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CATASTROPHIC EVENTS

Interview with Maurits R. Jochems*

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Could you explain briefly the nature and extent of NATO's civil emergency planning activities?

Since the creation of the Alliance in 1949, NATO has always placed great emphasis on the protection of civilian populations. In 1953, NATO agreed on a disaster assistance scheme, recognizing that the capabilities to protect populations in wartime could also be used to protect them against the effects of natural or man-made disasters. Following the launch of Partnership for Peace in 1994, many Partner nations showed an interest in enhancing co-operation with NATO in the field of civil protection and disaster response. In 1998, following an initiative from the Russian Federation, the Euro-Atlantic Disaster Response Coordination Centre (EADRCC) was created at NATO HQ.

Civil emergency planning is first and foremost a national responsibility, and civil assets remain under national control at all times. NATO's added value lies in facilitating co-ordination and liaison through structures such as the Co-ordination Centre. This enables smaller Allies and Partners to contribute

* The interview was conducted on 28 June 2007 in Brussels by Toni Pfanner (Editor-in-Chief of the *International Review of the Red Cross*).

capabilities, such as a field hospital or water purification unit, that they would not otherwise be able to contribute. The aim of civil emergency planning in NATO is to share information on national planning activity to ensure the most effective utilization of civil resources for use during emergency situations. It enables Allies and Partner nations to assist each other in preparing for and dealing with the consequences of crisis, disaster or conflict.

What do you understand by a co-ordinated civil and military response?
Planning and executing military operations is a complex process. In order to mount an operation that best addresses a crisis situation, military planners and commanders often need to call upon expertise and assets from the civilian sector. NATO provides an effective forum in which the use of civilian and military assets can complement one another and be dovetailed to achieve a desired goal. Close co-operation and interoperability between military and civilian actors is vital, and the specific nature of the scenario will dictate whether a military response is required, or a civil response, or a combination of both.

Isn't NATO a military alliance?
From the above, it is clear that NATO has a civil dimension, but it is primarily a political alliance which makes use of mainly military instruments. However, in most NATO member states the military also has a role to assist civil authorities in exceptional and overwhelming situations. Of course, the military's principal task in a given country is that of national defence. Its second task is to contribute to the Alliance's defence, including contributing to peacekeeping operations. Military assistance to civil authorities in several countries, e.g. the Netherlands, the United Kingdom, the United States and Canada, is leading to more intense contacts between interior and defence ministries, for example to make arrangements enabling the former to draw on a number of helicopters during emergencies such as floods.

If civil emergency planning is a national responsibility, why should military capabilities be deployed in international disaster-relief operations?
Recent disasters such as Hurricane Katrina and the earthquake in Pakistan have highlighted how useful certain military capabilities can be when first responders find themselves overwhelmed. Some may believe that disaster-relief work is done better and more economically by civilian actors: national authorities, international organizations or non-governmental organizations. However, while this is the case for most disasters, there are unfortunate occasions when the scale of the disaster is so great that first responders – local authority and/or interior ministry services – are simply overwhelmed. Assistance by the military may also be necessary for operations requiring special equipment such as airlifts, field hospitals or bridges, etc. It is in these instances that the military can and should become involved. Helping national authorities in responding to natural or industrial disasters is, as stated above, a fundamental mission of the armed forces in most NATO and non-NATO countries.

Could you clarify how roles are distributed if NATO intervenes in a civil disaster?

Before answering, I have a remark about terminology. I have some difficulty with the term ''intervene'' in your question. If a disaster occurs, NATO provides assistance following a request from a stricken nation. I underline that NATO does not intervene, it offers assistance on the basis of a request.

