang v. Guatemala*, above note 25, at §§ 153–158.

For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... This means not only a lack of hierarchical or institutional connection but also a practical independence ...

The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... This is not an obligation of result, but of means ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard ...

A requirement of promptness and reasonable expedition is implicit in this context ... While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts ...

For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests ... <sup>27</sup>

The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has specifically addressed the issue of accountability for violations of the right to life in armed conflict and occupation. He referred in particular to IHL's specific rules relating to war crimes together with governments' obligations to respect, and ensure respect of, IHL. This requires an obligation effectively to investigate suspected violations, using impartial and independent procedures, and to prosecute and punish violations. More generally, he stressed the need for a systematic supervision and periodic investigation so that institutions, policies and practices ensure that the right to life is upheld as effectively as possible by the military. In this regard he recognized that there are certain unique characteristics of armed conflict, but that investigation would be needed to evaluate, for example, whether the deceased was taking part in hostilities. He also stated that such an investigation would be facilitated if there were indicators and criteria to evaluate a possible breach of proportionality and if belligerents kept records for post-conflict investigation. The advantage for the military would be to allow belligerents to counter false accusations, as well as suggestions by some critics that IHL is not respected in practice.<sup>28</sup>

27 *Isayeva, Yusupova and Bazayeva v. Russia*, above note 12, at §§ 209–213.

28 P. Alston, Report to the Human Rights Commission, 8 March 2006, UN Doc. E/CN.4/2006/53, §§25–26.

The Special Rapporteur deplored in particular policies that have permitted unjustifiable exceptions to these requirements and the lenient punishment of those military personnel who are convicted of murders. He likewise stressed the need for transparency in investigating suspected violations in order to prevent impunity: “the results of the investigation must be made public, including details of how and by whom the investigation was carried out, the findings, and any prosecutions subsequently undertaken”.<sup>29</sup>

Like human rights treaties, a duty of investigation is not spelled out in IHL treaties, but this author agrees with the UN Special Rapporteur; a *bona fide* interpretation of IHL must come to the same conclusion – that is, any suspected violation of IHL needs to be properly investigated for the reasons stated by the human rights treaty bodies.

## Non-international armed conflicts

Unlike international armed conflicts, which clearly categorize people as either “combatants” or “civilians”, IHL does not formally recognize the status of “combatant” in non-international conflicts. This is not due to any altruistic articulation by governments of the need to avoid using force against all persons during such conflicts, but rather because of their insistence that rebels must not in any shape or form benefit from any kind of international recognition. Since combatants generally benefit from prisoner-of-war status during international conflicts, thus protecting them from trial for having taken part in hostilities, such a result could not be envisaged in the case of rebel forces. On the other hand, it is accepted that there cannot be an unlimited use of force by governments during such conflicts.

Common Article 3 of the Geneva Conventions and Additional Protocol II have tried to use the notions of IHL to protect inoffensive persons whilst at the same time avoiding any hint of “combatant” status. The result is confusing and has caused controversy. One interpretation is that the reference to “armed forces”<sup>30</sup> and “armed groups”<sup>31</sup> means that force can automatically be used against them, especially since these same provisions stress the need to avoid using force against persons not taking “an active part in hostilities”<sup>32</sup> or “civilians [not taking] a direct part in hostilities”.<sup>33</sup> Indeed, the Commentary to Additional Protocol II supports this interpretation, since it states that force may be used against armed groups without reference to any further conditions.<sup>34</sup> The second interpretation is that the use of force turns entirely on what the phrase “direct part in hostilities”

29 Ibid., at §§ 33–43.

30 Common Article 3 of the Four Geneva Conventions of 1949.

31 Article 1 of Additional Protocol II, 1977, refers to “dissident armed forces” and “other armed groups”.

32 Common Article 3 of the Four Geneva Conventions of 1949.

33 Article 13 of Additional Protocol II, 1977.

34 Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary to the Additional Protocols of 1977*, ICRC, Geneva, 1987, § 4789.

means. This interpretation is based on the fact that the reference to “armed groups” in Article 1 of Additional Protocol II is only for the purpose of describing the situation that must exist for the Protocol to apply, and that the only reference to the use of force against persons is in Article 13, which protects from attack civilians not taking a direct part in hostilities.

The experts at the meeting held by the UCIHL were divided on which should be the best interpretation. They therefore went on to consider whether human rights law, which applies to such situations, could help resolve the issue of when force could be used and against whom. As already seen, human rights law requires a state’s forces to effect an arrest where possible and to plan operations in such a way as to maximize the possibility of being able to arrest persons. On the other hand, in cases where state bodies do not exercise sufficient control, human rights law does not impose such a requirement.

Some of the experts hesitated in coming to the conclusion that persons belonging to armed groups could be sometimes exempt from attack. However, the majority felt that even fighting members of such groups would be exempt from attack in situations where they presented no threat and could easily be arrested – the hypothetical case of a rebel in the process of doing his shopping in the supermarket was referred to. One basis for this conclusion was that he would be a person not taking “a direct part in hostilities” at that time – this would be based on the second interpretation of the relevant IHL provisions referred to above without the need for reference to human rights law.<sup>35</sup> The second basis for this conclusion is an amalgam of the first interpretation of the IHL provisions and human rights – that is, persons belonging to armed groups can, in principle, be attacked but, under human rights law, must not be if they could be easily arrested.<sup>36</sup>

One concern discussed during the expert meeting was whether a prohibition from attacking rebels when they could be arrested would create an imbalance of responsibilities between government forces and rebel forces.<sup>37</sup> It was pointed out that IHL depended very much on the legal equality of opposing forces. However, others, including this author, stressed that in reality there is no such equality during non-international conflicts, since rebels remain criminals under domestic law and IHL respects this. Rebels are, therefore, at a disadvantage in this respect. A perfect analogy with IHL applicable to international conflicts does not yet exist. On the other hand, it is normal that governments have more responsibilities under international law than their citizens, in this case the restrictions of human rights law.

35 This is the approach taken in the ICRC Commentary when explaining this phrase in Article 51(3) of Additional Protocol I, 1977: “Once he ceases to participate, the civilian ... may no longer be attacked ... there is nothing to prevent the authorities capturing him in the act or arresting him at a later stage”. *Ibid.*, at § 1944.

36 Report of the expert meeting, above note 4, Section F.3–5. This amalgamation of IHL and human rights is proposed by David Kretzmer in his article “Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence”, *EJIL*, Vol. 16, no. 2 (2005), p. 171.

37 Report of the expert meeting, above note 4, Section F.6.

This author would support the notion that armed forces are targetable, without the need for imminence of danger, provided that rebel “armed forces” or “armed groups” are narrowly defined to include only those members who regularly do the actual fighting. This was suggested by the ICRC<sup>38</sup> in the context of the meetings on the meaning of “direct participation” after several participants in earlier meetings pointed out the danger of allowing an attack on “armed groups” without further specification. Persons who are involved in the activities of armed groups, whether voluntarily or under pressure, vary and most of them do not use force. Further, it is not uncommon for governments to label an ethnic group as a whole as a “rebel group”, when only some of its members are using force. The second condition is that, even as regards the fighting rebel forces, they must not be attacked on sight if they can be easily arrested without undue risk for government forces. Such situations do occur in reality. These conditions respect both IHL and human rights: they would allow government forces to deal with the insurrection but at the same time require the government to take the necessary measures to plan for an arrest where possible rather than use lethal force. As for persons who are not fighting members of armed groups, then an attack can only be possible if it respects Article 9 of the UN Basic Principles, which, it must be remembered, spells out in which circumstances the use of force by state officials is possible to prevent potentially lethal violence by a person. If these conditions are not respected, then if lethal force is used before the suspected person executes a violent act a government executes a mere suspect, or if the government kills the person after such a violent act, it is in effect punishing the person with an instant death penalty.

It needs to be remembered that IHL relating to the use of lethal force against a *person* is different from the law relating to the attack of military objectives, that is, objects. The two should not be confused. The ICRC Commentary on the meaning of “direct participation in hostilities [by civilians]” in Article 51(3) of Additional Protocol I is as follows: ““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”.<sup>39</sup>

The evaluation of whether an *object* may be attacked does not require that the object uses, or is on the point of using, force, but only whether it effectively *contributes* to the military action of the enemy and attacking it gives one a direct military advantage. This is a less restrictive test than that governing the deliberate targeting of persons. Consciously or unconsciously using the reasoning associated with the choice of military objectives when deciding on an attack against persons widens the possible scope of human targets beyond what was in the mind of the negotiators of Article 51(3) of Protocol I and the same provision in Article 13 of Additional Protocol II.

38 Draft Interpretative Guidance on the Notion of “Direct Participation in Hostilities”, Fourth Expert Meeting on the “Notion of Direct Participation in Hostilities”, 27–28 November 2006, Section B.II (on file with the author).

39 Commentary to the Additional Protocols of 1977, above note 34, at § 1944.

## Military occupation

### Combined applicability of human rights law and international humanitarian law

Both the International Court of Justice and human rights treaty bodies have insisted that human rights law applies, alongside IHL, to military occupations.<sup>40</sup> Although the US and Israeli governments have both stated that only IHL applies, there is extensive state practice, in the form of General Assembly and Security Council resolutions, insisting on respect of both human rights and IHL in such situations.<sup>41</sup>

The conditions relating to the use of lethal force in occupation is different from non-international conflicts in that occupation relates to an international conflict, albeit with its own specific rules under IHL. As such it is a condition *sui generis*. Nevertheless, The Hague Regulations of 1907 and the Fourth Geneva Convention, which regulate occupation,<sup>42</sup> do not spell out when lethal force may be used, thus leaving a significant degree of uncertainty. The participants in the UCIHL expert meeting considered the situation in some detail.<sup>43</sup> The discussions carefully took into account the fact that the situation on the ground can vary considerably, not only in time but also in different parts of the territory; thus some parts of the territory can be relatively calm whereas in others there may be an outbreak of hostilities.

### The use of lethal force in “calm” occupations

It is generally agreed that in situations that are relatively calm, the use of potentially lethal force during occupation is governed by the “law enforcement model” – that is, human rights law which requires that a state effect an arrest where possible. The United Nations Human Rights Committee, in its report on Israel, stated that “Before resorting to the use of deadly force, all measures to arrest and detain persons suspected of being in the process of committing acts of terror must be exhausted”.<sup>44</sup>

A minority view in the expert meeting was that when an occupying power needs to take measures to protect its own security, then IHL provisions apply

40 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. 2004, §§ 102–114, and the *Case Concerning Armed Activities on the Territory of the Congo*, Judgment, 19 December 2005, ICJ Rep. 2005, § 216; UN Human Rights Committee, General Comment 31 § 10 and its Concluding Observations on the Second Periodic Report of Israel, 21 August 2003, § 11; European Court of Human Rights, *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, §§ 63–64, and supporting Resolution DH 105 by the Council of Europe Committee of Ministers, adopted 24 July 2000.

41 See discussion of this point in Report of the expert meeting, above note 4, Section B.6.

42 Regulations annexed to the Hague Convention 1907, Articles 42–56; Fourth Geneva Convention 1949, Articles 1, 2, 4–34, 47–149.

43 Report of the expert meeting, above note 4, Section D.

44 Concluding Observations, Israel: UN Doc. CCPR/CO/78/ISR, 21 August 2003, § 15.

because such action is connected with the international armed conflict rather than the pure maintenance of order in the occupied territory.<sup>45</sup> However, in the opinion of this author, such a distinction would be difficult to apply in practice, and such treaty provisions as do exist do not point to such a distinction. In particular, Articles 5 and 64 of the Fourth Geneva Convention do imply that persons who are a danger to the security of the occupying state will be subject to criminal legislation and detention rather than fired on as a matter of course. All agreed, however, that the response to a riot or violent demonstration needs to be that of the law-enforcement model.

Another issue that was considered was whether lethal force could be used against members of the armed forces of the occupied state. It was generally agreed that if such forces are in the process of conducting combat operations in the occupied territory then the normal rules of IHL would apply, including the categorization as combatants of resistance movements which comply with the conditions set forth in Article 4.A(2) of the Third Geneva Convention.

Finally, the group discussed the possible use of force against foreign fighters acting against the occupying state. It was generally agreed that as the threshold of the outbreak of an international armed conflict is low (i.e. any use of force by the armed forces of a state against another state), if foreign fighters are sent by a third state to fight the occupying state and if they fulfil the conditions of being “combatants”, then they may be targeted on sight in accordance with the rules of IHL. If they do not fulfil these conditions, then they are civilians who can be attacked only while they are taking a “direct part in hostilities”.<sup>46</sup>

### The situation where there has been a resumption or outbreak of hostilities<sup>47</sup>

It was generally agreed that when there is a situation of armed hostilities in an occupied territory, the IHL rules relating to the conduct of hostilities apply. The question was, therefore, when it can be determined that such a situation exists. If the situation in an occupied territory is relatively calm, then the mere use of military force by the occupying state cannot of itself trigger IHL rules – otherwise this would render meaningless the rule that the law enforcement model applies to such a “calm” occupation. Therefore the hostilities must result from combat activity initiated by those challenging the occupation. The distinction was made between violence and disorder which resemble riots or ordinary criminal activity, which are governed by the law-enforcement model, and military hostilities, which would be governed by IHL.

As already mentioned above, it had been agreed that use of military force by the *armed forces* of the occupied state would entitle the occupying state to attack them. Would such an entitlement allow the occupying power to conduct military operations in accordance with IHL throughout the entire territory? The

45 Report of the expert meeting, above note 4, Section D.3(a).

46 Article 51(3) of Additional Protocol I, 1977.

47 Issue discussed in Report of the expert meeting, above note 4, Section D.4.

majority view was that if most of the territory was “calm”, then the conduct of hostilities under IHL rules would apply only to the incident concerned.

The most common situation, however, is military resistance activity within the occupied territory by groups not officially members of the occupied state’s armed forces. The experts agreed that the threshold for determining the “resumption” or “outbreak” of hostilities by such a group, of a nature to reintroduce the IHL rules relating to the conduct of hostilities, is not specified in IHL treaties. A view was put forward that if such groups do not belong to one of the parties to the original armed conflict, then such hostilities should be seen as a non-international conflict. The majority disagreed with this characterization, however, since an occupation is by definition part of an international armed conflict. The only possible exception, entitling such a situation to be seen as a non-international conflict, is when the displaced sovereign clearly does not support the resistance movement.

Although the majority thought that such resistance activity, where sufficiently serious, would amount to an international conflict, all the experts were of the view that, given the lack of guidance in IHL treaties, the test used to establish the existence of a non-international conflict would be a useful one for this context also. The test requires a certain intensity and duration of violence of the sort that requires the state to use military measures<sup>48</sup> – that is, law-enforcement operations would be inadequate to restore order. Isolated, sporadic attacks by resistance movements would not meet the required threshold.<sup>49</sup> The experts recognized that this test for the use of IHL conduct of hostilities rules relating to international conflicts in occupied territory is an invention, but given that the law so far gives no guidance, they thought that it was the most reasonable threshold available.

As the applicable law to situations of violence – IHL or human rights law – depends on the analysis outlined above, the experts stressed the need for clear rules of engagement and effective training, so that soldiers are able to distinguish the war-fighting situation from the law-enforcement situation.

## Targeted killings

A targeted killing is a lethal attack on a person that is not undertaken on the basis that the person concerned is a “combatant”, but rather where a state considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaging in hostile activities.<sup>50</sup>

48 The test used by the International Tribunal for the former Yugoslavia is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”, *Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, IT-94-1-AR72, § 70.

49 As specified in Article 1(2) of Additional Protocol II, “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence” do not amount to armed conflict.

50 Definition used by the experts of the UCIHL’s meeting, Report of the expert meeting, above note 4, Section E.

The issue of targeted killings was considered by the United Nations Human Rights Committee in the context of its review of the report submitted by Israel. The Committee stated that

The State Party should not use “targeted killings” as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.<sup>51</sup>

More recently the Israeli Supreme Court considered whether targeted killings carried out by the Israeli government are lawful.<sup>52</sup> It held that hostilities were taking place in the context of an international armed conflict but that the “terrorists”<sup>53</sup> are not combatants.<sup>54</sup> Therefore they were to be considered as “civilians”. It then went on to analyse whether they were taking a “direct part in hostilities”. The Court was of the view that if a person belongs to an armed group and “in the framework of his role in that organization he commits a chain of hostilities” he loses his immunity from attack.<sup>55</sup> The Court went on to say, however, 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 ... Thus, if a terrorist

51 Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR, § 15.

52 *The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel, the Prime Minister of Israel, the Minister of Defense, the Israel Defense Forces, the Chief of the General Staff of the Israel Armed Forces, and Shurat HaDin – Israel Law Center and 24 others*, Israeli Supreme Court Sitting as the High Court of Justice, Judgment of 11 December 2005.

53 This is the term used by the Court, although this author would prefer referring to the persons concerned as resistance fighters, since this reflects the situation more accurately whilst not condoning in any way their attacks on civilians, such attacks being war crimes.

54 Because according to the Court they do not belong to armed forces, neither can they be militias with such status, because they do not wear a fixed distinctive sign recognizable at a distance nor respect the laws and customs of war, Judgment, above note 52 at § 24.

55 *Ibid.*, at § 39. The Court quotes passages from the ICRC Commentary to the Additional Protocols to support its view that to restrict the notion of “hostilities” to combat and active military operations would be too narrow. The relevant part of the ICRC Commentary states that: “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”, above note 34, at § 1943. On this basis the Israeli Supreme Court rather expansively concluded that “hostilities” included a civilian bearing arms who is one his way to the place where he will use them against the army or on his way back from it as well as a person who collects intelligence on the army, a person who transports fighters to or from the place where hostilities are taking place, a person who operates weapons which fighters use, or supervises their operation or provides service to them. This is wider than the ICRC suggestion for the understanding of “fighters” within a group as mentioned on p. 891 of this article.

taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed ... A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force ... 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 ... However, it is a possibility which should always be considered. 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 realisable 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 ... [A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent ...<sup>56</sup>

The Court supported these conclusions by referring to the principle of proportionality under its internal law and the European Court of Human Rights judgment in the *McCann* case. In effect it therefore used human rights law, although it did not refer to the UN Human Rights Committee.

The expert group convened by the UCIHL considered whether targeted killings could ever be lawful in the context of occupation where there has not been a resumption of hostilities – that is, where the law-enforcement model applies. It was generally agreed that in most situations, it would not be lawful. This is because in “calm” occupations, the occupying state exercises sufficient control to arrest the person concerned. In such situations lethal force can only be used if there is an imminent threat of death or injury to the arresting officer or to a third person or if it is the only way to stop the escape of a dangerous person.

A possible exception to this conclusion could be where the person concerned is in an area in which either the occupying state has given up jurisdiction under an agreement,<sup>57</sup> or in which the occupying state has lost physical control. The experts recalled that Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials includes, as one possible basis for the use of lethal force, “prevent[ing] the perpetration of a particularly serious crime involving grave threat to life”.

Given that a state is under an obligation of due diligence to protect the life of its citizens against the potentially lethal actions of non-governmental persons,<sup>58</sup>

<sup>56</sup> Ibid., at § 40.

<sup>57</sup> For example, “Area A” in the Israeli-occupied territory under the Oslo accords.

<sup>58</sup> Human rights treaty bodies have found states to have violated the right to life where governmental authorities knew, or should have known, that individuals are in real danger of being killed by non-governmental persons. See, for example, *Kiliç v. United Kingdom*, European Court of Human Rights, Judgment of 28 March 2000, § 63. In the case of *Velasquez Rodriguez v. Honduras*, the Inter-American

the experts thought that Principle 9 would not consider a targeted killing to be illegal in the following exceptional situation:

1. It is carried out in an area where the state does not exercise effective control so that it cannot reasonably effect an arrest; and
2. the state authorities have sought to transfer the individual from whatever authority is in control of the area, assuming that there is such an authority; and
3. the individual has engaged in serious, life-threatening, hostile acts and the state has reliable intelligence that the individual will continue to commit such acts against the lives of persons the state is under an obligation to protect; and
4. other measures would be insufficient to address this threat.<sup>59</sup>

Although the experts only considered this question in the context of occupation, there is no obvious reason why it should not apply to persons in non-international armed conflicts who are not fighting members of rebel armed groups and are not at that moment engaging in violent acts. Of course in both this situation, and any other, the quality of intelligence and procedural requirements are of extreme importance, since any rule that might exceptionally allow targeted killings is subject to considerable potential for abuse.

## Procedural requirements

Any use of lethal force against a person depends on the proper identification of the victim. This is the origin, of course, of the rule requiring, in international armed conflicts, that combatants (who may be attacked on sight) distinguish themselves visually from the civilian population either through the wearing of a uniform and/or the carrying of arms openly.<sup>60</sup>

In the context of occupation or of non-international armed conflict, the proper identification of persons suspected of belonging to rebel armed groups is often both difficult and of crucial importance. One expert noted that an important rationale behind the rule that civilians may only be targeted for such time as they participate in hostilities is to avoid mistakes in identification.<sup>61</sup>

Court of Human Rights stated that “The State has a legal duty to take reasonable steps to prevent human rights violations” and “The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention”, Judgment of 29 July 1988, §§ 174 and 176; the UN Human Rights Committee has stated that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations ... by its agents, but also against acts committed by private persons or entities”. It went on to list measures required to exercise due diligence which included preventive ones, General Comment 31, UN Doc.CCPR/C/21/Rev.1/Add.13(2004), § 8.

59 Report of the expert meeting, above note 4, Section E.2.

60 The extent to which the wearing of a uniform is still required for POW status is different from the issue of combatant status (i.e. such persons can be attacked on sight) which is automatically accorded to members of the armed forces.

61 Report of the expert meeting, above note 4, Section D.3(c). This comment was actually made in the context of targeting foreign fighters entering occupied territory, but is perfectly relevant to the use of force against armed groups not wearing uniform and other persons not at that moment using violence.

Any use of force against a civilian not at that moment using violence has the potential of being a mistake and such a mistake would be particularly serious in the case of a targeted killing. For this reason, the experts at the UCIHL meeting stressed the need for procedural requirements both before and after any such killing. A procedure would be needed beforehand to consider (i) whether the individual the state wants to target is indeed someone who has committed and will probably continue to commit serious hostile acts;<sup>62</sup> and (ii) whether there exists a necessity to kill this person in order to protect the lives of others. The experts were concerned that this procedure, although crucial, could not help but resemble something of a trial *in absentia*, and therefore such a procedure in no way relieves the state of its obligation to try to arrest individuals if possible.<sup>63</sup> The second part of the required procedure is the human rights requirement for a credible investigation into whether the state's use of force was lawful.<sup>64</sup> Knowledge that an independent investigation will automatically have to take place, the results of which will be made public, should have the effect of deterring such targeted killings except in the most exceptional of situations.

As we have already seen, the requirement to plan and to conduct investigations are not limited under human rights law to targeted killings but to any use of lethal force by state authorities where there is a possibility that such force was illegal. Although states do not generally believe that they are required to conduct such an investigation whenever they use force, and indeed during hostilities in an international armed conflict this would hardly be feasible, if there is a suspicion of possible illegality, then a *bona fide* interpretation of IHL would require an investigation in order to ensure that its forces respect the law.

## Are human rights rules incompatible with international humanitarian law?

### The *lex specialis* nature of international humanitarian law<sup>65</sup>

It is well known that IHL has had a different origin and development from human rights law, and only recently has there been an intentional overlapping of the two.<sup>66</sup> It makes sense to recognize that specific rules created for armed conflict

62 The majority of experts did not accept that incitement could be included in the definition of such acts, especially in the case of general incitement, as this would be subject to tremendous abuse. *Ibid.*, Section E.6.

63 *Ibid.*, Section E.5.

64 See pp. 887–889 above of this paper.

65 The term *lex specialis* has been used primarily to state that more detailed rules in a particular branch of law are to be used by way of interpretation when applying a more general rule in the same branch of law. In this section, we are speaking of two branches of law, IHL and human rights law, but for the sake of ease, the discussion below will use the term *lex specialis* as the International Court of Justice did, i.e. IHL as the branch of law specially created for armed conflict.

66 For example, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000; Articles 75 and 6 of Additional Protocols I and II respectively.

continue to be of importance and cannot be simply brushed aside if the same rules do not appear in human rights law. This was recognized by the International Court of Justice in the *Palestinian Wall* case which confirmed the concurrent applicability of human rights law and IHL to armed conflicts in the following manner:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>67</sup>

All the experts at the UCIHL meeting were of the view that the Court's understanding of the term *lex specialis* in this context is not clear. That is why it went on to discuss how the concurrent application to both areas of law should work in practice as regards the use of lethal force in both non-international conflicts and situations of occupation.

The meeting did not have on its agenda the use of force during hostilities in international conflicts, since the relationship between IHL and human rights law is not such a pressing issue in such conflicts. In a situation that is not one of occupation, a human rights treaty may not apply since the attacking state may not have jurisdiction due to lack of actual control of the territory,<sup>68</sup> although the Inter-American Commission has applied the American Declaration of the Rights and Duties of Man to the lethal use of force against persons outside the attacking state's jurisdiction.<sup>69</sup>

Since, in principle, human rights law does apply to all situations, including international conflicts where the attacking state has jurisdiction, then it is worth considering whether the ICJ's third category – that is, both human rights and IHL as *lex specialis* – could be meaningful.

The rules relating to combatant status in international conflicts are not only relatively clear, but also have a long history. As already mentioned, human rights law does not categorize people and does not concern itself as to whether there is an armed conflict or not.<sup>70</sup> It would make sense to recognize the categories of persons under IHL – that is, combatants vs. civilians – as *lex specialis* and therefore accept that an attack on a combatant in an international armed conflict

67 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 40, § 106.

68 European Court of Human Rights: *Issa v. Turkey*, Judgment of 16 November 2004, §§ 68–74.

69 *Brothers to the rescue*, above note 21, at § 23; this case concerned the attack on a civilian plane in international air space; *Disabled Peoples International v. United States*, Application No. 9213, Admissibility Decision of 22 September 1987: this case concerned the bombing by US aircraft of a mental health hospital in Grenada before ground troops arrived. The case was declared admissible although a friendly settlement was subsequently reached.

70 The only “category” with which human rights law concerns itself is a situation in which a State has made a valid derogation.

is lawful. In the case of the European Convention on Human Rights, and provided that the state concerned made a statement of derogation,<sup>71</sup> then the exception of “lawful acts of war” would come into play in an international armed conflict. In the case of the other human rights treaties, attacks on combatants would not be regarded as “arbitrary”.

The specific IHL rules on when a combatant may not be attacked because he or she is *hors de combat* also reflect, in this author’s view, a straightforward instance of *lex specialis* for both international and non-international conflicts.<sup>72</sup> The important issue is whether human rights law adds extra conditions to the IHL prohibitions on attack, that is, in addition to the prohibition of attacking combatants *hors de combat* as now defined in IHL. As we have already seen, in the case of occupation and non-international armed conflicts, the answer is clearly in the affirmative in cases where such persons may be arrested. Could this apply to international armed conflicts? Theoretically, from the point of view of human rights law, there is no reason why not, provided that there is jurisdiction. It would make most sense in the case of civilians taking “a direct part in hostilities”, since it is unclear under IHL what this encompasses exactly. It would be more difficult, however, in the case of combatants. IHL treaties do not provide a rule that, in addition to the recognized cases of combatants *hors de combat*, a combatant may not be attacked if he or she may be arrested. However, in this author’s opinion, the reason for this absence should be looked at more carefully, in particular in the light of the old rule concerning the prohibition of assassination, in order to see whether the human rights rule is so very different from the original rules and philosophy of IHL.

## The prohibition of assassination

The recognized categories of *hors de combat*, in particular surrender, wounds, shipwreck and bailing out of aircraft in distress, presuppose that such a condition occurs during hostilities. In addition, Article 41 of Additional Protocol I refers to a person being *hors de combat* if he is in the power of the adverse party, provided that he abstains from a hostile act. This is normally understood as meaning someone who is detained or captured, but not a combatant still with his unit whilst hostilities are still occurring between the belligerents (i.e. whilst the armed conflict still exists).

These rules reflect the traditional concept of IHL, as developed by professional armies, that there was a code of honour between opposing professional soldiers. This principle prohibited “treachery”.<sup>73</sup> It is important to

71 A state would not want to be limited to the situations in which force can be used set forth in para. 2 of Article 2 of the ECHR (see p. 883 above of this paper). In practice, European states have not made such derogations in relation to the use of force against combatants in international conflicts abroad.

72 This is codified in Article 23(c)–(d) of the Hague Regulations 1907, Articles 41 and 42 Additional Protocol I 1977, Article 12 of Geneva Convention II (for armed conflicts at sea) and Common Article 3 for non-international conflicts.

73 Article 23 (b) of the Hague Regulations states that “it is especially forbidden ... to kill or wound treacherously individuals belonging to the hostile nation or army”.

note that “treachery” was not limited to the modern concept of “perfidy” as defined in Article 37 of Additional Protocol I, but included also the prohibition of assassination.

Several sources make this clear.

The Oxford Manual of 1880 states that it is forbidden

to make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender.<sup>74</sup>

Oppenheim states that Article 23 (b) of the Hague Regulations prohibits any treacherous way of killing and wounding combatants. Accordingly: no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.<sup>75</sup>

The seriousness with which assassination was viewed is reflected in the Lieber Code:

The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow murder committed in consequence of such proclamation, made by whatever authority. Civilised nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.<sup>76</sup>

This statement is not linked to perfidy. Although the statement refers to proclamations and murder by a captor, it should be remembered that in 1863 assassination by missiles and bombs from aircraft was not a technical possibility. Therefore it is the underlying reason, namely a lack of honour, that motivated the rule.

This is made clear by Westlake on his treatise on war published in 1907: killing individuals, outside the cases of fighting or military punishment to which they have made themselves liable, is killing persons who have had no reason to put themselves on their guard, and is therefore treacherous killing.<sup>77</sup>

The old British *Manual of Military Law*, which included the prohibition of assassination, defined it as

74 *Oxford Manual*, adopted by the Institute of International Law on 9 September 1880, Article 8 (b).

75 L. Oppenheim, *International Law, Vol. II, Disputes, War and Neutrality*, ed. H. Lauterpacht, 7th edn, Longman's, Green & Co., London, 1952, p.341, § 110.

76 *Instructions for the Government of Armies of the United States in the Field*, 1863, Article 148.

77 John Westlake, *International Law, Part II, War*, Cambridge University Press, Cambridge, 1907, p.75.

the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans.<sup>78</sup>

If one looks at these old rules against the background of methods of warfare in those days, hostilities occurred primarily through direct close fighting and the use of sieges. It is obvious that arrest was not an option in such situations: capture was only possible if the person surrendered or was wounded in a way that he could not continue fighting. If one wished to kill combatants outside such situations, one would have to resort to assassination; but this was forbidden for the reason explained by Westlake above.

Let us now try to use this notion in modern conditions: hostilities now occur not only during battles on the ground but also from a distance by aircraft and missiles. Thus the prohibition of assassination under the old law, which was based on the fact that the normal mode of hostilities was to attack combatants during a ground battle, is no longer meaningful today. It is therefore doubtful that the rule prohibiting assassination of combatants still survives in modern IHL. The new British manual departs from the old one by stating that there is “no rule dealing specifically with assassination”.<sup>79</sup> The situation now, therefore, appears to be that unless a combatant has not yet been called up (i.e. is still a reservist), he or she can technically be attacked in any place at any time during an international armed conflict.<sup>80</sup>

In the context of non-international conflict and occupation, where the IHL rules are not so clear, we have seen that a person in territory under the control of government forces must, under human rights law, be arrested if this can be done without more risk for such forces than normal arrest procedures for dangerous persons. This can only occur in situations outside combat and only where the person concerned is close enough to be arrested. As we have seen, under the traditional law of war, killing combatants in such situations would have been considered an assassination. Is human rights law therefore so incompatible, at least with the original rules and philosophy of the law of war? In the view of this author, the specific rules of human rights law as they apply to the right to life, and as these have been interpreted in practice, are not incompatible.

During the fourth expert meeting on the meaning of “direct participation in hostilities” held by the ICRC and the Asser Institute, the ICRC proposed a rule that would mirror the human rights rule, but by reference to the fact that killing persons when they could be arrested does not fall within military necessity.<sup>81</sup> There is a difficulty with relying on a reference to military necessity, since this notion is usually an underlying principle rather than a rule, unless it is specifically referred

78 *The Law of War on Land, Part III of the Manual of Military Law*, War Office, 1958, § 115.

79 *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2004, § 5.13.

80 This author persists in her minority view that a combatant on leave in a different country and well outside the theatre of war should expect to be left alone. However, probably due to the demise of notions of honour and chivalry, this is, it seems, no longer accepted by the majority, since modern manuals do not mention such an exception to the ability to attack.

81 Above note 38, commentary to section D.IX.

to in a rule. The provisions under IHL that state that a civilian loses immunity from attack when taking a direct part in hostilities do not mention such an exception. However, it is clear that attacking a person when he can be arrested is indeed not necessary from a military point of view. Therefore, in this author's view, either such a rule should be proposed, or the definition of taking "a direct part in hostilities" be very narrowly defined to include only persons (whether belonging to an armed group or not) who are in the very process of shooting, firing a missile or similar, or by reference to the parallel application of human rights law. It is submitted that the last option makes most sense as it reflects existing law.

## Conclusion

The concurrent applicability of human rights law and IHL to hostilities in armed conflict does not mean that the right to life must, in all situations, be interpreted in accordance with the provisions of IHL. As has already been shown, IHL is not always clear and a simple reference to IHL provisions will not suffice. It is this author's view that any law needs to be interpreted in the light of the aim and purpose of that law. Such a teleological interpretation is not the same as relying on a dogma associated with a particular branch of law. Thus although it is true that the aim and purpose of IHL is to regulate armed conflicts, it is dogma to state that only IHL can be relevant. It would also be dogma to state that human rights law was only made for peacetime – the very provisions of the human rights treaties show that this is not accurate. On the other hand, what is true is that both branches of law try to protect people from unnecessary violence to the degree possible whilst respecting the perceived needs of society. In the case of IHL, it is the need to ensure that the armed forces are not frustrated in their attempt to control a situation of rebellion or to win an international conflict. In the case of human rights law, it is the need to keep order and harmony within society. Both bodies of law are aimed at preventing unnecessary or disproportionate deaths, thus prohibiting acts motivated by vengeance, megalomania or cruelty.

As long as any sort of dogma is avoided, then the concurrent application of both branches of law should not create difficulty. A simplistic attribution to non-international conflicts and occupation of rules that only make sense in international conflicts would be such a dogma. Clearly, notions of formal combatant status and equality between the parties in every respect are inappropriate for non-international conflicts, since states have simply refused to accept these. A pragmatic and legally accurate approach is therefore to see how human rights law applies. Specific, clear and well-established rules of IHL can be considered to be *lex specialis*. However, where there is any kind of doubt, or where the rules are too general to provide all the answers, then human rights law will fill the gap, provided that this law is not incompatible with the overall fundamental aim and purpose of IHL. It is submitted that the human rights law relating to the right to life is suitable to supplement and interpret IHL rules relating to the use of

force for non-international conflicts and occupation, as well as the law relating to civilians taking a “direct part in hostilities”. The restrictions imposed, as described earlier in this article, are not at all incompatible with the original fundamental spirit of IHL, namely the desire to prevent unnecessary deaths. Let us hope that this spirit survives.

## REPORTS AND DOCUMENTS

# Respect for international humanitarian law by armed non-state actors in Africa

Churchill Ewumbue-Monono\*

### Abstract

*This report presents the instruments and strategies used by non-state actors to respect international humanitarian law during intra-state conflicts in Africa and highlights the recognition by these non-state actors of the role of humanitarian organizations. It examines the impact of such recognition on the development of international humanitarian law and the activities of humanitarian organizations, and shows the problems encountered by non-state actors with respect to their commitments. It concludes with some suggestions as to a way forward.*

.....

By 2004 all 53 African Union countries had ratified the four Geneva Conventions, while of the two 1977 Additional Protocols, Protocol I had been ratified by 45 and Protocol II by 44 African Union countries. However, this manifestation of respect for international humanitarian law (IHL) by states parties does not give a complete picture of reality, since between 1955 and 2005 more than 200 armed groups were involved in about forty armed conflicts on the African continent. These conflicts could be broadly classified in two categories, namely wars of liberation and internal post-independence wars, while the armed non-state actors have included freedom fighters, guerrillas, separatists, secessionists, terrorists and rebels.

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From a historical perspective, the involvement of non-state actors in conflicts on the African continent can be divided into four phases:

*The period of wars of liberation*, between 1955 and 1976, with the emergence of armed non-state groups in Algeria, Kenya, Cameroon, the Portuguese territories of Angola, Cape Verde and Mozambique, the French territories of Djibouti, and so on. Some of these wars, such as those in Zimbabwe, Namibia and South Africa, went on into the 1980s and 1990s. Most of these armed groups were recognized liberation movements inspired and led by “freedom fighters”, and their members, if captured, had the status of prisoners of war (POW).

*The period of ideological wars*, between 1977 and 1992, influenced by cold war politics and waged in Angola, Mozambique, Zaire (now Democratic Republic of Congo – DRC), Uganda and the Horn of Africa.

*The period of secessionist wars*, which came in two waves first in the 1960s, with the Katangese and Biafran secessions in the Congo and Nigeria respectively, and later in the 1980s, with the wars of Eritrea and Ogaden against Ethiopia, as well as of southern Sudan against the Republic of Sudan.