In essence, there are very few capabilities independently owned by NATO. NATO draws almost entirely on national capabilities. NATO's value lies in its capacity to mobilize and use these capabilities in an organized fashion. NATO has command and control capabilities, headquarters in Naples, Brunssum, Lisbon and Brussels. NATO has an overview of what is available, where and with whom. Not all nations have capacities or capabilities in sufficient quantity and quality. In some nations, there is room for improvement, as the British say. NATO's major role is to mobilize and co-ordinate the use of these capabilities. In general, those nations with considerable resources handle emergency situations themselves. However, some nations stricken by a major disaster may have shortfalls and might ask for help. In the case where NATO support is requested, its role is to help address the shortfalls and, using the Inventory of National Capabilities, to mobilize these resources within those nations of the Euro-Atlantic Partnership Council who possess them. Once resources are located, the task is to help the stricken nation and to support nations so as to bring assistance to the place where it is needed. The Disaster Response Co-ordination Centre is a small but effective unit.

Are there differences between the military approach to civilian support and that of national authorities or humanitarian organizations?

We don't compartmentalize one approach or another. It's all part of a co-ordinated response. While the military clearly has useful capabilities to bring to disaster-relief operations, such assistance should be provided according to the principle of subsidiarity. By this I mean that civil responders should always be in the lead, and must formally request military support. It is demand-driven assistance, not a supply-driven relief contribution. In principle, local authorities should ask for external, including military, assistance, if and when they decide that the scale of the disaster is too great for them to handle it alone.

Is that what happened in the case of Hurricane Katrina in the United States and the earthquake in Pakistan in 2005?

Yes. In the case of both Hurricane Katrina and the South Asian earthquake, the respective national governments formally requested NATO assistance. In the case of Pakistan, the United Nations also asked NATO for assistance in putting together its own relief operation. As a result, most of the crucial shelter material provided by the Office of the UN High Commissioner for Refugees was transported to Pakistan via NATO's airlift before the onset of the harsh Himalayan winter. NATO also participated in the overall co-ordination meetings in Islamabad, jointly led by Pakistan government officials and the UN resident

representative, as well as in the relevant UN-led cluster meetings, such as the health and shelter clusters.

NATO's operation in Pakistan was the first major civilian disaster-relief operation.

The earthquake hit Pakistan and parts of India on 8 October 2005. On 10 October the Pakistan government asked NATO and other organizations for assistance. The following day, NATO took the decision to establish an airlift from Europe to Pakistan to transport much-needed relief material to high-altitude areas. We transported 3,400 tonnes of relief goods, mostly tents and shelter material, made available by the United Nations. At the same time, NATO considered other options and decided to make available an extra hospital for the stricken area, a unit of engineers for relief repairs, and water purification units. Engineers repaired about 60 kilometres of badly damaged roads. The medical personnel treated some 5,000 people directly and 3,500 people through mobile teams. The whole operation lasted for a period of about three months. Instinctively we had the idea that a relief operation should be limited in time. After that, reconstruction activities would start, and reconstruction is definitely a role to be led by the UN and others, not by NATO.

What are the lessons learned from Pakistan?

Our main problem was funding. For example, the operational costs of running both the strategic airlift and onward distribution by the helicopters were enormous. Defence ministries which ultimately finance NATO operations do not have funds to run humanitarian relief operations. If you look at it on a national basis, this is the responsibility of development co-operation ministries.

Some steps towards reforming and improving funding mechanisms were already put in place during the Pakistan relief operation by individual countries. In the United Kingdom, for example, the Secretary of State for International Development, Hilary Benn, decided to cover the additional operating costs caused by the deployment of three Chinook helicopters and a regiment of engineers out of the international development budget. By using another budget line, Secretary Benn was also able to make a significant financial contribution to the NATO ''trust fund'' that met the costs of the airlift.

The benefits of Secretary Benn's improvised arrangement are clear. A department for international development does not need to operate and deploy its own fleet of helicopters. This avoids duplication of assets. Moreover, depending on how costs are calculated, this solution is likely to be considerably cheaper than any arrangement involving the leasing of commercial helicopters, if, indeed, they are available.

In order to institutionalize such arrangements, however, it will also be necessary to revise definitions of what constitutes official development assistance. It seems that the financing of military helicopters for disaster-relief operations does not qualify as official development assistance under current definitions. As a result, there is a disincentive for development ministers to copy the initiative of

their UK counterpart in Pakistan. But given that many countries are forging ever stronger working relationships between ministries of international development, defence and foreign relations, it might be time to reassess the assistance criteria.

In the case of the Pakistan relief operation, such a move would have been especially appropriate since the United Nations asked NATO to provide an air-bridge and to deploy helicopters. Common sense would suggest that either NATO nations be allowed to bill some of the additional costs incurred by their militaries to the international assistance and development budgets or that the United Nations reimburse them directly out of funds collected to pay for the relief operation.

In what kind of civil emergency may NATO offer its services in the future? Besides natural disasters, could you imagine operating in man-made disasters or even chemical, biological, radiological or nuclear attacks? Is it possible to prepare for all these different threats?

Some years ago, NATO was limited to dealing with natural and technological disasters. However, the aftermath of the 9/11 attacks prompted renewed efforts to assist nations in also protecting civilian populations against the consequences of attacks with chemical, biological, radiological or nuclear agents. It is not only possible to prepare for the different scenarios, it is essential to prepare. Chemical and biological catastrophes could be the consequence of an accident or a natural disaster. In addition, there are many nuclear plants in Europe, and accidents cannot be excluded. Their consequences do not respect national borders. We also have to take into account the new faces of terrorism.

Had we done a good job on the civil side, we would have been prepared before 9/11. Today, we are catching up. National authorities have the prime responsibility. Some nations do better than others and the advantage of organizations such as NATO, the UN or the EU is that national experiences and best practices can be shared and compared and nations can learn from each other. It is also a good way to develop common approaches. If one nation in the Alliance is particularly skilled in one area, we share this knowledge with the other nations of the Alliance, which is very useful.

Assistance to victims of chemical, biological, radiological and nuclear events would only be feasible using very specific and expensive equipment, and the preparation would be no less expensive. Does NATO have the capacity to deal with such incidents and the ability to provide material and training?

It is a scenario nobody likes, but unfortunately we have to prepare for it. The threat from chemical, biological, radiological and nuclear weapons (CBRN) must be taken seriously. NATO has worked extensively to help enhance national capabilities and civil preparedness in the event of possible CBRN incidents.

On the civil side, a comprehensive Euro-Atlantic Partnership Council programme on CBRN training and exercises has been developed. Since 2002 an ongoing project has been under way on non-binding guidelines and minimum standards for first responders regarding planning, training, procedures and

equipment for CBRN incidents. The purpose of this initiative is to provide general guidelines that the Council's nations may draw upon on a voluntary basis to enhance their preparedness to protect populations against CBRN risks. Such guidelines also seek to improve interoperability between nations. NATO promotes sharing of information on medical capabilities to cope with large-scale casualties. Its Joint Medical Committee has developed treatment protocols for casualties following a CBRN attack and its Civil Protection Committee has developed public information guidelines for use before, during and after a crisis. These so-called ''Budapest Guidelines'' are applicable for a crisis involving a CBRN incident. The Transportation Planning Boards and Committees have established mechanisms for co-ordination of nationally provided civil transport resources for Alliance use. Areas where assistance could be provided include mass evacuation of populations, medical evacuation using specially reconfigured civil assets, and national volunteers to transport essential equipment and/or medicines. NATO has also developed a Memorandum of Understanding on the facilitation of vital civil cross-border transport. The main feature of the Memorandum is the acceleration and simplification of existing national border-crossing procedures and customs clearance for international assistance sent in response to a major incident.

On the military side, in 2003 NATO created the Multinational CBRN Defence Battalion to help protect soldiers with a fast, flexible, deployable unit and potentially also assist civilian authorities. The battalion can conduct reconnaissance operations to detect CBRN substances and can assist in decontamination operations. The main aim is to provide a credible CBRN defence capability, primarily to deployed NATO joint forces and commands.

What does NATO do to evaluate and improve its capabilities in this area? Are they directly related to such scenarios?