*The period of identity-related conflicts*, which were complementary to most post-cold war armed conflicts in Africa and abound in the Horn of Africa, the Great Lakes region and west Africa.

This period stretched between 1992 and 2005, and was marked by the end of the cold war, the demise of apartheid and the decolonization of Namibia, and led to new types of identity-based armed conflicts in Africa fought by new types of non-state actors, mostly ethnic militias like the Mai Mai (DRC), Interhamwe (Rwanda), Kamajors (Sierra Leone) and Janjaweed (Darfur, Sudan).

The participation of non-state actors in African conflicts raises a number of issues with regard to respect for IHL:

respect during conflicts for protected persons, such as prisoners of war, children and civilian populations;  
methods of conducting hostilities, including violations of human rights, hostage-taking and summary executions;  
the types of weapons used in conducting hostilities; and  
recognition of the role of humanitarian organizations such as the International Committee of the Red Cross (ICRC) as neutral humanitarian intermediaries.

To address these issues, a number of instruments and strategies have been put in place, such as the signing of special agreements on visits to prisoners of war, unilateral declarations, provision for amnesties in peace agreements, application of Deeds of Commitment initiated by the international humanitarian organization Geneva Call, as well as the integration of IHL into African peace agreements,

Organization of African Unity (OAU) resolutions and the military doctrines of the armed non-state parties to a conflict.

This paper will examine the instruments and strategies used by non-state actors to respect IHL during intra-state conflicts in Africa. It will also highlight the recognition by these non-state actors of the role of humanitarian organizations such as the ICRC. It will further examine the impact of such recognition on the development of IHL and the activities of humanitarian organizations, as well as highlight the problems encountered by the non-state actors in respecting IHL. It concludes with some suggestions as to the way forward.

## **Instruments ensuring respect for international humanitarian law principles by African armed non-state actors**

The main instruments used to ensure compliance with international humanitarian law by African armed non-state actors during armed conflict include unilateral declarations, OAU resolutions and special agreements on methods of warfare, ceasefire agreements, and the integration of IHL principles into the armed groups' military doctrines.

### **Unilateral declarations**

A number of unilateral declarations by armed non-state parties to a conflict have been used as mechanisms for ensuring compliance with IHL in accordance with Article 96.3 of Additional Protocol I, which gives national liberation movements the option to make unilateral declarations whereby they undertake to apply the Geneva Conventions. The following unilateral declarations since 1963 by African non-state actors can be cited as examples:

Declaration of 23 May 1968 in Kampala by the rebel Biafran authorities, pledging to respect civilian populations, give the ICRC facilities for the delivery of humanitarian assistance and organize the exchange of prisoners of war through the ICRC;<sup>1</sup>

Declaration of 16 June 1977 by Joshua Nkomo of the African National Congress and the Zimbabwean African People's Union (ANC-ZAPU), undertaking to apply the Geneva Conventions and their Additional Protocols;<sup>2</sup>

Declaration of 8 September 1977 by Ndabaningi Sithole of the African National Congress (ANC, Zimbabwe), undertaking to apply the Geneva Conventions and their Additional Protocols;<sup>3</sup>

1 See ICRC Annual Report, 1968, pp. 13–14.

2 See ICRC Annual Report, 1977, p. 16.

3 Ibid.

Declaration of 23 September 1977 by Bishop Muzorewa of the United African National Council (UANC), undertaking to apply the Geneva Conventions and their Additional Protocols;<sup>4</sup>

Declaration of 25 July 1980 by the União Nacional para a Independencia Total de Angola (UNITA), pledging to respect the fundamental rules of IHL;<sup>5</sup>

Declaration of 28 November 1980 by the African National Congress (ANC, South Africa) president, Oliver Tambo, that his organization would respect the Geneva Conventions and the Additional Protocols;<sup>6</sup>

Declaration of the South West Africa People's Organization (SWAPO) to the ICRC of 15 July 1981 by its president, Sam Nujoma, on respect for the Geneva Convention and its Additional protocols;<sup>7</sup>

UNITA (Angola) Declaration of 5 April 1988, authorizing the ICRC to visit detained persons and captured Angolan soldiers;<sup>8</sup>

Declaration in June 1988 in Geneva to the ICRC director of operations by John Garang (Sudan), relating to his movement's respect for IHL principles;<sup>9</sup>

Declaration of 6 October 1988 in Geneva by the SWAPO secretary-general, Toivo ya Toivo, assuring his movement's application of IHL;<sup>10</sup> and

Declaration of the Rwandese Patriotic Front of 22 October 1992 in Geneva, confirming its application of IHL and recognition of the ICRC's activities.<sup>11</sup>

These declarations were very formal and well-written legal documents. The 28 November 1980 ANC Declaration signed in Geneva by its president, for instance, stated that:

“It is the conviction of the African National Congress of South Africa that international rules protecting the dignity of human beings must be upheld at all times. Therefore, and for humanitarian reasons, the African National Congress of South Africa hereby declares that, in the conduct of the struggle against Apartheid and racism and for self-determination in South Africa, it intends to respect and be guided by the general principles of international humanitarian law applicable to armed conflicts.

4 Ibid.

5 See ICRC Annual Report, 1982, p. 11.

6 See ICRC Annual Report, 1980, p. 14.

7 See ICRC Annual Report, 1991, p. 16.

8 See ICRC Annual Report, 1988, p. 15.

9 Ibid.

10 Cited in Churchill Ewumbue-Monono, *Promoting Humanitarian Public Diplomacy in Africa*. CEREDDA, Buea, 2003, p. 70.

11 Ibid.

Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of international conflicts.”<sup>12</sup>

On the other hand, the SWAPO Declaration of 15 July 1981, signed in Geneva by its president, Sam Nujoma, stated that

“It is the conviction of SWAPO that fundamental rules protecting the dignity of all human beings must be upheld at all times. Therefore, and purely for humanitarian reasons, SWAPO declares hereby that in the conduct of the struggle for self-determination, it intends to respect and be guided by the rules of the four Geneva Conventions of 12 August 1949 for the protection of the victims of armed conflicts and the 1977 additional Protocol relating to the protection of victims of international armed conflicts (Protocol I).

As soon as possible, SWAPO will consider addressing the Swiss Federal Council, as the government of the Depository State, a declaration according to article 96 paragraph 3 of the 1977 Protocol. Such a declaration would be considered as a preliminary step to becoming a party to these instruments.”<sup>13</sup>

Apart from these formal declarations, many liberation movements also made a number of statements of commitments to respect the IHL, for example the statements of commitment of December 1975 by Ethiopian liberation movements such as the Eritrean Liberation Front (ELF), Eritrean People’s Liberation Front (EPLF), and by the Popular Front for the Liberation of Saugua el Hamra and Rio de Oro in Western Sahara (POLISARIO) to respect IHL; the statements of commitments in 1976 by the representatives of nationalist movements in southern Africa, notably the Zimbabwe African People’s Union (ZAPU), the ANC and SWAPO, to co-operate with the ICRC in promoting IHL; and the pledge by the various armed groups in Angola, given in January 1976 during the OAU Extraordinary Summit on Angola, to respect their IHL commitments. Unlike the declarations, these statements of commitment and pledges are less formal but are at least manifestations of good intentions by the non-state parties to conflicts.

### The Organization of African Unity resolutions and compliance by armed non-state actors with international humanitarian law

Between 1970 and 1990 the OAU passed a number of resolutions on the application of and respect for IHL principles by liberation movements, the earliest of which were Resolution CM/Res. 242/Rev.1 (XVII) of 15–19 June 1971 and CM/Res. 270 (XIX) of 5–12 June 1972. These early OAU resolutions were part of a worldwide campaign to “ensure that the freedom fighters enjoy the benefits of provisions of the Geneva Convention on prisoners and ensure participation of liberation movement in the drafting and application of international humanitarian

12 See <<http://www.genevacall.org/signatory-groups/signatory-groups.htm>> (last visited 5 January 2007).

13 Ibid.

law applicable to conflicts described as internal”. In 1973 the OAU further adopted Resolution CM/Res. 307 (XXI) of 17–24 May 1973 requesting its secretary-general to organize a seminar for the liberation movements to enable them to harmonize their views and make concrete proposals for the application of IHL to their movements.

After the adoption of the 1977 Additional Protocols most of the OAU resolutions, such as CM/Res. 681 (XXXII) and CM/Res. 695 (XXXII) of February–March 1979,<sup>14</sup> addressed the non-application of IHL to mercenaries in African conflicts. Resolution CM/Res. 695,<sup>15</sup> for instance, reiterated the organization’s policy of selective application of IHL principles to the different categories of armed conflicts and non-state actors such as mercenaries and freedom fighters. Among other things, the resolution stressed that

The two Protocols additional to the Geneva Convention of 1949 relative to the protection of war victims provide:

- i. that wars of national liberation in African territories under colonial domination or racist minority regimes are international conflicts subject to the provisions of the additional protocols of the Geneva Convention of 1949;
- ii. that protected persons and places, notably civilian populations and refugees camps, must under no circumstances be subjected to acts of reprisals;
- iii. that mercenaries do not enjoy the status of combatants and therefore are liable to summary execution, if captured.

The OAU also passed a number of resolutions on the application of IHL principles to the freedom fighters in Southern Africa.<sup>16</sup> It likewise passed a number of resolutions on the methods of conducting hostilities against freedom fighters, and especially on the use of chemical weapons in Africa by Western colonial powers such as Portugal and the racist regimes in southern Africa. Such resolutions included those of CM/Res. 234 (XV) of August 1970<sup>17</sup> and Resolution CM/Res. 268 (XIX) of June 1972,<sup>18</sup> which denounced Portugal for “employing chemical weapons such as napalm, toxic gas and defoliant, against the freedom fighters and the African population in the territories under its domination in flagrant violation of international conventions”, as well as CM/Res. 1207 (L) of

14 Available online <[http://www.africa-union.org/root/au/Documents/Decisions/com/14CoM\\_1979a.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/14CoM_1979a.pdf)> (last visited 4 December 2006).

15 Ibid. Resolution on the activities of mercenaries in Zimbabwe and Namibia and against the front-line states, p. 25.

16 See Resolution CM/Res. 767 (XXXIV) of February 1980, CM/Res. 911 (XXXVIII) of February 1982, CM/Res. 933(XL) of February 1984, CM/Res. 1148 (XLVIII) of May 1988, and CM/Res. 1207 of February 1989.

17 Resolution on Decolonization, available at <[http://www.africa-union.org/root/au/Documents/Decisions/com/uCoM\\_1970b.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/uCoM_1970b.pdf)> (last visited 4 December 2006), p. 28.

18 Available at <[http://www.africa-union.org/root/AU/Documents/Decisions/com/zCoM\\_1972b.pdf](http://www.africa-union.org/root/AU/Documents/Decisions/com/zCoM_1972b.pdf)> (last visited 4 December 2006), p. 6.

July 1989<sup>19</sup> on South Africa, which condemned the “the use of poisonous chemicals by the racist regime against members of the Liberation Movements and mass democratic organization”.

### Special agreements on methods of conducting hostilities

Special agreements between armed non-state entities and states parties or with the ICRC have been a strategy used to ensure compliance by African non-state actors with IHL. Common Article 3 of the four Geneva Conventions states in paragraph 2 that “the Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention”.

The use of this mechanism in African conflicts is widespread.

- During the Algerian civil war the ICRC signed special agreements with the president of the Provisional Government of the Republic of Algeria (GPRA), Ferhat Abbas, which led to the release of French prisoners of war seven times between October 1958 and December 1961.<sup>20</sup>
- In the 1960–4 Congo crisis, the ICRC made special agreements with the rebels in the Katanga and Orientale provinces for the exchange of UN soldiers against Katangese gendarmes in March 1961, January 1962 and May 1963, while on 18 September 1964 the organization launched an appeal to “all exercising authority in Congo to respect prisoners of war and non-combatants and comply with the prohibition on hostage-taking and bombing civilian targets”.<sup>21</sup>
- Between 1967 and 1968 the ICRC further negotiated a special agreement for the evacuation of European mercenaries fighting for the Katangese secessionists from Zaire to the Shagasha camp in Rwanda, and eventually their repatriation to Brussels, Zurich and Paris.<sup>22</sup>
- During the 1967–71 Nigerian civil war the ICRC, the OAU and the Biafran authorities signed a special agreement in October 1968 for a humanitarian corridor to evacuate Biafran children through Santa Isabel and Obilago. In August 1969 the ICRC concluded another special agreement with the Biafran authorities for an emergency relief plan, the fair treatment of prisoners of war and the repatriation of foreigners. Following such agreements the ICRC was able to visit hundreds of Nigerian prisoners of war held by the Biafran authorities in the Urualla, Ntuene and Achina prisons, and in June 1969 it negotiated the release of eighteen employees of the Italian ENI oil prospecting firm.<sup>23</sup>

19 Available online <[http://www.africa-union.org/root/au/Documents/Decisions/com/33CoM\\_1989b.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/33CoM_1989b.pdf)> (last visited 4 December 2006).

20 See ICRC Annual Report, 1958, p. 10, and 1962, p. 10.

21 See ICRC Annual Report, 1964, p. 22.

22 See ICRC Annual Report, 1968, p. 21.

23 See ICRC Annual Report, 1969, pp. 16–18.

- During the liberation wars in Portuguese Africa the ICRC negotiated a number of special agreements between 1967 and 1976 with liberation movements there. In Guinea Bissau the ICRC concluded an agreement with Amilcar Cabral's African Party for the Liberation of Guinea and Cape Verde (PAIG) for the release of Portuguese soldiers in March and December 1968. It furthermore ensured that thirty-three PAIG freedom fighters were granted POW status and released before the country attained independence on 10 September 1974.
- In Mozambique the ICRC negotiated special agreements with the National Front for the Liberation of Mozambique (FRELIMO) for the release of Portuguese prisoners of war between 1968 and September 1974, as well as with the rebel Mozambique National Resistance (RENAMO) for the release of about eighty foreign detainees in December 1986 and in April and December 1987.
- In Angola the ICRC negotiated special agreements in November 1974 for the release of Portuguese prisoners held by the Popular Movement for the Liberation of Angola (MPLA), the National Front for the Liberation of Angola (FNLA) and the Front for the Liberation of the State of Cabinda (FLEC) in DR Congo (Zaire) and the Congo Republic. Moreover, after the Bicesse Agreement of May 1991 between the MPLA government and the rebel UNITA, the ICRC and UNITA leader Jonas Savimbi signed special agreements for the delivery of humanitarian relief and the release of prisoners of war in the UNITA-controlled zone, which led to the release by UNITA of 94 Angolan government prisoners of war and foreign abductees in 1982, followed by 136 releases in 1983 and 148 in 1984.<sup>24</sup>
- The various liberation movements in Rhodesia also made special agreements with the ICRC during the November–December 1976 Conference on Rhodesia, held in Geneva, to respect IHL and the ICRC's work. In February 1979 the ICRC signed an agreement with ZANU on the provision of medical and material assistance to ZANU war amputees and returnees, while in Namibia the ICRC negotiated with SWAPO for the release of South African soldiers captured by SWAPO in Angola in 1978.<sup>25</sup>
- In Rwanda, the ICRC and the rebel Rwanda Patriotic Front (RPF) signed a special agreement on humanitarian co-operation in June 1993 for the safe return of war victims, which provided an enabling environment for the release of three RPF officials exchanged against 121 officials of the government of Rwanda in August 1993.<sup>26</sup>
- In the Western Sahara conflict, the ICRC negotiated the release of Moroccan, Mauritanian and French prisoners of war held by POLISARIO between 1975 and 1977, as well as the extension of POW status to POLISARIO freedom

24 See ICRC Annual Report, 1984, p. 12.

25 See ICRC Annual Report, 1982, p. 11.

26 See ICRC Annual Report, 1993, p. 80.

fighters by Mauritania and Morocco in 1977. Moreover, on 24 November 1981, the ICRC offered its services to both Morocco's King Hassan and the POLISARIO secretary-general Abdel Aziz, to visit the detainees held by the POLISARIO forces. The offer was sent in 1982 to the OAU Committee on Western Sahara chaired by President Daniel Arap Moi of Kenya. On 6 March 1982 POLISARIO accepted the ICRC offer as a mark of its will to respect IHL and ICRC activities.

- In Chad the ICRC made special agreements with the National Front for the Liberation of Chad (FROLINAT) to visit over 1,550 prisoners of war belonging to Chadian government forces held by that organization, and for the release of forty-three prisoners of war to the N'Djamena government in December 1978.
- In Somalia the ICRC negotiated with rebel leaders of the Western Somalia Liberation Front (WSLF), the Somali National Movement (SNM) and the Oromo Abbo Liberation Front between 1979 and 1989 and, in the 1990s, with opposition groups such as the United Somali Congress (USC), the Somali Patriotic Movement (SPM) and the Somali Salvation Democratic Front (SSDF) to visit detainees in their hands.
- In Sudan the ICRC negotiated visits to prisoners of war between 1989 and 1991 in the areas controlled by the Sudan's People's Liberation Movement (SPLM).
- In Ethiopia it negotiated to have access to POWs held by Ethiopian and Eritrean and rebel groups such as the Eritrean People's Liberation Front (EPLF), the Tigrayan People's Liberation Front (TPLF) and the Eritrean Liberation Front (ELF) between 1975 and 1991. Since 1996 it has been negotiating with armed opposition groups such as the Oromo Liberation Front (OLF), the Oromo National Liberation Front (ONLF), the Islamic Front for the Liberation of Oromia (IFLO), Al Ittihad and the Somali National Front (SNF) in order to obtain respect for IHL.
- In the 1989–99 Liberian crisis, the ICRC concluded special agreements with armed opposition groups such as the Armed Forces of Liberia (AFL) and the National Patriotic Front of Liberia (NPLF) for access and visits to POWs in areas under their control. In January 1991, for instance, it negotiated the release of NPLF fighters, and in February 1991 that of 9 hostages by the NPLF. In January 1992, the ICRC also negotiated the release of detainees in the hands of the NPLF in Gbarnga, and in June 1992 it met with Charles Taylor in Gbarnga to discuss the organisation's access to civilian victims cut off by the hostilities.
- In Mali the ICRC negotiated the government's release of twenty-four Tuareg prisoners of war in April 1992, while the Tamashek (Tuareg) rebels freed twenty-eight people held by them, who were flown to Bamako.<sup>27</sup>

27 See ICRC Annual Report, 1992, p. 22.

## Special agreements on types of arms and weapons in hostilities

The fear that armed non-state groups or individuals, notably terrorists, could use either deadly weapons of mass destruction such as nuclear, chemical and biological weapons or other conventional weapons such as landmines, booby-traps and other devices prohibited by the 1980 Convention on Certain Conventional Weapons (CCW) has been a major security concern.