NATO's activities on the civilian side focus mainly on the promotion of minimum standards of preparedness for first responders through the adoption of common guidelines, training programmes and exercises. We have exercises every year where the Disaster Response Co-ordination Centre engages in relevant scenarios in a partner country, and these exercises are being evaluated and serve as a basis for improvements. The last civil emergency exercise was held in Croatia in May 2007. It was essentially a biological scenario. The purpose of these exercises is to improve or to strengthen the capacity of nations to deal with emergency situations and also to test handling of international assistance. Through exercising, we can promote co-ordination and interoperability.

Does NATO co-ordinate its activities with other international organizations?

NATO, as an international organization, has close contacts with the UN and other major relief organizations. Until recently, the UN Office for the Co-ordination of Humanitarian Affairs had a liaison officer permanently detached to the Euro-Atlantic Disaster Response Co-ordination Centre. One of the most important aspects of co-operation is to be informed about the activities of the various actors involved in disaster relief. Co-operation with other international organizations is

therefore very high on NATO's agenda. NATO has decided that every year a large international exercise should enhance co-operation with as many players as are willing to participate.

Every major emergency overstretches existing capabilities. The good news is that today, thanks to organizations like the UN, the ICRC, the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons, the World Health Organization and so on, significant progress has been made on the civilian side in terms of potential co-operation.

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Governing catastrophes: security, health and humanitarian assistance

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Abstract

Recent catastrophes, and predictions of an increasing potential for more, have stimulated thinking about the best policy responses to these threats. This article explores how security concepts influence catastrophe governance. The article considers how globalization affects thinking about catastrophes and describes ways in which catastrophes have been conceptualized as governance challenges, such as the human rights approach to the provision of health and humanitarian assistance. The article explains how health and humanitarian assistance experienced "securitization" in the post-cold war period, a development that challenges rights-based strategies and creates complex and controversial implications for the prevention, protection and response functions of catastrophe governance.

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We live in a world haunted by catastrophes past, present and pending. From the past come memories of devastating world wars that scarred humanity deeply. In the present, we watch disease and natural disasters wreak havoc around the world. Portents for the future offer more ferocious pandemics, terrorist use of nuclear, radiological, biological or chemical weapons, and planetary pain and suffering linked to unabated environmental degradation.[1] Catastrophes are, of course, not new to human societies, but what is new is the nature of the globalized context in which they occur. We not only see large-scale disasters and the human suffering they cause unfold through communications technologies, but we also have

developed global capabilities to provide humanitarian assistance to victims just about anywhere in the world. This context makes us more aware of catastrophes and the shared responsibilities of preparing for, protecting against and responding to them.

This awareness confronts us with the challenge of governing catastrophes before, during and after their occurrence. Governance requires framing policy challenges in ways that facilitate effective strategies and tactics. Preparedness and response to catastrophes are increasingly framed as security challenges rather than humanitarian problems. The reconceptualization of health and disaster relief as security issues directly contributes to thinking about catastrophes in security terms. Although in many ways understandable, framing catastrophe governance through the lens of security creates significant complexities and controversies concerning the provision of humanitarian assistance to populations affected by catastrophic events.

This article explores the emerging contours of catastrophe governance in order to illuminate how the security framework affects the protection of health and the provision of humanitarian assistance. It analyses how thinking about disaster relief and health has shifted from a rights-based philosophy to approaches grounded in security concepts. The article then examines issues that arise when approaching catastrophe governance under a security paradigm. In this approach, considerations of the source, scale and severity of a catastrophic event affect political calculations concerning sovereignty and security in ways that shape the effectiveness and sustainability of catastrophe governance. The security paradigm produces a double-edged effect for catastrophe governance that it is important to understand, because large-scale disasters, both man-made and naturally occurring, may increasingly affect the protection of health and the provision of humanitarian assistance in the future.

Catastrophes and globalization

Dictionaries typically define a ''catastrophe'' as a large-scale, sudden and disastrous event that causes widespread death, destruction and suffering.[2] History is replete with famous catastrophes, including devastating military

1 For considerations on the future of catastrophes in human societies, see Richard A. Posner, *Catastrophe: Risk and Response*, Oxford University Press, Oxford, 2004; Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed*, Penguin, New York, 2005; and Thomas Homer-Dixon, *The Upside of Down: Catastrophe, Creativity, and the Renewal of Civilization*, Island Press/Shearwater Books, Washington, DC, 2006.