This threat became serious with the sarin poisoning incident in Matsumoto, Japan, in 1994 and the 1995 sarin attack on a Tokyo subway by the Aum Shinrikyu doomsday cult. In Africa chemicals have been used as weapons in agro-terrorism by Kenyan non-state actors such as the Mau Mau fighters in 1952, who used a local toxic plant, “the African milk bush”, to poison thirty-three steers at a British mission station. Moreover, chemical weapons were reportedly used by the Spanish against the Rif rebels in Spanish Morocco (1922–7), and in the 1970s and 1980s by Portugal and apartheid South Africa against freedom fighters in Angola, Mozambique, Guinea Bissau and Namibia.<sup>28</sup>

With regard to conventional weapons such as landmines, there have been reports of the use of anti-personnel mines by non-state actors such as UNITA in Namibia, Angola and Zambia, various groups in the Democratic Republic of Congo, the Movement of Democratic Forces in Casamance (MFDC) in Senegal, various factions in Somalia, the Sudan People’s Liberation Army (SPLA) in Sudan and the Lord’s Resistance Army (LRA) in Uganda.<sup>29</sup>

A number of measures have therefore been taken to ensure compliance by armed non-state groups with commitments relating to anti-personnel landmines and unexploded ordnance in Africa. For instance, the SPLM passed a resolution on 1 November 1996, ahead of the entry into force of the Mine Ban Treaty in 1997,<sup>30</sup> committing itself “to unilateral demining effort in the areas under its control”.<sup>31</sup>

Since March 2000, when the independent Geneva-based non-governmental organization (NGO) Geneva Call launched the Deed of Commitment as a parallel instrument for non-state actors to pledge compliance with the principles of humanitarian law enshrined in the Mine Ban Treaty, a number of African non-state actors have become party to it. Between 2000 and 2004 the Deed of Commitment

28 See Stephen Burgess and Helen Purkit, “The rollback of South Africa’s biological warfare program”, INSS Occasional Paper, 37 February 2001, pp. 16–19.

29 Stott Noel, “Armed non-state actors in Africa and the ban on anti-personnel landmines”, *African Security Review*, Vol. 13, no. 3, 2004, p.7. Available at <<http://www.iss.co.za/pubs/ASR/13No3/FStott.htm>> (last visited 5 December 2006).

30 Available at <<http://hrw.org/landmines/ratification.htm>> (last visited 5 December 2006).

31 The SPLM/A commits itself to “a unilateral demining effort in the areas under its control ... to demine the liberated areas of New Sudan and to help put an end this scourge”, in Sudan People’s Liberation Army, “Resolution on problem posed by proliferation of anti personnel mines in liberated parts of New Sudan”, Statement signed by Commander Salva Khr Mayardit, Deputy Chair, NLC/NEC (SPLM) and SPLA Chief of General Staff, New Kush-Himan, 1 November 1996.

was signed by twenty-six non-state actors, eighteen of which were in Africa, six in Asia and two in the Middle East.<sup>32</sup>

Most of the African non-state actors that have acceded to that instrument are from the east African region, where there is considerable advocacy by the Nairobi-based Kenya Coalition against Landmines (KCAL) and the Greater Horn of Africa Mine Action Network (GHAMAN), which deal with non-state actors in Burundi, the Democratic Republic of Congo, Ethiopia, Somalia and Uganda.

### The incorporation of international humanitarian law in African ceasefire agreements

An important strategy in ensuring compliance with international humanitarian law by armed non-state actors is to include provisions relating to the fair treatment of prisoners of war, respect for IHL and the delivery of humanitarian assistance in the various ceasefire and peace agreements concluded with them. Since the March 1962 Evian Agreement between the National Liberation Front (FLN) in Algeria and the French authorities there have been over thirty such agreements concluded with non-state actors, for example

the Lomé ceasefire agreement on Liberia of 13 February 1991, which urged the warring parties to “cooperate with all humanitarian agencies in their efforts to provide relief and assistance to the people of Liberia; and also to agree to respect the Red Cross (Geneva) Conventions”;

the Cotonou Agreement on Liberia of 25 July 1993, which stipulated that “all prisoners of war and detainees shall be immediately released to the Red Cross authority”;

the ceasefire agreement of 1 November 1998 between the government of Guinea Bissau and the self-proclaimed military junta in Abuja, which guaranteed “the free access to humanitarian organisations and agencies to reach the affected civilian population”;

the Lomé Peace Agreement on Sierra Leone of 7 July 1999, which pledged “the enforcement of humanitarian law” and guaranteed the “safe and unhindered access by humanitarian organisations to all people in need” and the establishment of “safe corridors for the provisions of food and medical supplies to the Economic Community for West Africa Monitoring Group (ECOMOG) soldiers behind the Revolutionary United Forces (RUF) lines and to RUF combatants behind ECOMOG lines”;

32 The African non-state actors that have acceded to the Deed of Commitment are the National Council for the Defence of Democracy – Forces for the Defence of Democracy (CNDD–FDD) in Burundi (December 2003); the SPLM/A in Sudan (October 2001); and the Transitional National Government (TNG), United Somali Congress (USC), SNA, Somali Reconciliation and Reconstruction Council (SRRC), Rahanweyn Resistance Army (RRA), Somali National Front (SNF), Hiran Patriotic Alliance (HPA), Southern Somali National Movement (SSNM), Somali African Muke Organization (SAMO), BIREM and Somali Patriotic Movement (SPM) in Somalia (November 2002).

the preamble to the 7 July 1999 Lusaka ceasefire agreement on the DRC, which stated that the parties were “determined to ensure the respect by all parties signatory to this agreement for the Geneva Conventions of 1949 and the Additional Protocols of 1977”; and the ceasefire agreement on Liberia in 2003, the parties to which pledged to “respect as well as encourage the Liberian populace also to respect the principles and rules of international humanitarian law in post-conflict Liberia”.<sup>33</sup>

## **Recognition of humanitarian organizations by armed non-state groups**

Since 1955 the role of humanitarian organizations such as the ICRC as a neutral humanitarian intermediary has been recognized by many armed non-state groups in Africa, notably for such functions as advocacy, negotiations, dissemination and supervision of exchanges of prisoners by such groups during conflicts.

Respect for the role of the ICRC has been expressed in African peace-making instruments such as the following peace agreements and reconciliation agreements:

- the Lancaster House talks of 1979, which led to the ceasefire in the conflict in Zimbabwe and gave the ICRC a role in providing postwar humanitarian assistance there;
- the 13 May 1991 Bicesse Agreement, which called on the ICRC as a neutral intermediary to supervise the release of prisoners in the hands of the warring parties;
- the ceasefire agreement of 15 May 1991 between the government of Angola and the rebel UNITA, which contained the provision that verification for the release of prisoners of war “will be performed by the International Committee of the Red Cross”;
- the Kinyira agreement of 30 May 1993 between the government of Rwanda and the rebel RPF, which stipulated that in matters related to aid distribution “the ICRC position on each individual shall be final”;
- the 4 August 1993 Arusha Peace Agreement on Rwanda, providing for the mandatory protection of the expatriate community and the security of contributors of humanitarian assistance such as the ICRC;
- the Lomé ceasefire agreement of 18 May 1999 between the government of Sierra Leone and the Revolutionary United Front/ Sierra Leone (RUF/SL) on the release of prisoners of war and non-combatants through a committee “chaired by the UN Chief Military Observer in Sierra Leone

33 Churchill Ewumbue-Monono and Carlo Von Flüe, “Promotion of international humanitarian law through cooperation between the ICRC and the African Union”, *International Review of the Red Cross*, Vol. 85, no. 852, December 2003, p. 757.

and comprising representatives of the ICRC, UNICEF, and other relevant UN agencies and NGOs”;  
 the Lusaka agreement of 7 July 1999 on the DRC, in which parties undertook to “allow immediate and unhindered access to the International Committee of the Red Cross (ICRC) and the Red Crescent for the purpose of arranging the release of prisoners of war and other persons detained as a result of the war, as well as the recovery of the dead and the treatment of the wounded”;  
 the Nuba Mountains ceasefire agreement of 19 January 2002 in Buergenstock (Switzerland) between the government of Sudan and the rebel SPLM/Nuba, which stipulated that the parties “shall allow immediate and unhindered access to the International Committee of the Red Cross (ICRC) for the purpose of identifying and assuring the well-being of any person detained as a result of the conflict”; and  
 the ceasefire agreement on Liberia in 2003 between the government of Liberia and the armed National Salvation Army (NSA), which stated that “All parties shall provide the International Committee of the Red Cross (ICRC) and other relevant national and international agencies with information regarding their prisoners of war, abductees, or persons detained because of the war, to enable the ICRC ... to visit them.”<sup>34</sup>

## **The impact of international humanitarian law compliance by non-state actors on humanitarian action**

Compliance by armed non-state actors with the principles of international humanitarian law and respect for the activities of the ICRC have had a tremendous impact on the development of that law and humanitarian action in Africa, notably in areas such as participation in IHL conferences, adherence to IHL instruments, dissemination, the delivery of humanitarian assistance, the establishment of ICRC offices in Africa and the integration of IHL principles in the military doctrines of some African non-state actors.

### **African non-state actors and the development of international humanitarian law**

African non-state actors have participated in diplomatic conferences for the development of IHL. In response to the invitation sent to recognized liberation movements, African nationalist movements such as the FNLA, the Pan African Congress of Azania (PAC), Seychelles People’s United Party (SPUP) the ANC, the ANCZ, the FNLA, the MPLA, SWAPO, ZANU and ZAPU took part in the 1974–7 Diplomatic Conference on the Reaffirmation and Development of Humanitarian

34 Churchill Ewumbue-Monono, above note 10, pp. 69–70.

Law (CDDH) in Geneva. In addition, some African liberation movements such as the PAC and SWAPO actually demonstrated their commitment to IHL instruments by formally signing the Geneva Conventions and the Final Act of the Additional Protocols. Moreover, on 18 October 1983 the United Nations Council for Namibia (UNCON), created in 1967, acceded to the Geneva Conventions and their Additional Protocols at the request of UN General Assembly Resolution 37/233 (1982).

### Spreading knowledge of the Geneva Conventions among all combatants

Compliance by armed non-state actors has facilitated the dissemination of knowledge of IHL principles by the ICRC in African conflicts.

In the Congo crisis of 1960–4, for instance, the ICRC translated and published Common Article 3 of the four 1949 Geneva Conventions in nine languages. In 1962, it published the “Brief summary of the Geneva Conventions for use by military personnel and the public” in Lingala, Swahili, Tshiluba and Kikongo, while in 1999–2000 it translated *The Soldiers’ Handbook* into Kiswahili, the language used in eastern Zaire and by most of the rebel groups. Compliance by non-state actors also helped in the translation of the Geneva Conventions into local African languages in Somalia and Burundi, in order to reach most of the uneducated members of the armed groups.

It furthermore led to the integration of liberation movements in ICRC regional dissemination efforts, as in July 1978, when most such movements of the southern Africa region participated in a regional dissemination meeting in Dar es Salaam. The same applied to similar dissemination efforts in July 1993 for fifteen officials of the rebel Rwanda Patriotic Front (RPF) in Rwanda and IHL programmes for 300 SPLA and Southern Sudan Independence Army (SSIA) commanders in 1999 in Sudan.

### Humanitarian assistance to non-state actors

Compliance by armed non-state actors with IHL and their recognition of the ICRC’s work have furthermore increased the effectiveness of humanitarian aid distributions in armed conflicts. Between 1960 and 1971 the secessionist authorities in Katanga and Biafra played a prominent role in this regard, and by 1976 a dozen other African liberation movements had followed suit.<sup>35</sup>

In 1975, the ICRC provided African liberation movements with relief supplies to a total value of 172,800 Swiss francs, distributed as follows FNLA

35 Between 1967 and 1975, the ICRC had developed fruitful relations with African liberation movements such as the Mozambique Revolutionary Committee (COREMO), the National Front for the Liberation of Mozambique (FRELIMO), the Popular Movement for the Liberation of Angola (MPLA), the Pan African Congress of Azania (PAC), the African Party for the Independence of Guinea and Cape Verde (PAIGC), the South West Africa People’s Organization (SWAPO), the Zimbabwe African National Union (ZANU), and the Zimbabwe African People’s Union (ZAPU).

(32,000 francs), PAIG (70,000 francs), MPLA (35,000 francs), FRELIMO (11,000 francs), PAC (10,000 francs), SWAPO (5,300 francs), ZANU (5,000 francs) and ZAPU (4,500 francs). ICRC assistance to these groups also included medical equipment and ambulances worth 76,000 Swiss francs.<sup>36</sup>

The application of humanitarian principles by most armed non-state actors in African conflicts has also led them to create humanitarian agencies. In Algeria the FLN set up the Algerian Red Crescent Society in 1956. In Eritrea, the armed EPLF also had humanitarian agencies such as the Eritrean Relief and Rehabilitation Agency (ERRA) and the Eritrean Red Cross and Red Crescent Society (ERCCS). In Tigray, the Relief Society of Tigray (REST) was set up by the TPLF. In Sudan the SPLM created the Sudan Relief and Rehabilitation Association (SRRA) and Operation Save Innocent Lives (OSIL). Most of these “liberation humanitarian organizations” created by non-state actors helped considerably in the application of humanitarian principles in African armed conflicts.

On 16 July 1992 RENAMO and the government of Mozambique signed a joint declaration on the guiding principles of humanitarian assistance, which among other things reaffirmed “the understanding reached in December 1990 between the Government of Mozambique, RENAMO, and the ICRC on the principles of free movement of populations and assistance for all Mozambicans”.<sup>37</sup>

### Non-state actors and the operational organization of the ICRC in Africa

Because of its recognition by non-state actors, the ICRC has been adjusting its operational presence in Africa to be closer to the military bases of armed non-state groups, mostly in neighbouring countries, or to the headquarters of the governments-in-exile of those groups.

- During the Algerian war of liberation, the ICRC conducted negotiations with the FLN from its offices in Cairo, Morocco and Tunisia.
- In Angola, the ICRC established operational centres for contacts with the various non-state armed group movements in 1975, which included the Carmonaorllige centre for the FNLA zone, the Nova Lisboa (Huambo) centre for the UNITA zone, and in N’Dalatando centre for the MPLA zone.
- In Zimbabwe, the ICRC set up an office in Bulawayo in 1977 for its relations with the ZANU-ZAPU freedom fighters; its office in Salisbury dealt with the Ian Smith government; in Namibia, it opened an office in Windhoek in 1981 to handle SWAPO issues.
- In Chad, an ICRC delegation was opened in Faya for relations with FROLINAT, in addition to those in N’Djamena, Moundou and Sahr for relations with the government of Chad.<sup>38</sup>

36 See ICRC Annual Report 1974.

37 See <[http://www.santegidio.org/archivio/pace/mozamb\\_19920716\\_EN.htm](http://www.santegidio.org/archivio/pace/mozamb_19920716_EN.htm)> (last visited 05 January 2007).

38 See ICRC Annual Report, 1979, p. 27.

- In Sudan the ICRC also used its offices in Nairobi, Addis Ababa, Kampala, Wau and Lokichokio for its relations with the armed rebel groups such as the SPLM.
- In the west African conflicts, the ICRC maintained an office in Monrovia for relations with the Liberian government and ECOMOG peacekeeping forces, while the Gbarnga and Kakata offices handled relations with the National Patriotic Reconstruction Assembly (NPRA) government; the Man office in Cote d'Ivoire handled relations with the NPLF. In Sierra Leone, the ICRC set up sub-delegations in Kenema, Makeni and Segbwema to handle relations with armed rebel movements. In Mali, it opened two offices, in Timbuktu and Bourem, for its contacts with the Tuareg rebels, while the Bamako delegation concentrated on relations with the government.
- In the Great Lakes conflicts, the ICRC's operational presence for the Rwandan crisis included its delegations in Bujumbura and Nairobi, as well as its offices in Ngara (Tanzania), Kabale (Uganda) and in Goma and Bukavu (Zaire), which handled relations with the various armed groups.
- In Uganda, where armed resistance was fanned by the LRA, the West Nile Bank Front (WNBFB) and the Uganda National Rescue Front (UNRF), the ICRC opened offices in Kampala, Kasese, Arua, Kitgum, Gulu and Koboko in 1997.
- Finally, in the Democratic Republic of Congo, the ICRC opened offices in Kolwezi, Goma, Bukavu and Bunia between 1994 and 1998 to negotiate with the warring armed groups.

### Integration of international humanitarian law in military doctrines

Another important manifestation of compliance with IHL by non-state actors in African conflicts has been the integration of its principles in the military doctrines of some leading rebel movements, notably Uganda's National Resistance Movement (NRM) (1980–6), the Rwandan RPF (1990–4) and, to some extent, John Garang's SPLM in Sudan. As part of their bid to abide by humanitarian principles, these non-state actors formulated a set of directives governing the conduct of hostilities. These directives were centred on a declaration of intent to respect IHL, and in particular to take captives prisoner rather than execute them, to attack only military objectives and combatants, to desist from using terror tactics and to punish violations of IHL in fair and regular trials.

### **Problems of respect for international humanitarian law and the ICRC by African non-state actors**

Respect for IHL by armed non-state actors in African armed conflicts, and recognition by them of the activities of humanitarian organizations such as the

ICRC as neutral, humanitarian intermediaries have, however, come up against a number of problems, such as the management of state sovereignty, the variance between the need for justice and for national reconstruction, security concerns, the nature of the conflict concerned, the non-participation of post-independence rebel movements in IHL-related international events and the problem of confidentiality.

With regard to the problem of state sovereignty, there is a perception that the negotiation of special agreements with non-state actors or acceptance of their unilateral declarations confers on them recognition by humanitarian organizations such as the ICRC and Geneva Call. If states feel that these humanitarian organizations have granted recognition to rebel armed groups or are negotiating with them on the same level, their willingness to co-operate with them might be affected. The problem of sovereignty has rendered most of the agreements and unilateral declarations by African non-state actors meaningless, since they are usually contested by the national authorities. For instance, the accession of the UN Committee on Namibia (UNCON) to the Geneva Conventions on 18 October 1983, like SWAPO's unilateral declarations, was contested by the government of South Africa on 12 March 1984.<sup>39</sup>

The second problem is the conflict between justice and national reconciliation. The general amnesty granted in African peace and national reconciliation instruments to perpetrators of war crimes has only intensified the zeal with which IHL is being violated on the continent.<sup>40</sup>

Although Common Article 3.2, for instance, prescribes that "the application of [special agreements] shall not affect the legal status of the Parties to the conflict", this situation creates a conflict between the need to enforce respect for IHL principles through the promotion of justice by the special criminal tribunals, such as those for Rwanda and Sierra Leone, and the need to promote national reconciliation.

The need to promote justice was also a strong argument used by the racist governments in southern Africa to justify their failure to respect members of liberation movements as having prisoner-of-war status, despite the special

39 See ICRC Annual Report, 1984, p. 14.

40 \*\*\*In the Angolan crises of 1975-6, the Alvor Agreement of 15 January 1975 between the FNLA, the MPLA and UNITA provided, in its Article 9, that an amnesty "be granted to cover all the effects of the patriotic acts performed in the course of the national liberation struggle in Angola, which could have been considered to be liable to punishment under legislation in force at the time of their commission". Moreover, the Lagos Accord of August 1979 on national reconciliation in Chad pledged, in Article 4(a), to "release all political prisoners of war and political detainees not later than 15 days from the date of formation of the Transitional National Union Government" and stipulated in Article 4(b) that "the Transitional National Union Government shall proclaim immediately amnesty for all political exiles to enable them to return to their homes". The Sudan Peace Agreement of 21 April 1997 provided for a "general and unconditional amnesty for all offences committed between 16 May 1993 through to 1997 in accordance with the common will of the people of the Sudan." It also stressed that "No action or other legal proceeding whatsoever, civil or criminal, shall be instituted against any persons in any court of law or any place for, or on account of, any act, omission or matter done inside or outside Sudan as from 16-05-1983 to 1997, if such act or omission or matter was committed by any member." In 1999, the Uganda Parliament passed an amnesty law applicable to all armed groups, "without fear of further pursuit", while in July 2001, Taylor declared a general amnesty for all armed groups.

agreements by those movements to respect IHL and the work of the ICRC. In Rhodesia, the government of Ian Smith stated in January 1977 that it would not grant POW status to members of the various liberation movements, despite their commitments and unilateral declarations and the appeals in July and December 1977 by the president of the ICRC, arguing that as Rhodesian citizens they were liable to legal prosecution and punishment by hanging for their terrorist acts.<sup>41</sup>

Third, some special agreements with non-state actors on humanitarian issues were abortive because of security considerations. In the 1990s, for instance, the ICRC's attempts to broker a special agreement between the Mozambican government and RENAMO to set up a neutral "combat-free zone" humanitarian corridor, the "Tete Corridor", on the Mozambique–Malawi border failed because of security considerations.

Fourth, the implementation of special agreements with non-state actors has been obstructed by problems in defining the nature of some armed conflicts. In the Ogaden war, for instance, the Somali government did not consider itself a party to the conflict and insisted that because it was an internal armed conflict, only Common Article 3 of the Geneva Conventions could be applied. Conversely, the Ethiopian government deemed the war in Ogaden to be an international armed conflict between Ethiopia and Somalia, which meant that all four Geneva Conventions and their Additional Protocols had to be applied. This problem of determining the nature of armed conflicts became more prominent in the 1990s in the various armed conflicts of the Great Lakes region.

Fifth, the absence of non-state actors in international fora where respect for IHL is discussed has also hampered implementation. In the 1960s and 1970s many liberation movements were recognized as observers within the OAU and as such participated in some international fora on the development of IHL, such as the Diplomatic Conference on International Humanitarian Law in 1974–7. Post-independence armed non-state groups, on the contrary, have not been able to take part in events where respect for IHL is discussed.

## Conclusion

The present study has shown the efforts made by most armed non-state actors to comply with IHL and co-operate with humanitarian organizations such as the ICRC and Geneva Call in promoting humanitarian principles in African conflicts. It has also shown that respect by African non-state actors for IHL and the ICRC's work was greater between 1956 and 1989, when most of the fighting was by recognized liberation movements and the majority of them had observer status and the support of the OAU. With the proliferation of post-cold war identity-based conflicts spearheaded by ethnic militias such as the Mai Mai, Interhamwe, Kamajors, and Janjaweed there has been little respect for IHL, the reason being

41 See ICRC Annual Report, 1978, p. 10.

that some traditional concepts of warfare promote terror tactics, torture and executions.

For IHL principles to take root under these circumstances it might be preferable to promote a wider dissemination of African best practices as expressed in terms of respect for humanitarian principles in African societies. Second, the humanitarian organizations, together with the African Union and the ICRC, should integrate African non-state actors as much as possible into some of their IHL dissemination activities and thereby enable them to integrate IHL into their military doctrines. Third, rebel movements with a clear track record of respect for IHL should be given incentives during peace and national reconciliation talks to maintain and uphold this course.

### Select list of abbreviations used in this article

AFL	Armed Forces of Liberia
CNDD-FDD	National Council for the Defence of Democracy – Forces for the Defence of Democracy
ECOMOG	Economic Community of West Africa Monitoring Group
EPLF	Eritrean People's Liberation Front
FLEC	Front for the Liberation of the State of Cabinda
FNLA	National Front for the Liberation of Angola
FRELIMO	National Front for the Liberation of Mozambique
FROLINAT	National Front for the Liberation of Chad
HPA	Hiran Patriotic Alliance
ILFO	Islamic Front for the Liberation of Oromia
KCAL	Kenyan Coalition against Landmines
LRA	Lord's Resistance Army
MFDC	Movement of Democratic Forces of Casamance
MPLA	Popular Movement for the Liberation of Angola
NPLF	National Patriotic Front of Liberia
OLF	Oromo Liberation Front
ONLF	Oromo National Liberation Front
OSIL	Operation Save Innocent Lives – Sudan
PAIG	African Party for the Liberation of Guinea and Cape Verde
POLISARIO	Popular Front for the Liberation of Western Sahara
RENAMO	Mozambique National Resistance
RUF/SL	Revolutionary United Front/Sierra Leone
SAMO	Somali African Muke Organisation
SPLA	Sudan People's Liberation Army
SPLM	Sudan's People's Liberation Movement
SPM	Somali Patriotic Movement
SNF	Somali National Front
SNNR	Somali Reconciliation and Reconstruction Council
SSIA	Southern Sudan Independence Army
SSNM	Southern Somali National Movement
SSDF	Somali Salvation Democratic Front

SVM	Somali National Movement
SWAPO	South West Africa People's Organization
TPLF	Tigrayan People's Liberation Front
UNRF	Uganda National Rescue Front
USC	United Somali Congress
WNBF	West Nile Bank Front

## REPORTS AND DOCUMENTS

# Reviewing the legality of new weapons, means and methods of warfare

Kathleen Lawand\*

Parties to an armed conflict are limited in their choice of weapons, means and methods of warfare by the rules of international humanitarian law (IHL) governing the conduct of hostilities. Relevant rules include the prohibition on using means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and the prohibition on using means of warfare that are incapable of distinguishing between civilians or civilian objects and military targets,<sup>1</sup> which are the “cardinal rules” of IHL applying to weapons.<sup>2</sup> In addition, particular treaties and customary rules impose specific prohibitions or limitations on the use of certain weapons, for example anti-personnel mines and blinding laser weapons.

For a state that is party to Additional Protocol I of 1977, determining the legality of new weapons is a treaty obligation pursuant to Article 36 of the Protocol, which requires each state to determine whether the employment of “a weapon, means or method of warfare” that it studies, develops, acquires or adopts would, “in some or all circumstances”, be prohibited by international law applicable to the state. But it also makes good policy sense for all states, regardless of whether or not they are party to the Protocol, to carry out legal reviews of new weapons. Indeed, it is in each state’s interest to assess the lawfulness of its new weapons in order to ensure that it is able to comply with its international legal obligations during armed conflicts and other situations of violence.

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1 See, e.g., J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005, Rules 70 and 71.

2 In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice referred to these basic IHL rules as “cardinal principles”: 8 July 1996, [1996] ICJ Rep., p. 257, §78.

Establishing national mechanisms to review the legality of new weapons is especially relevant and urgent in view of emerging new weapons technologies such as directed energy, incapacitants, behaviour change agents, acoustics and nanotechnology, to name but a few.<sup>3</sup> Weapons review mechanisms would also be relevant in reassessing existing weapons stocked in a state's arsenal in the light of new or emerging norms of international law, such as when a state becomes party to a treaty prohibiting or limiting the use of a certain weapon, for example the Ottawa Convention banning anti-personnel mines.<sup>4</sup>

Both the 27th International Conference of the Red Cross and Red Crescent in 1999 and the 28th Conference in 2003 called on states to establish mechanisms and procedures to determine the conformity of weapons with international law.<sup>5</sup> In particular, the 28th Conference declared that “[i]n light of the rapid development of weapons technology and in order to protect civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering and prohibited weapons, all new weapons, means and methods of warfare should be subject to rigorous and multidisciplinary review.”<sup>6</sup>

Underlying these calls is the fact that very few states are known to have adopted formal weapons review procedures. The ICRC is aware of only a handful of states that have such procedures in place, one of which is not party to Additional Protocol I.<sup>7</sup>

## Background and highlights of *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*

In order to provide a tool to assist states in establishing weapons review mechanisms, in 2006 the ICRC drew up *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, which it prepared in consultation with close to thirty military and international law experts, including government experts from ten countries. The *Guide* (reproduced below) advises on the substantive and procedural questions to be considered in taking such action.

3 See, e.g., D. P. Fidler, “The meaning of Moscow: “Non-lethal” weapons and international law in the early 21st century”, *International Review of the Red Cross*, Vol. 87, no. 859, 2005, p. 525; M. Wheelis and M. Dando, “Neurobiology: a case study of the imminent militarization of biology”, *ibid.*, p. 553; Robin Coupland and Dominique Loye, “Legal and health issues: international humanitarian law and the lethality or non-lethality of weapons”, in M. Dando, (ed.), *Non-Lethal Weapons: Technological and Operational Prospects* (Jane’s Special Report), Jane’s Information Group, London, 2000, pp. 60–6.

4 In such a case the new state party to the Ottawa Convention would need to review the mines in its arsenal to ensure that none are “designed to be exploded by the presence, proximity or contact of a person” within the meaning of the definition of anti-personnel mines in Article 2 (1) of the Convention.

5 The International Conference of the Red Cross and Red Crescent includes the states parties to the Geneva Conventions, i.e. virtually all states.

6 See Final Goal 2.5 of the Agenda for Humanitarian Action adopted by the 28th International Conference of the Red Cross and Red Crescent (2003).

7 See footnote 8 of the annexe *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*.

The *Guide* is not intended as a definitive statement on the matter of legal reviews of new weapons. Rather it reflects the ICRC's interpretation of the subject, based on the few sources at hand: the text of Article 36 of Additional Protocol I, the ICRC's *Commentary on the Additional Protocols* (itself based largely on the *travaux préparatoires* of the Protocols, i.e. their negotiating history), statements of international conferences and the practice of six states as reflected in the instruments that establish their weapons review procedures.<sup>8</sup>

In terms of state practice, the *Guide* relies only on primary sources – that is, official written procedures that were already in the public domain or were made available to the ICRC by the state concerned. It does not take into account secondary sources – that is, statements or publications of officials or scholars describing procedures to which the ICRC does not have access or which are otherwise not in the public domain.

In this connection, both the 27th and 28th International Conference of the Red Cross and Red Crescent have encouraged states to exchange information on their review mechanisms and procedures, calling on the ICRC to facilitate such exchanges and inviting states to co-operate with the ICRC in this regard.<sup>9</sup> Moreover, the *Guide* argues that a state that is party to Additional Protocol I would be required to share its review procedure with other states on the basis of Article 84, pursuant to which the high contracting parties must communicate to one another “the laws and regulations which they may adopt to ensure [the] application” of the Protocol. It is important to understand that this obligation applies only to the review *procedure*, not to the results of an actual review of a specific weapon, although the *Guide* does suggest that in accordance with the obligation of all states to ensure respect for IHL, a state should consider sharing the results of its review with others if it concludes that the weapon in question is illegal.

The obligation to review the legality of new weapons implies at least two things. First, a state should have in place some form of permanent procedure to that effect, in other words a *standing mechanism* that can be automatically activated at any time that a state is developing or acquiring a new weapon. Second, for the authority responsible for developing or acquiring new weapons such a procedure should be made *mandatory*, by law or by administrative directive.<sup>10</sup> Other than these minimum procedural requirements, it is left to each state to decide what specific form its review mechanism will take.

As emphasized throughout the *Guide*, a new weapon – that is, a proposed *means* of warfare, cannot be examined in isolation from the way in which it is to be used – that is, without also taking into account the *method* of warfare associated with it. This raises three questions. The first is whether the reviewing authority should consider only the proposed or intended use of the weapon, or whether it

8 Ibid.

9 See, e.g., Action 2.5.3 of Final Goal 2.5 of the Agenda for Humanitarian Action, above note 6.

10 These minimum procedural requirements are drawn *inter alia* from the ICRC *Commentary*, the above-mentioned calls of the International Conference of the Red Cross and Red Crescent, and the general obligation of states party to Additional Protocol I to adopt measures to ensure the execution of the Protocol pursuant to Article 80.

should also consider other *foreseeable* uses and effects – the weapon’s effects resulting from a combination of its design and the manner in which it is used. Article 36 of Additional Protocol I appears to support the broader approach, since it requires a state to determine whether the use of a new weapon would be prohibited “in some or all circumstances”. The *Commentary on the Additional Protocols* interprets this as meaning that a state should determine whether the “normal or expected” use of the weapon would be prohibited, but it “is not required to foresee or analyse all possible misuses of a weapon”. This would imply that the reviewing authority need not consider possible uses or effects of the weapon beyond those that can be reasonably expected. Let us take, for example, serrated-edged bayonets, the anti-personnel use of which is considered by some states as causing unnecessary suffering, and therefore prohibited by IHL.<sup>11</sup> Although those states may choose to equip their field troops with serrated-edged knives as tools for digging, cutting through material and other non-anti-personnel military uses, as in some armed forces,<sup>12</sup> it is entirely foreseeable that soldiers may in the heat of battle use them as anti-personnel weapons.

This leads to the second question arising from the link between means and methods of warfare: what should the reviewing authority do if some, but not all, expected methods of use of the weapon are found to be unlawful? On the basis of state practice, the *Guide* suggests that in such cases the reviewing authority should place restrictions on the weapon’s use. Taking the example of the serrated-edged knives, the reviewing authority would allow them to be issued to soldiers on condition that their anti-personnel use is prohibited. It is essential to incorporate any conditions governing a weapon’s use into the operating procedures or “user’s manual” for that weapon, so as to ensure that the commanders and combatants who will be using the weapon are fully aware of its operational restrictions.

The third question stemming from the intrinsic link between means and methods of warfare involves the type of IHL “conduct of hostilities” rules to be considered by the reviewing authority. The *Guide* suggests that, in addition to the “cardinal rules” of IHL applicable to weapons, the reviewing authority could also take into consideration other rules of IHL relating to the conduct of hostilities, for example those calling for proportionality and precautions in attacks. Although these rules are primarily intended to be applied at field level by military commanders on a case-by-case basis, they would nonetheless be relevant at the review stage of a new weapon insofar as the weapon’s design, characteristics and foreseeable effects enable the reviewing authority to determine whether or not the weapon’s end-user will be capable of employing it in conformity with them. For example, the IHL rule of precaution, which requires a party to a conflict to do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective, may have to be considered when reviewing a weapon equipped with an automated firing or targeting mechanism. In such a

11 See examples under Rule 70 in *Customary International Humanitarian Law*, above note 1, I, pp. 243–4.

12 See, e.g., J. Silberman, “Non-lethal weaponry and non-proliferation”, *Notre Dame Journal of Law, Ethics & Public Policy*, Vol.19, 2005, pp. 347–54, at p. 352.

case, the reviewing authority should determine whether the system allows for the cancellation of the attack, in other words whether the end-user of the weapon will be capable of respecting the rule of precaution.

It must be noted that IHL is not the only body of law relevant to weapons reviews. Article 36 of Additional Protocol I refers to the applicable law as “this Protocol *or any other rule of international law* applicable to the High Contracting Party” (emphasis added). Although the *Guide* underscores the broad scope of the legal framework, it has confined its list of the relevant rules to IHL treaty and customary rules and to treaties of a mixed IHL-disarmament nature, such as the Convention prohibiting the development, production and stockpiling of biological weapons. However, in reviewing the legality of new weapons, states may also need to consider the rules of international human rights law applicable to the use of force in situations not amounting to armed conflict. This is especially important in view of the increased involvement of armed forces in peace support operations, where troops are more likely to be involved in law enforcement than warfare.

Finally, whether the weapons review is carried out by an individual reviewer or a body made up of several persons or departments, it should be capable of taking a *multidisciplinary approach*, drawing on relevant military, legal, medical and environmental expertise. Such an approach is emphasized in the *Guide* and was expressly called for by the 28th International Conference of the Red Cross and Red Crescent.<sup>13</sup> Multidisciplinary expertise is important, given the wide range of factors that must be considered during the review; in particular the reviewing authority must have a technical understanding of the reliability and accuracy of the weapon in the light of the prohibition of the use of indiscriminate weapons, and a medical understanding of the effects of weapons on health in the light of the prohibition of the use of weapons of a nature to cause superfluous injury or unnecessary suffering. Medical expertise is especially important when faced with technologies that have effects different from those with which surgeons are generally familiar, notably effects other than those of explosive or projectile force, such as changes in body chemistry, electromagnetic energy, etc. In this regard the 28th International Conference encouraged states to review with particular scrutiny weapons “that cause health effects with which medical personnel are unfamiliar”.<sup>14</sup>

## Recent developments and future opportunities

In June 2006 the ICRC held a regional seminar for government representatives of western and eastern Europe and North America, with the aim of facilitating greater understanding and an exchange of views on the requirement to review the legality of new weapons. The ICRC plans similar events in Asia and Latin America

13 See Agenda for Humanitarian Action, above note 6, Action 2.5.1.

14 *Ibid.*, Action 2.5.2.

in the near future. These events are taking place in response to the request made by the 28th International Conference of the Red Cross and Red Crescent to the ICRC to “organise, in cooperation with government experts, a training workshop for States that do not yet have review procedures”.<sup>15</sup>

As pointed out above, although each of the 167 states party to Additional Protocol I<sup>16</sup> is required by Article 36 to carry out legal reviews of weapons it is developing or acquiring, very few are known to be doing so. The thirtieth Anniversary of the Protocol in 2007 presents a significant opportunity for the states concerned to begin implementing this important treaty obligation. Moreover, the forthcoming 30th International Conference of the Red Cross and Red Crescent at the end of 2007 will be an opportunity for the states party to the Geneva Conventions to report on the progress being made in implementing their pledges at the 28th Conference in 2003 to establish weapons review procedures.

Finally, it is important to mention that in November 2006 the Third Review Conference of the Convention on Certain Conventional Weapons (CCW), in operative paragraph 14 of its Final Document, “urge[d] States which do not already do so to conduct reviews to determine whether any new weapon, means or methods of warfare would be prohibited under international humanitarian law or other rules of international law applicable to them”, and in this context took note of the ICRC *Guide*.

It is hoped that states will follow through on these important treaty and policy commitments. Ensuring the legality of new weapons is crucial if the development, proliferation and use of cruel and indiscriminate weapons are to be prevented and if humanity, to cite the words of Henry Dunant, is to be protected from “new and frightful weapons of destruction”.<sup>17</sup>

15 Ibid., Action 2.5.3.

16 At 31 December 2006.

17 Henry Dunant, *A Memory of Solferino (Un Souvenir de Solferino, 1862)*, ICRC, Geneva, 1986, p. 128.

## REPORTS AND DOCUMENTS

# A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977

International Committee of the Red Cross Geneva,  
January 2006

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*Therefore, those who are not thoroughly aware of the disadvantages in the use of arms cannot be thoroughly aware of the advantages in the use of arms.*

Sun Tzu, *The Art of War*, circa 500 BC

*If the new and frightful weapons of destruction which are now at the disposal of the nations seem destined to abridge the duration of future wars, it appears likely, on the other hand, that future battles will only become more and more murderous.*

Henry Dunant, *Memory of Solferino*, 1862

*[The International Military] Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity...*

St Petersburg Declaration, 1868

### Introduction

The right of combatants to choose their means and methods of warfare<sup>1</sup> is not unlimited.<sup>2</sup> This is a basic tenet of *international humanitarian law* (IHL), also known as the *law of armed conflict* or the *law of war*.

IHL consists of the body of rules that apply during armed conflict with the aim of protecting persons who do not, or no longer, participate in the hostilities (e.g. civilians and wounded, sick or captured combatants) and regulating the conduct of hostilities (i.e. the means and methods of warfare). IHL sets limits on armed violence in wartime in order to prevent, or at least reduce, suffering. It is based on norms as ancient as war itself, rooted in the traditions of all societies. The rules of IHL have been developed and codified over the last 150 years in international treaties, notably the 1949 Geneva Conventions and their Additional Protocols of 1977, complemented by a number of other treaties dealing with specific matters such as cultural property, child soldiers, international criminal justice, and use of certain weapons. Many of the rules of IHL are also considered part of *customary international law* based on widespread, representative and virtually uniform practice of States accepted as legal obligation and therefore mandatory for all parties to an armed conflict.

The combatants' right to choose their means and methods of warfare is limited by a number of basic IHL rules regarding the conduct of hostilities, many of which are found in Additional Protocol I of 1977 on the protection of victims of international armed conflicts.<sup>3</sup> Other treaties prohibit or restrict the use of specific weapons such as biological and chemical weapons, incendiary weapons, blinding laser weapons and landmines, among others. In addition, many of the basic rules and specific prohibitions and restrictions on means and methods of warfare may be found in customary international law.<sup>4</sup>

Reviewing the legality of new weapons, means and methods of warfare is not a novel concept. The first international instrument to refer to the legal assessment of emerging military technologies was the St Petersburg Declaration, adopted in 1868 by an International Military Commission. The Declaration addresses the development of future weapons in these terms:

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops,

- 1 The terms “means and methods of warfare” designate the tools of war and the ways in which they are used. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [hereinafter Additional Protocol I] refers alternately to “methods or means of warfare” (Art. 35(1) and (3)), Art. 51(5)(a), Art. 55(1)), “methods and means of warfare” (titles of Part III and of Section I of Part III), “means and methods of attack” (Art. 57(2)(a)(ii)), and “weapon, means or method of warfare” (Art. 36).
- 2 This principle is stipulated in e.g. Article 22 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, and Article 35(1) of Additional Protocol I.
- 3 Additional Protocol I includes provisions imposing limits on the use of weapons, means and methods of warfare and protecting civilians from the effects of hostilities. See in particular Part III, Section I, and Part IV, Section I, Chapters I to IV.
- 4 For a list of the general and specific treaty and customary IHL rules applicable to weapons, means and methods of warfare, see section 1.2 of this Guide, below.

in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.<sup>5</sup>

The only other reference in international treaties to the need to carry out legal reviews of new weapons, means and methods of warfare is found in Article 36 of Additional Protocol I of 1977:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

The aim of Article 36 is to prevent the use of weapons that would violate international law in all circumstances and to impose restrictions on the use of weapons that would violate international law in some circumstances, by determining their lawfulness before they are developed, acquired or otherwise incorporated into a State's arsenal.

The requirement that the legality of all new weapons, means and methods of warfare be systematically assessed is arguably one that applies to *all* States, regardless of whether or not they are party to Additional Protocol I. It flows logically from the truism that States are prohibited from using illegal weapons, means and methods of warfare or from using weapons, means and methods of warfare in an illegal manner. The faithful and responsible application of its international law obligations would require a State to ensure that the new weapons, means and methods of warfare it develops or acquires will not violate these obligations.<sup>6</sup> Carrying out legal reviews of new weapons is of particular importance today in light of the rapid development of new weapons technologies.

Article 36 is complemented by Article 82 of Additional Protocol I, which requires that legal advisers be available at all times to advise military commanders on IHL and "on the appropriate instruction to be given to the armed forces on this subject." Both provisions establish a framework for ensuring that armed forces will be capable of conducting hostilities in strict accordance with IHL, through legal reviews of planned means and methods of warfare.

Article 36 does not specify how a determination of the legality of weapons, means and methods of warfare is to be carried out. A plain reading of Article 36 indicates that a State must assess the new weapon, means or method of warfare in light of the provisions of Additional Protocol I and of any other applicable rule of international law. According to the ICRC's Commentary on the Additional Protocols, Article 36 "implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality, and the other Contracting Parties

5 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 29 November / 11 December 1868. The full text of the St Petersburg Declaration is reproduced in Annex II of this Guide.

6 See for example the practice of Sweden and the United States, which established formal weapons review mechanisms as early as 1974, three years before the adoption of Additional Protocol I.

can ask to be informed on this point.”<sup>7</sup> But there is little by way of State practice to indicate what kind of “internal procedures” should be established, as only a limited number of States are known to have put in place mechanisms or procedures to conduct legal reviews of weapons.<sup>8</sup>

The importance of the legal review of weapons has been highlighted in a number of international fora. In 1999, the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent encouraged States “to establish mechanisms and procedures to determine whether the use of weapons, whether held in their inventories or being procured or developed, would conform to the obligations

- 7 Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 [hereinafter Commentary on the Additional Protocols], at paragraphs 1470 and 1482. States Parties would be required to share the procedures they adopt with other States Parties on the basis of Article 84 of Additional Protocol I: see below, note 96 and corresponding text.
- 8 States that are known to have in place national mechanisms to review the legality of weapons and that have made the instruments setting up these mechanisms available to the ICRC are: **Australia**: *Legal review of new weapons*, Australian Department of Defence Instruction (General) OPS 44-1, 2 June 2005 [hereinafter Australian Instruction]; **Belgium**: Défense, Etat-Major de la Défense, Ordre Général - J/836 (18 July 2002), establishing *La Commission d’Evaluation Juridique des nouvelles armes, des nouveaux moyens et des nouvelles méthodes de guerre* (Committee for the Legal Review of New Weapons, New Means and New Methods of Warfare) [hereinafter Belgian General Order]; **the Netherlands**: *Beschikking van de Minister van Defensie* (Directive of the Minister of Defence) nr. 458.614/A, 5 May 1978, establishing the *Adviescommissie Internationaal Recht en Conventioneel Wapengebruik* (Committee for International Law and the Use of Conventional Weapons) [hereinafter the Netherlands Directive]; **Norway**: Direktiv om folkerettslig vurdering av vapen, krigforingsmetoder og krigforingsvirkemidler, (Directive on the Legal Review on Weapons, Methods and Means of Warfare), Ministry of Defence, 18 June 2003 [hereinafter Norwegian Directive]; **Sweden**: *Förordning om folkrättslig granskning av vapenprojekt* (Ordinance on international law review of arms projects), Swedish Code of Statutes, SFS 1994:536 [hereinafter Swedish Monitoring Ordinance]; **the United States**: *Review of Legality of Weapons under International Law*, US Department of Defense Instruction 5500.15, 16 October 1974; *Weapons Review*, US Department of Air Force Instruction 51-402, 13 May 1994 [hereinafter US Air Force Instruction]; *Legal Services: Review of Legality of Weapons under International Law*, US Department of Army Regulation 27-53, 1 January 1979 [hereinafter US Army Regulation]; *Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System*, US Department of Navy, Secretary of the Navy Instruction 5000.2C, 19 November 2004 [hereinafter US Navy Instruction]; *Policy for Non-Lethal Weapons*, US Department of Defense Directive 3000.3, 9 July 1996 [hereinafter Non-lethal Weapons Directive]; *The Defense Acquisition System*, US Department of Defense Directive 5000.1, 12 May 2003 [hereinafter US Acquisition Directive]. France and the United Kingdom have indicated to the ICRC that they carry out reviews pursuant to Ministry of Defence instructions, but these have not been made available. The United Kingdom’s procedures are mentioned in UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004, at p. 119, paragraph 6.20.1 [hereinafter referred to as “UK Military Manual”]. In Germany, the Federal Agency for Defence Procurement (BWB), upon instruction of the Defence Technology Department at the Federal Ministry of Defence, commissioned a “Manual regarding a test of compliance with international law at the initial point of procurement – International arms control obligations and international humanitarian law” which was published in 2000: Rudolf Gridl, *Kriterienkatalog zur Überprüfung von Beschaffungsvorhaben im Geschäftsbereich des BWB/BMVG mit völkerrechtlichen Vereinbarungen: Internationale Rüstungskontrolle und humanitäres Völkerrecht*, Ebenhausen im Isartal: Stiftung Wissenschaft und Politik, 2000. For an overview of Article 36 and existing review mechanisms, see: Lt. Col. Justin McClelland, “The review of weapons in accordance with Article 36 of Additional Protocol I”, *International Review of the Red Cross*, Vol. 85, No 850 (June 2003), pp. 397–415; I.Daoust, R. Coupland and R. Isohey, “New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare”, *International Review of the Red Cross*, Vol. 84, No 846 (June 2002) at pp. 359–361; Danish Red Cross, *Reviewing the Legality of New Weapons*, December 2000.

binding on them under international humanitarian law.” It also encouraged States “to promote, wherever possible, exchange of information and transparency in relation to these mechanisms, procedures and evaluations.”<sup>9</sup>

At the Second Review Conference of the Convention on Certain Conventional Weapons (CCW) in 2001, the States Parties urged “States which do not already do so, to conduct reviews such as that provided for in Article 36 of Protocol I additional to the 1949 Geneva Conventions, to determine whether any new weapon, means or methods of warfare would be prohibited by international humanitarian law or other rules of international law applicable to them”.<sup>10</sup>

In December 2003, the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent reaffirmed by consensus the goal of ensuring “the legality of new weapons under international law,” this “in light of the rapid developments of weapons technology and in order to protect civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering and prohibited weapons.”<sup>11</sup> The Conference stated that all new weapons, means and methods of warfare “should be subject to rigorous and multidisciplinary review”, and in particular that such review “should involve a multidisciplinary approach, including military, legal, environmental and health-related considerations.”<sup>12</sup> The Conference also encouraged States “to review with particular scrutiny all new weapons, means and methods of warfare that cause health effects with which medical personnel are unfamiliar.”<sup>13</sup> Finally, the Conference invited States that have review procedures in place to cooperate with the ICRC with a view to facilitating the voluntary exchange of experience on review procedures.<sup>14</sup>

In this Guide, the terms “weapons, means and methods of warfare” designate the means of warfare and the manner in which they are used. In order to lighten the text, the Guide will use the term “weapons” as shorthand, but the terms “means of warfare”, “methods of warfare”, “means and methods of warfare”, and “weapons, means and methods of warfare” will also be used as the context requires.<sup>15</sup>

9 Section 21, Final Goal 1.5 of the Plan of Action for the years 2000–2003 adopted by the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 31 October to 6 November 1999. The Conference further stated that “States and the ICRC may engage consultations to promote these mechanisms (...)”.

10 Final Declaration of the Second Review Conference of the States Parties to the Convention on Certain Conventional Weapons, Geneva, 11–21 December 2001, CCW/CONF.II/2, at p. 11. Available at <<http://disarmament.un.org:8080/ccw/ccwmeetings.html>>.

11 Final Goal 2.5 of the Agenda for Humanitarian Action adopted by the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003 [hereinafter Agenda for Humanitarian Action]. The full text of Final Goal 2.5 is reproduced in Annex I to this Guide. At the International Conference, two States – Canada and Denmark – made specific pledges to review their procedures concerning the development or acquisition of new weapons, means and methods of warfare.

12 *Id.*, paragraph 2.5.1.

13 *Id.*, paragraph 2.5.2.

14 *Id.*, paragraph 2.5.3.

15 See note 1 above and section 1.1 below.

## STRUCTURE

This Guide is divided into two parts: the first deals with the substantive aspects of an Article 36 review, i.e. relating to its material scope of application, and the second deals with functional considerations, i.e. those of form and procedure. The material scope of application is dealt with before the functional considerations because determining the latter requires an understanding of the former. For example, it is difficult to determine the expertise that will be needed to conduct the review in advance of understanding what the review is required to do.

**Part 1** on the review mechanism's material scope of application addresses three questions:

- What types of weapons must be subjected to a legal review? (**section 1.1**)
- What rules must the legal review apply to these weapons? (**section 1.2**)
- What kind of factors and empirical data should the legal review consider? (**section 1.3**)

**Part 2** addresses the functional considerations of the review mechanism, in particular:

- The establishment of the review mechanism (**section 2.1**): by what type of constituent instrument and under whose authority?
- The structure and composition of the review mechanism (**section 2.2**): who is responsible for carrying out the review? what departments / sectors are represented? what kind of expertise should be considered in the review?
- The procedure for conducting a review (**section 2.3**): at what stage should the review of new weapons take place? how and by whom is the review procedure triggered? how is information about the weapon under review gathered?
- Decision-making (**section 2.4**): how are decisions reached? are decisions binding on the government or treated as recommendations? can decisions attach conditions to the approval of new weapons? is the review's decision final or can it be appealed?

Record-keeping (**section 2.5**): should records be kept of the reviews that have been carried out and the decisions reached? who can have access to such records and under what conditions?

### 1. Material scope of application of the review mechanism

#### 1.1 Types of weapons to be subjected to legal review

Article 36 of Additional Protocol I refers to “*weapons, means or methods of warfare*”. According to the ICRC's Commentary on the Additional Protocols:

“the words “methods and means” *include weapons in the widest sense, as well as the way in which they are used.* The use that is made of a weapon can be unlawful in itself, or it can be unlawful only under certain conditions. For example, poison is unlawful in itself, as would be any weapon which would, by its very nature, be so imprecise that it would inevitably cause indiscriminate damage. (...) However, a weapon that can be used with precision can also be abusively used against the civilian population. In this case, it is not the weapon which is prohibited, but the method or the way in which it is used.”<sup>16</sup>

The material scope of the Article 36 legal review is therefore very broad. It would cover:

- weapons of all types - be they anti-personnel or anti-materiel, “lethal”, “non-lethal” or “less lethal” - and weapons systems;<sup>17</sup>
- the ways in which these weapons are to be used pursuant to military doctrine, tactics, rules of engagement, operating procedures and counter-measures;<sup>18</sup>
- all weapons to be acquired, be they procured further to research and development on the basis of military specifications, or purchased “off-the-shelf”;<sup>19</sup>
- a weapon which the State is intending to acquire for the first time, without necessarily being “new” in a technical sense;<sup>20</sup>

16 Commentary on the Additional Protocols, paragraph 1402, emphasis added.

17 Subsection 3(a) of the Australian Instruction defines the term “weapon” for the purposes of the Instruction, as “an offensive or defensive instrument of combat used to destroy, injure, defeat or threaten. It includes weapon systems, munitions, sub-munitions, ammunition, targeting devices, and other damaging or injuring mechanisms.”. Subsection 1(a) of the Belgian General Order defines the term “weapon” for the purposes of the General Order as “any type of weapon, weapon system, projectile, munition, powder or explosive, designed to put out of combat persons and/or materiel” (unofficial translation from the French). Subsection 1.4 of the Norwegian Directive defines the word “weapons”, for the purposes of the Directive, as “any means of warfare, weapons systems / project, substance, etc. which is particularly suited for use in combat, including ammunition and similar functional parts of a weapon.”. In the US, review of all “weapons or weapons systems” is required: see US Army Regulation, subsection 2(a); US Navy Instruction, p. 23, subsection 2.6; US Acquisition Directive, p. 8, subsection E.1.1.15. The US DOD Law of War Working Group has proposed standard definitions, pursuant to which the term “weapons” refers to “all arms, munitions, materiel, instruments, mechanisms, or devices that have an intended effect of injuring, damaging, destroying or disabling personnel or property”, and the term “weapon system” refers to “the weapon itself and those components required for its operation, including new, advanced or emerging technologies which may lead to development of weapons or weapon systems and which have significant legal and policy implications. Weapons systems are limited to those components or technologies having direct injury or damaging effect on people or property (including all munitions and technologies such as projectiles, small arms, mines, explosives, and all other devices and technologies that are physically destructive or injury producing).” See W. Hays Parks, Office of The Judge Advocate General of the Army, “Weapons Review Programme of the United States”, presented at the Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, Jongny sur Vevey, Switzerland, 29–31 January 2001 (both this presentation and the report of the meeting are on file with the ICRC).

18 See for example Norwegian Directive, subsection 1.4 and 2.4.

19 See also sub-section 2.3.1 below.

20 Commentary on the Additional Protocols, paragraph 1472.

- an existing weapon that is modified in a way that alters its function, or a weapon that has already passed a legal review but that is subsequently modified;<sup>21</sup>
- an existing weapon where a State has joined a new international treaty which may affect the legality of the weapon.<sup>22</sup>

When in doubt as to whether the device or system proposed for study, development or acquisition is a “weapon”, legal advice should be sought from the weapons review authority.

A weapon or means of warfare cannot be assessed in isolation from the method of warfare by which it is to be used. It follows that the legality of a weapon does not depend solely on its design or intended purpose, but also on the manner in which it is expected to be used on the battlefield. In addition, a weapon used in one manner may “pass” the Article 36 “test”, but may fail it when used in another manner. This is why Article 36 requires a State “to determine whether its employment would, *in some or all circumstances*, be prohibited” by international law (emphasis added).

As noted in the ICRC’s Commentary on the Additional Protocols, a State need only determine “whether the employment of a weapon *for its normal or expected use* would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in a way that would be prohibited.”<sup>23</sup>

## 1.2 Legal framework: Rules to be applied to new weapons, means and methods of warfare

In determining the legality of a new weapon, the reviewing authority must apply existing international law rules which bind the State -- be they treaty-based or customary. Article 36 of Additional Protocol I refers in particular to the Protocol and to “any other rule of international law applicable” to the State. The relevant rules include *general* rules of IHL applying to *all weapons, means and methods of warfare*, and *particular* rules of IHL and international law prohibiting the use of *specific weapons and means of warfare* or restricting the methods by which they can be used.

The first step is to determine whether employment of the particular weapon or means of warfare under review is prohibited or restricted by a treaty which binds the reviewing State or by customary international law (sub-section

21 See for example Australian Instruction, section 2 and subsection 3(b) and footnote 3 thereof; Belgian General Order, subsection 5(i) and (j); Norwegian Directive, subsection 2.3 *in fine*; US Air Force Instruction, subsections 1.1.1, 1.1.2, 1.1.3; and US Army Regulation, subsection 6(a)(3).

22 See for example Norwegian Directive, subsections 2.2 (“To the extent necessary, legal review shall also be done with regard to existing weapons, methods and means of warfare, in particular when Norway commits to new international legal obligations.”) and 2.6 (“In addition, relevant rules of International Law that may be expected to enter into force for Norway in the near future, shall also be taken into consideration. Furthermore, particular emphasis shall be put on views on International Law put forward by Norway internationally.”). See also US Air Force Instruction, subsection 1.1.3.

23 Commentary on the Additional Protocols, paragraph 1469, emphasis added.

1.2.1 below). If there is no such specific prohibition, the next step is to determine whether employment of the *weapon or means of warfare* under review and the normal or expected *methods* by which it is to be used would comply with the general rules applicable to all weapons, means and methods of warfare found in Additional Protocol I and other treaties that bind the reviewing State or in customary international law (sub-section 1.2.2 below). In the absence of relevant treaty or customary rules, the reviewing authority should consider the proposed weapon in light of the principles of humanity and the dictates of public conscience (sub-section 1.2.2.3 below).

Of those States that have established formal mechanisms to review the legality of new weapons, some have empowered the reviewing authority to take into consideration not only the law as it stands at the time of the review, but also likely future developments of the law.<sup>24</sup> This approach is meant to avoid the costly consequences of approving and procuring a weapon the use of which is likely to be restricted or prohibited in the near future.

The sections below list the relevant treaties and customary rules without specifying in which situations these apply – i.e. whether they apply in international or non-international armed conflicts, or in all situations. This is to be determined by reference to the relevant treaty or customary rule, bearing in mind that most of the rules apply to all types of armed conflict. Besides, as stated in the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in relation to prohibited means and methods of warfare, “what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.<sup>25</sup>

## 1.2.1 Prohibitions or restrictions on specific weapons

1.2.1.1 *Prohibitions or restrictions on specific weapons under international treaty law.* In conducting reviews, a State must consider the international instruments to which it is a party that prohibit the use of specific weapons and means of warfare, or that impose limitations on the way in which specific weapons may be used. These instruments include (in chronological order):<sup>26</sup>

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St-Petersburg, 29 November / 11 December 1868 (hereafter the 1868 St-Petersburg Declaration).

24 See for example UK Military Manual, p. 119, paragraph 6.20.1, which states: “The review process takes into account not only the law as it stands at the time of the review but also attempts to take account of likely future developments in the law of armed conflict.” See also Norwegian Directive, at paragraph 2.6, which states that “relevant rules of International Law that may be expected to enter into force for Norway in the near future shall also be taken into consideration.” The same provision adds that “particular emphasis shall be put on views on International Law put forward by Norway internationally.”

25 ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, Case no. IT-94-1, para. 119 and 127.

26 Reference is made only to the instruments and not to the specific prohibitions or restrictions contained therein, except in the case of the Rome Statute of the International Criminal Court.

- Declaration (2) concerning Asphyxiating Gases. The Hague, 29 July 1899.
- Declaration (3) concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body, The Hague, 29 July 1899.
- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 23 (a), pursuant to which it is forbidden to employ poison or poisoned weapons.
- Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. The Hague, 18 October 1907.
- Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington, 10 April 1972.
- Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976 (ENMOD Convention).
- 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 (CCW), Geneva, 10 October 1980, and Amendment to Article 1, 21 December 2001. The Convention has five Protocols:
  - Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980;
  - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980; or Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996);
  - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980;
  - Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995;
  - Protocol on Explosive Remnants of War (Protocol V), 28 November 2003.<sup>27</sup>

<sup>27</sup> The Protocol on Explosive Remnants of War does not prohibit or restrict the use of weapons, but stipulates the responsibilities for dealing with the post-hostilities effects of weapons that are considered legal *per se*. However, Article 9 of the Protocol encourages each State Party to take “generic preventive measures aimed at minimising the occurrence of explosive remnants of war, including, but not limited to, those referred to in Part 3 of the Technical Annex.”

- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.
- Rome Statute of the International Criminal Court, 17 July 1998, Article 8(2)(b), paragraphs (xvii) to (xx), which include in the definition of war crimes for the purpose of the Statute the following acts committed in international armed conflict:<sup>28</sup>

“(xvii) Employing poison or poisoned weapons;

“(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

“(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

“(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.”<sup>29</sup>

## 1.2. Prohibitions or restrictions on specific weapons under customary international law

In conducting reviews, a State must also consider the prohibitions or restrictions on the use of specific weapons, means and methods of warfare pursuant to customary international law. According to the ICRC study on *Customary International Humanitarian Law*,<sup>30</sup> these prohibitions or restrictions would include the following:

- The use of poison or poisoned weapons is prohibited.<sup>31</sup>
- The use of biological weapons is prohibited.<sup>32</sup>

28 These are not new rules of IHL, but instead criminalize prohibitions that exist pursuant to other treaties and to customary international law.

29 At the time of writing, there is no such annex to the Statute.

30 J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005.

31 *Id.*, Vol. I, Rule 72, at 251.

32 *Id.*, Rule 73, at 256.

- The use of chemical weapons is prohibited.<sup>33</sup>
- The use of riot-control agents as a method of warfare is prohibited.<sup>34</sup>
- The use of herbicides as a method of warfare is prohibited under certain conditions.<sup>35</sup>
- The use of bullets which expand or flatten easily in the human body is prohibited.<sup>36</sup>
- The anti-personnel use of bullets which explode within the human body is prohibited.<sup>37</sup>
- The use of weapons, the primary effect of which is to injure by fragments which are not detectable by x-ray in the human body is prohibited.<sup>38</sup>
- The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited.<sup>39</sup>
- When landmines are used, particular care must be taken to minimize their indiscriminate effects. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.<sup>40</sup>
- If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*.<sup>41</sup>
- The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited.<sup>42</sup>

### 1.2.2 General prohibitions or restrictions on weapons, means and methods of warfare

If no specific prohibition or restriction is found to apply, the weapon or means of warfare under review and the normal or expected methods by which it is to be

33 *Id.*, Rule 74, at 259.

34 *Id.*, Rule 75, at 263.

35 *Id.*, Rule 76, at 265. The rule sets out the conditions under which the use of herbicides as a method of warfare is prohibited as follows: “if they: a) are of a nature to be prohibited chemical weapons; b) are of a nature to be prohibited biological weapons; c) are aimed at vegetation that is not a military objective; d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or e) would cause widespread, long-term and severe damage to the natural environment.”

36 *Id.*, Rule 77, at 268.

37 *Id.*, Rule 78, at 272.

38 *Id.*, Rule 79, at 275.

39 *Id.*, Rule 80, at 278.

40 *Id.*, Rules 81–83, at 280, 283, and 285 respectively. Rule 82 specifies that a party to the conflict using landmines must record their placement as far as possible.

41 *Id.*, Rules 84 and 85, at 287 and 289 respectively.

42 *Id.*, Rule 86, at 292.

used must be assessed in light of the general prohibitions or restrictions provided by treaties and by customary international law applying to all weapons, means and methods of warfare.

A number of the rules listed below are primarily context-dependent, in that their application is typically determined at field level by military commanders on a case-by-case basis taking into consideration the conflict environment in which they are operating at the time and the weapons, means and methods of warfare at their disposal. But these rules are also relevant to the assessment of the legality of a new weapon before it has been used on the battlefield, to the extent that the characteristics, expected use and foreseeable effects of the weapon allow the reviewing authority to determine whether or not the weapon will be capable of being used lawfully in certain foreseeable situations and under certain conditions. For example, if the weapon's destructive radius is very wide, it may be difficult to use it against one or several military targets located in a concentration of civilians without violating the prohibition on the use of indiscriminate means and methods of warfare<sup>43</sup> and/or the rule of proportionality.<sup>44</sup> In this regard, when approving such a weapon, the reviewing authority should attach conditions or comments to the approval, to be integrated into the rules of engagement or operating procedures associated with the weapon.

*1.2.2.1 General prohibitions or restrictions on weapons, means and methods of warfare under international treaty law.* A number of treaty-based general prohibitions or restrictions on weapons, means and methods of warfare must be considered. In particular, States party to Additional Protocol I must consider the rules under that treaty, as required by Article 36. These include:<sup>45</sup>

- Prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Art. 35(2)).
- Prohibition to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment (Articles 35(3) and 55).
- Prohibition to employ a method or means of warfare which cannot be directed at a specific military objective and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(b)).
- Prohibition to employ a method or means of warfare the effects of which cannot be limited as required by Additional Protocol I and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(c)).

43 See Additional Protocol I, Article 51(4)(b) and (c), referred to under sub-section 1.2.2.1 below, and the rule of customary international law prohibiting indiscriminate attacks, under sub-section 1.2.2.2 below.

44 See Article 51(5)(b) of Additional Protocol I, referred to under sub-section 1.2.2.1 below, and rule of proportionality under customary international law, under sub-section 1.2.2.2 below.

45 Selected provisions of Additional Protocol I are reproduced in Annex III to this Guide.

- Prohibition of attacks by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects (Art. 51(5)(a)).
- Prohibition of attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule) (Art. 51(5)(b)).

*1.2.2.2 General prohibitions or restrictions on weapons, means and methods of warfare under customary international law.* General prohibitions or restrictions on the use of weapons, means and methods of warfare pursuant to customary international law must also be considered. These would include:

- Prohibition to use means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.<sup>46</sup>
- Prohibition to use weapons which are by nature indiscriminate.<sup>47</sup> This includes means of warfare which cannot be directed at a specific military objective, and means of warfare the effects of which cannot be limited as required by IHL.<sup>48</sup>
- Prohibition of attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.<sup>49</sup>
- Prohibition to use methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Destruction of the natural environment may not be used as a weapon.<sup>50</sup>
- Prohibition to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule).<sup>51</sup>

46 Henckaerts and Doswald-Beck (eds.), note 30 above, Rule 70, at 237.

47 *Id.*, Rule 71, at 244. See also Rule 11, at 37.

48 *Id.*, Rule 12, at 40.

49 *Id.*, Rule 13, at 43.

50 *Id.*, Rule 45, at 151. The summary of the rule notes that: "It appears that the United States is a "persistent objector" to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons." See also Rule 44.

51 *Id.*, Rule 14, at 46.

1.2.2.3 *Prohibitions or restrictions based on the principles of humanity and the dictates of public conscience (the “Martens clause”).* Consideration should be given to whether the weapon accords with the principles of humanity and the dictates of public conscience, as stipulated in Article 1(2) of Additional Protocol I, in the preamble to the 1907 Hague Convention (IV), and in the preamble to the 1899 Hague Convention (II). This refers to the so-called “Martens clause”, which Article 1(2) of Additional Protocol I formulates as follows:

“In cases not covered by this Protocol or by other international agreements, 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 dictates of public conscience.”

The International Court of Justice in the case of the *Legality of the Threat or Use of Nuclear Weapons* affirmed the importance of the Martens clause “whose continuing existence and applicability is not to be doubted”<sup>52</sup> and stated that it “had proved to be an effective means of addressing rapid evolution of military technology.”<sup>53</sup> The Court also found that the Martens clause represents customary international law.<sup>54</sup>

A weapon which is not covered by existing rules of international humanitarian law would be considered contrary to the Martens clause if it is determined *per se* to contravene the principles of humanity or the dictates of public conscience.

### 1.3 Empirical data to be considered by the review

In assessing the legality of a particular weapon, the reviewing authority must examine not only the weapon’s design and characteristics (the “means” of warfare) but also how it is to be used (the “method” of warfare), bearing in mind that the weapon’s effects will result from a combination of its design *and* the manner in which it is to be used.

In order to be capable of assessing whether the weapon under review is subject to specific prohibitions or restrictions (listed in sub-section 1.2.1 above) or whether it contravenes one or more of the general rules of IHL applicable to weapons, means and methods of warfare (listed in sub-section 1.2.2 above), the reviewing authority will have to take into consideration a wide range of military, technical, health and environmental factors. This is the rationale for the involvement of experts from various disciplines in the review process.<sup>55</sup>

52 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paragraph 87.

53 *Id.*, paragraph 78.

54 *Id.*, paragraph 84.

55 The importance of ensuring a multidisciplinary approach to the legal review of weapons is emphasised in Action 2.5.2 of Agenda for Humanitarian Action adopted by the 28th International Conference of the Red Cross and Red Crescent and was noted by the Expert Meeting on Legal Reviews of Weapons and the SrUS Project referred to in note 17 above. See also section 2.2 below.

For each category of factors described below, the relevant general rule of IHL is referred to, where appropriate.

### 1.3.1 Technical description of the weapon

An assessment will logically begin by considering the weapon's technical description and characteristics, including:

- a full technical description of the weapon;<sup>56</sup>
- the use for which the weapon is designed or intended, including the types of targets (e.g. personnel or materiel; specific target or area; etc.);<sup>57</sup>
- its means of destruction, damage or injury.

### 1.3.2 Technical performance of the weapon

The technical performance of the weapon under review is of particular relevance in determining whether its use may cause *indiscriminate effects*. The relevant factors would include:

- the accuracy and reliability of the targeting mechanism (including e.g. failure rates, sensitivity of unexploded ordnance, etc.);
- the area covered by the weapon;
- whether the weapons' foreseeable effects are capable of being limited to the target or of being controlled in time or space (including the degree to which a weapon will present a risk to the civilian population after its military purpose is served).

### 1.3.3 Health-related considerations

Directly related to the weapon's mechanism of injury (damage mechanism) is the question of what types of injuries the new weapon will be capable of inflicting. The factors to be considered in this regard could include:<sup>58</sup>

- the size of the wound expected when the weapon is used for its intended purpose (as determined by wound ballistics);

56 In addition to the design, material composition and fusing system of the weapon, the technical description would include "range, speed, shape, materials, fragments, accuracy, desired effect, and nature of system or subsystem employed for firing, launching, releasing or dispensing": see US Department of Air Force Instruction 51-402, Weapons Review, 13 May 1994 (implementing US Department of Air Force Policy Directive 51-4, Compliance with the Law of Armed Conflict, 26 April 1993 and US Department of Defence Directive 5100.77, DoD Law of War Program, 9 December 1998), at subsection 1.2.1.

57 This is referred to by some as the weapon's "mission" or "military purpose".

58 See for example US Air Force Instruction, subsection 1.2.1, which requires that the reviewer be provided with information *inter alia* on the "nature of the expected injury to persons (including medical data, as available)".

- the likely mortality rate among the victims when the weapon is used for its intended purpose;
- whether the weapon would cause anatomical injury or anatomical disability or disfigurement which are specific to the design of the weapon.

If a new weapon injures by means other than explosive or projectile force, or otherwise causes health effects that are qualitatively or quantitatively different from those of existing lawful weapons and means of warfare, additional factors to be considered could include:<sup>59</sup>

- whether all relevant scientific evidence pertaining to the foreseeable effects on humans has been gathered;
- how the mechanism of injury is expected to impact on the health of victims;
- when used in the context of armed conflict, what is the expected field mortality and whether the later mortality (in hospital) is expected to be high;
- whether there is any predictable or expected long term or permanent alteration to the victims' psychology or physiology;
- whether the effects would be recognised by health professionals, be manageable under field conditions and be treatable in a reasonably equipped medical facility.

These and other health-related considerations are important to assist the reviewing authority in determining whether the weapon in question can be expected to cause *superfluous injury or unnecessary suffering*. Assessing the legality of a weapon in light of this rule involves weighing the relevant health factors together against the intended military purpose or expected military advantage of the new weapon.<sup>60</sup>

59 The 28<sup>th</sup> International Conference of the Red Cross and Red Crescent encouraged States "to review with particular scrutiny all new weapons, means and methods of warfare that cause health effects with which medical personnel are unfamiliar": paragraph 2.5.2 of Agenda for Humanitarian Action. In addition, the Expert Meeting on Legal Reviews of Weapons and the SIRUS Project noted that "we are familiar with the effects of weapons which injure by explosives, projectile force or burns and weapons causing these effects need to be reviewed accordingly" and that "there is a need for particularly rigorous legal reviews of weapons which injure by means and cause effects with which we are not familiar" (report of the meeting at p. 8, note 17 above).

60 According to the ICRC Study on Customary International Humanitarian Law, "The prohibition of means of warfare which are of a nature to cause superfluous injury or unnecessary suffering refers to the effect of a weapon on combatants. Although there is general agreement on the existence of the rule, views differ on how it can actually be determined that a weapon causes superfluous injury or unnecessary suffering. States generally agree that suffering that has no military purpose violates this rule. Many States point out that the rule requires that a balance be struck between military necessity, on the one hand, and the expected injury or suffering inflicted on a person, on the other hand, and that excessive injury or suffering, i.e., that which is out of proportion to the military advantage sought, therefore violates the rule. Some States also refer to the availability of alternative means as an element that has to go into the assessment of whether a weapon causes unnecessary suffering or superfluous injury." Henckaerts and Doswald-Beck (eds.), note 30 above, under Rule 70, at 240 (footnotes omitted).

### 1.3.4 Environment-related considerations

In determining the effects of the weapon under review on the natural environment, and in particular whether they are expected to cause excessive incidental damage to the natural environment or widespread, long-term and severe damage to the natural environment,<sup>61</sup> the relevant questions to be considered would include:

- have adequate scientific studies on the effects on the natural environment been conducted and examined?
- what type and extent of damage are expected to be directly or indirectly caused to the natural environment?
- for how long is the damage expected to last; is it practically/economically possible to reverse the damage, i.e. to restore the environment to its original state; and what would be the time needed to do so?
- what is the direct or indirect impact of the environmental damage on the civilian population?
- is the weapon specifically designed to destroy or damage the natural environment,<sup>62</sup> or to cause environmental modification?<sup>63</sup>

## 2. Functional aspects of the review mechanism

In setting up a weapons review mechanism, a number of decisions need to be made relating to the manner in which it is to be established, its structure and composition, the procedure for conducting a review, decision-making and record-keeping.

The following questions are indicative of the elements to be considered. Reference to State practice is limited to published procedures only.

### 2.1 How should the review mechanism be established?

#### 2.1.1 By legislation, regulation, administrative order, instruction or guidelines?

Article 36 of Additional Protocol I does not specify in what manner and under what authority reviews of the legality of new weapons are to be constituted. It is the responsibility of each State to adopt legislative, administrative, regulatory and/

61 See Articles 35(3) and 55 of Additional Protocol I, referred to above under sub-section 1.2.2.1, and rules of customary international law under sub-section 1.2.2.2. Of relevance to the consideration of environmental factors is Rule 44 of ICRC Study on Customary International Humanitarian Law, which states *inter alia*: “Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking” all feasible precautions “to avoid, and in any event to minimise, incidental damage to the environment”. See Henckaerts and Doswald-Beck (eds.), note 30 above.

62 See customary international law rule referenced in note 50 above.

63 See ENMOD Convention, listed under sub-section 1.2.1.1 above.

or other appropriate measures to effectively implement this obligation. At a minimum, Article 36 requires that each State Party set up a formal procedure and, in accordance with Article 84 of Additional Protocol I, other States parties to the Protocol may ask to be informed about this procedure.<sup>64</sup> The establishment of a formal procedure implies that there be a standing mechanism ready to carry out reviews of new weapons whenever these are being studied, developed, acquired or adopted.

Of the six States that have made available their weapons review procedures, one has established its review mechanism pursuant to a government ordinance<sup>65</sup> and five have done so pursuant to instructions, directives or orders of their Ministry of Defence.<sup>66</sup>

### *2.1.2 Under which authority should the review mechanism be established?*

The review mechanism can be established by, and made accountable to, the government department responsible for the study, development, acquisition or adoption of new weapons, typically the Ministry of Defence or its equivalent. This has the advantage that the Ministry of Defence is also the same authority that issues weapon handling instructions. Most States that have established review mechanisms have done so under the authority of their Ministry of Defence.

Alternatively, the review mechanism could be established by the government itself and implemented by an inter-departmental entity, which is the option preferred by one State.<sup>67</sup> It is also conceivable that another relevant department be entrusted with the establishment of the review mechanism, such as for example the authority responsible for government procurement.

Whatever the establishing authority, care should be taken to ensure that the reviewing body is capable of carrying out its work in an impartial manner, based on the law and on relevant expertise.<sup>68</sup>

## 2.2 Structure and composition of the review mechanism

### *2.2.1 Who should be responsible for carrying out the review?*

The responsibility for carrying out the legal review may be entrusted to a special body or committee made up of permanent representatives of relevant sectors and departments. This is the option taken by four of the States that have made known

64 See note 7 above and note 96 below.

65 See Swedish Monitoring Ordinance.

66 The Ministries of Defence of the Netherlands and Norway and the Department of Defence of the United States have adopted "Directives" to establish their legal review mechanisms. The US Directive has been implemented through separate instructions by each of the three military departments (Army, Navy and Air Force). The Ministry of Defence of Belgium has adopted a "General Order" to establish its legal review mechanism. The Department of Defence of Australia has adopted a general "Defence Instruction" to establish its legal review mechanism. See note 8 above for complete references.

67 In Sweden, the *Delegation for international law monitoring of arms projects* is established by the Government, which also appoints its members. See section 8 of the Swedish Monitoring Ordinance.

68 See sub-section 2.2.2 below.

their review mechanisms.<sup>69</sup> Two of these have adopted a “mixed” system, whereby a single official – the head of defence – is advised by a standing committee that carries out the review.<sup>70</sup>

In the two other States, the review is the responsibility of a single official (the Director-General of the Defence Force Legal Service in one State, and the Judge-Advocate General of the military department responsible for acquiring a given weapon in the other State). In carrying out the review, the official consults the concerned sectors and relevant experts.<sup>71</sup>

The material scope of the review requires that it consider a wide range of expertise and viewpoints. The review of weapons by a committee may have the advantage of ensuring that the relevant sectors and fields of expertise are involved in the assessment.<sup>72</sup>

Whether the reviewing authority is an individual or a committee, it must have the appropriate qualifications, and in particular a thorough knowledge and understanding of IHL. In this regard, it would be appropriate for the legal advisers appointed to the armed forces to take part in the review, or to head the committee responsible for the review.

### *2.2.2 What departments or sectors should be involved in the review? What kinds of experts should participate in the review?*

Whether it is conducted by a committee or by an individual, the review should draw on the views of the relevant sectors and departments, and a wide range of expertise. As seen under section 1 of this Guide, a multidisciplinary approach, including the relevant legal, military, health, arms technology and environmental experts, is essential in order to assess fully the information relating to the new weapon and make a determination on its legality.<sup>73</sup> In this regard, in addition to the relevant sectors of the Ministry of Defence and the Armed Forces, the review may need to draw on experts from the departments of foreign affairs (in particular international law experts), health, and the environment, and possibly on expert advice from outside of the administration.

In three of the States that have made available their review mechanisms, the permanent membership is taken from the relevant sectors of the Ministry of

69 Belgium, the Netherlands, Norway and Sweden: see note 8 above.

70 Belgium has a committee that advises the Head of Defence, who is responsible for “taking action required by international law” based on the committee’s advice: see Belgian General Order, at section 2(b). Norway has a committee that advises the Chief of Defence, who in turn is responsible for advising and reporting to the Defence Military Organisation: see Norwegian Directive, at section 2.1.

71 See Australian Instruction, section 6, and US, Department of Defence Instruction 5500.15, subsection IV.A. In the US, when the Office of the Judge Advocate General of one military department conducts a legal review of a new weapon, it generally coordinates the legal review with the other military departments and services, as well as the office of General Counsel, Department of Defence, to ensure consistency in interpretation.

72 See Lt. Col. McClelland, “The review of weapons in accordance with Article 36 of Additional Protocol I”, note 8 above, at p. 403.

73 See note 55 above and corresponding text.

Defence or equivalent. In addition to legal officers responsible for advising the Ministry (e.g. from the Judge-Advocate General's office), permanent members include a military doctor from the medical services of the armed forces,<sup>74</sup> and representatives of the departments responsible for operative planning, logistics and military engineering.<sup>75</sup> These mechanisms also provide the possibility for ad-hoc participation by experts drawn from other Ministries or external experts.<sup>76</sup>

Another State has included as permanent members of its review body officials outside of the Ministry of Defence – in particular researchers in weapons technology, members of the Surgeon-General's office and an international law expert of the Ministry of Foreign Affairs.<sup>77</sup>

Of the two States that vest the authority to review weapons in a single official, one requires defence agencies responsible for health, capability development, and science and technology (among other fields) to provide the official with “technical guidance, ballistics information, analysis and assessments of weapons effects, and appropriate... experts”, while in the other State, the reviewing authority may consult with medical officers and other relevant experts.<sup>78</sup>

## 2.3 Review process

### 2.3.1 *At what stage should the review of the new weapon take place?*

The temporal application of Article 36 is very broad. It requires an assessment of the legality of new weapons at the stages of their “*study, development, acquisition or adoption*”. This covers all stages of the weapons procurement process, in particular the initial stages of the research phase (i.e. conception, study), the development phase (i.e. development and testing of prototypes) and the acquisition phase (including “off-the-shelf” procurement).<sup>79</sup>

In practical terms this means that:

- For a State producing weapons itself, be it for its own use or for export, reviews should take place at the stage of the conception/design of the weapon, and

74 See for example Belgian General Order, subsection 4(a)(1).

75 For example, the Norwegian Committee, which includes in the Committee representatives of the Section for Operative Planning of the Department of Operational and Emergency Response Planning, the Joint Operative Headquarters, the Defence Staff College, the Defence Logistical Organisation and the Defence Research Institute: see Norwegian Directive, subsection 4.2.

76 See for example Belgian General Order, subsection 4(c) and Norwegian Directive, subsection 4.3.

77 Sweden: see Danish Red Cross, note 8 above, at p. 28 and website of “Government Offices of Sweden” at [www.sweden.gov.se](http://www.sweden.gov.se).

78 See Australian Instruction, section 6, and for the US, see for example US Army Regulation, subsection 5(d) (“Upon request of [the Judge Advocate General], [the Surgeon General] provides the medical consultation needed to complete the legal review of weapons or weapon systems”).

79 See for example Australian Instruction, section 7 (“For Major Capital Investment Projects, [the Chief of Capability Development Group] is responsible for requesting legal reviews as these projects progress through the major project approval process.”); Belgian General Order, subsection 5(a) (“When the Armed Forces study, develop, or wish to acquire or adopt a new weapon, a new means or a new method of warfare, this weapon, means or method must be submitted to the Committee for a legal review at the earliest possible stage and in any case before the acquisition or adoption” (unofficial translation)); Norwegian Directive, subsection 2.3 (“The reviews shall be made as early as possible, normally already in the concept /

thereafter at the stages of its technological development (development of prototypes and testing), and in any case before entering into the production contract.<sup>80</sup>

- For a State purchasing weapons, either from another State or from the commercial market including through “off the shelf” procurement, the review should take place at the stage of the study of the weapon proposed for purchase, and in any case before entering into the purchasing agreement. It should be emphasized that the purchasing State is under an obligation to conduct its own review of the weapon it is considering to acquire, and cannot simply rely on the vendor or manufacturer’s position as to the legality of the weapon, nor on another State’s evaluation.<sup>81</sup> For this purpose, all relevant information and data about the weapon should be obtained from the vendor prior to purchasing the weapon.
- For a State adopting a technical modification or a field modification to an existing weapon,<sup>82</sup> a review of the proposed modification should also take place at the earliest stage.

At each stage of the review, the reviewing authority should take into consideration how the weapon is proposed or expected to be used, i.e. the methods of warfare associated with the weapon.

In addition to being required by Article 36, the rationale for conducting legal reviews at the earliest possible stage is to avoid costly advances in the procurement process (which can take several years) for a weapon which may end up being unusable because illegal. The same rationale underlies the need for conducting reviews at different stages of the procurement process, bearing in mind that the technical characteristics of the weapon and its expected uses can change in the course of the weapon’s development. In this connection, a new review should be carried out when new evidence comes to light on the operational performance or effects of the weapon both during and after the procurement process.<sup>83</sup>

study phase, when operational needs are identified, the military objectives are defined, the technical, resources and financial conditions are settled.”); UK Military Manual at p. 119, paragraph 6.20.1 (“In the UK the weapons review process is conducted in a progressive manner as concepts for new means and methods of warfare are developed and as the conceptual process moves towards procurement.”); US Air Force Instruction 51–402, at subsections 1.1.1 (“The Judge Advocate General (TJAG) will ensure all weapons being developed, bought, built or otherwise acquired, and those modified by the Air Force are reviewed for legality under international law prior to use in a conflict”) and 1.1.2 (“at the earliest possible stage of the acquisition process, including the research and development stage”).

80 See for example Belgian General Order, subsection 5(a) (“...at the earliest possible stage and in any case before the acquisition or adoption”); US Department of Defence Directive 5500.15 at subsection IV.A.1 (“The legal review will take place prior to the award of an initial contract for production”).

81 See Commentary on the Additional Protocols, paragraph 1473. See also UK Military Manual at p. 119, paragraph 6.20.1 (“This obligation [Article 36 of Additional Protocol I] is imposed on all states party, not only those that produce weapons”).

82 See for example US Air Force Instruction, at subsection 1.1.1: the Judge Advocate General “will ensure all weapons being developed, bought, built, or otherwise acquired, and those *modified* by the Air Force are reviewed for legality under international law prior to use in a conflict.” (emphasis added). See also Australian Instruction, section 10 (“Any proposal to make field modifications to weapons shall be vetted in accordance with this instruction”). See also note 21 above.

83 See for example Belgian General Order, subsection 5(i) (“If new relevant information is made known after the file has been processed by the Committee, the weapon, means or method of warfare shall be

### 2.3.2 *How and by whom is the legal review mechanism triggered?*

Each of the authorities responsible for the study, development, acquisition, modification or adoption of a weapon should be required to submit the matter to the reviewing authority for a legal review at the stages identified above. This can be done through for example a notification<sup>84</sup> or a request for an advisory opinion<sup>85</sup> or for a legal review.<sup>86</sup>

In addition, the reviewing authority could itself be empowered to undertake assessments of its own initiative.<sup>87</sup>

### 2.3.3 *How does the review mechanism obtain information on the weapon in question, and from what sources?*

At each stage of any given case, the authorities responsible for studying, developing, acquiring or adopting the new weapon should make available to the reviewing authority all relevant information on the weapon, in particular the information described in section 1.3 above.

The reviewing authority should be empowered to request and obtain any additional information and to order any tests or experiments needed to carry out and complete the review, from the relevant government departments or external actors as appropriate.<sup>88</sup>

## 2.4 Decision-making

### 2.4.1 *How does the review mechanism reach decisions?*

This question is relevant to cases where the reviewing authority is a committee. Ideally, decisions should be reached by consensus, but another decision-making procedure should be provided in cases where consensus is not possible, either through a voting system, majority and minority reports, or by vesting in the chair of the committee final decision-making authority.

re-submitted to the Committee for legal review pursuant to the above-mentioned procedure” (unofficial translation) ) and Norwegian Directive, subsection 2.3 *in fine* (“Should circumstances at a later stage change significantly, the international legal aspects shall be re-assessed”).

84 See for example Swedish Monitoring Ordinance, section 9.

85 See for example Norwegian Directive, subsection 4.6.

86 See for example Australian Instruction, sections 7 and 8, and Belgian General Order, subsection 5(b).

87 As in the case of Norwegian Directive, subsection 4.3. The Swedish reviewing body also has a right of initiative: see Danish Red Cross, note 8 above, at p. 28 and I. Daoust et al., *id.*, at p. 355.

88 See for example US Army Regulation, subsections 5(b)(3) and (5), which require the Materiel Developer, when requested by the Judge Advocate General, to provide “specific additional information pertaining to each weapon or weapon system”, and to conduct “experiments, including wound ballistics studies, on weapons or weapons systems subject to review...”. See also Australian Instruction, sections 6 to 8, and Belgian General Order, subsection 5(e).

#### *2.4.2 Should the reviewing authority's decision be binding or should it be treated only as a recommendation?*

As the reviewing authority is making a determination on the conformity of the new weapon with the State's international legal obligations, it is difficult to justify the proposition that acquisition of a new weapon can proceed without a favourable determination by the reviewing authority. For example, if the reviewing authority finds that the new weapon is prohibited by IHL applicable to the concerned State, the development or acquisition of the weapon should be halted on this basis as a matter of law.<sup>89</sup>

#### *2.4.3 May the reviewing authority attach conditions to its approval of a new weapon?*

The reviewing authority is required by the terms of Article 36 to determine whether the employment of the weapon under consideration would "in some or all circumstances" be legal.<sup>90</sup> Therefore it may find that the use of the new weapon is prohibited in certain situations. In such a case the authority could either approve the weapon on condition that restrictions be placed on its operational use, in which case such restrictions should be incorporated into the rules of engagement or standard operating procedures relevant to the weapon, or it could request modifications to the weapon which must be met before approval can be granted.<sup>91</sup>

#### *2.4.4 Should the reviewing authority's decision be final or should it be subject to appeal or review?*

Of the States that have made known their review mechanisms, two expressly provide for the possibility of appeal or review of its decisions.<sup>92</sup> If an appeal mechanism is provided, care should be taken to ensure that the appellate or reviewing body is also qualified in IHL and conducts its review on the basis of legal considerations, taking into account the relevant multidisciplinary elements.

89 In the United States, a weapon cannot be acquired unless it has been subjected to a legal review: see for example US Navy Instruction, section 2.6 ("No weapon or weapon system may be acquired or fielded without a legal review"). See also Australian Instruction, sections 5 and 11.

90 See section 1.1 above.

91 For example, section 7 of the Swedish Review Ordinance states: "If the arms project does not meet the requirement of international humanitarian law, the Delegation shall urge the party that has submitted the matter to the Delegation to undertake construction changes, consider alternative arms projects or issue limitations on the operative use of weapons."

92 See US Department of Defence Directive 5500.15, at subsection IV.C, pursuant to which an opinion of the Judge Advocate General will be reviewed by the General Counsel of the Department of Defence when requested by the Secretary of Defence, the Secretary of a Military Department, the Director of Defence Research and Engineering, the Assistant Secretary of Defence (Installations and Logistics) or any Judge Advocate General; see also Swedish Monitoring Ordinance, section 10, which provides that a decision may be appealed "to the Government".

## 2.5 Record-keeping

### 2.5.1 *Should records be kept of the decisions of the review mechanism?*

The reviewing authority's work will be more effective over time if it maintains an archive of all its opinions and decisions on the weapons it has reviewed. By enabling the reviewing authority to refer to its previous decisions, the archive also facilitates consistency in decision-making. It is also particularly useful where the weapon under review is a modified version of a weapon previously reviewed.

Of the States that have made known their review mechanisms, two require the reviewing authority to maintain permanent files of the legal reviews.<sup>93</sup> At least one other has an obligation to maintain permanent files under a general obligation of the administration to archive decisions.<sup>94</sup>

### 2.5.2 *To whom and under what conditions should these records be accessible?*

It is up to each State to decide whether to allow access to the review records, in whole or in part, and to whom. The State's decision will be influenced by whether in a given case the weapon itself is considered confidential.

Amongst others, the following factors could be taken into account when deciding on whether to disclose reviews, and to whom:

- the value of transparency among different government departments, and towards external experts and the public;
- the value of sharing experience with other States;
- the obligation for all States to ensure respect for IHL in all circumstances, in particular in cases where it is determined that the use of the weapon under review would contravene IHL.

In at least four of the States that have made known their review mechanisms, decisions of the reviewing authority are known to be subject to legislation governing public access to information, which applies equally to other governmental bodies.<sup>95</sup> Pursuant to such legislation, access to information is subject to exemptions which include the non-disclosure of sensitive information affecting national security.

93 See Australian Instruction, section 13, which requires the Director-General Australian Defence Force Legal Service to "maintain a Weapons Review Register [that] will include a copy of all legal reviews and be the formal record of all weapons that have been reviewed", and US Department of Defence Instruction 5500.15, subsection IV.A.2, which requires each Judge Advocate General to "maintain permanent files or opinions issued by him". See in this regard paragraph 1.1.3 of US Air Force Instruction, paragraph 5(e)(2) of US Army Regulation, and paragraph 2.6 of US Navy Instruction.

94 See Belgium, Law on Archives, 24 June 1955.

95 In the US, the majority of review reports are unclassified and accessible to the public pursuant to the Freedom of Information Act: see H. Parks, note 17 above. In Sweden, the reports of the Delegation are subject to the Freedom of the Press Act: see Danish Red Cross, note 8 above, at p. 28 and I. Daoust et al., *id.* at p. 355. See also Belgium, Law of 11 April 1994 regarding publicity of the Administration, and Australia, Freedom of Information Act 1982.

While there is no obligation on the reviewing State to make the substantive findings of its review public nor to share them with other States, it would be required to share its review procedures with other States Parties to Additional Protocol I, in accordance with Article 84 of the Protocol.<sup>96</sup> In this regard, both the 27<sup>th</sup> and the 28<sup>th</sup> International Conference of the Red Cross and the Red Crescent, which includes all of the States Parties to the Geneva Conventions, have encouraged States to exchange information on their review mechanisms and procedures, and have called upon the ICRC to facilitate such exchanges.<sup>97</sup>

96 See Commentary on the Additional Protocols, paragraph 1470 and footnote 12 thereof. Article 84 reads: “The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.”

97 See Agenda for Humanitarian Action, paragraph 2.5.3.

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