2 See, e.g., *New Shorter Oxford English Dictionary*, Oxford University Press, Oxford, 1993, p. 351 (defining ''catastrophe'' as a ''sudden or widespread or noteworthy disaster; an extreme misfortune''). This definition overlaps with other concepts, such as complex emergencies, that also draw attention to policy and governance questions raised by significant man-made or natural disasters. See, e.g., Ronald Waldman, ''Responding to catastrophes: a public health perspective'', *Chicago Journal of International Law*, Vol. 6 (Winter) (2006), p. 553. Some have challenged the traditional definition of catastrophe by pointing out that the world also faces ''slow motion'' catastrophes, such as HIV/AIDS and climate change. See Raymond T. Pierrehumbert, ''Climate change: a catastrophe in slow motion'', *Chicago Journal of International Law*, Vol. 6 (Winter) (2006), p. 573; and Tony Trahar, ''Anglo American and the road to ART'', *Radar Perspective*, December 2003/January 2004, p. 27 (describing HIV/AIDS as a ''slow motion catastrophe'').

conflicts, decimating disease epidemics and destructive natural disasters. Industrial and technological revolutions created the potential for man-made catastrophes involving accidents to expose populations and ecosystems to harmful substances (e.g. the chemical accident at Bhopal, India, in 1984; the nuclear accident at Chernobyl, Soviet Union, in 1986). In terms of the history of human civilizations, efforts to construct governance regimes involving international co-operation to prevent, protect against and respond to large-scale disasters have appeared only recently. These governance efforts begin seriously with efforts made in the latter half of the nineteenth century to shield civilian populations from armed conflict and to protect and care for those wounded in war.[3] The examples set in this domain inspired others, who envisioned ways to improve international assistance to populations devastated by natural disasters such as earthquakes or famines.[4] Still later emerged attempts to harness better international co-operation to alleviate the death and suffering inflicted by disease on human populations, particularly those in poor, poverty-stricken countries.[5]

The development of international governance strategies for responding to catastrophes owes much to the processes of globalization sensed in the latter half of the nineteenth century. Political, economic and technological developments in the nineteenth century permitted those concerned about the impact of catastrophes not only to refine perceptions of an interdependent humanity but also to imagine the material ways and means to organize and provide humanitarian assistance to those harmed by large-scale disasters.[6] This earlier phase of globalization produced the ideational and material climate that fostered the development of governance efforts to provide humanitarian assistance to people affected by war and disasters. This period also saw states co-operating to address disease epidemics and industrial pollution that could cause cross-border harm.[7] All these efforts included the use of international law, the creation of intergovernmental organizations and the involvement of non-state actors dedicated to health or humanitarian causes.

Contemporary concerns about catastrophe governance echo the nineteenth century origins of this area of world affairs. In fact, new manifestations of globalization heighten awareness of both the human suffering related to

3 See, e.g., John Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Boulder, 1996; David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005.

4 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization*, Kluwer Law International, Dordrecht, 1985, pp. 17–21; John Hutchinson, "Disasters and the international order: earthquakes, humanitarians, and the Ciraolo Project", *International History Review*, Vol. 22 (2000), p. 1; John Hutchinson, "Disasters and the international order – II: the International Relief Union", *International History Review*, Vol. 23 (2001), p. 253.

5 Neville M. Goodman, *International Health Organizations and Their Work*, 2nd edn, Churchill Livingstone, London, 1971, p. 389.

6 Admittedly, concepts of an interdependent humanity were often Eurocentric and did not always extend to non-European civilizations experiencing imperialism and exploitation at the hands of European countries.

7 David P. Fidler, "The globalization of public health: the first 100 years of international health diplomacy", *Bulletin of the World Health Organization*, Vol. 79 (2001), pp. 843–4.

catastrophic events and the global capabilities available to provide assistance to those in need. This awareness and these capabilities converge to produce insights on the governance mechanisms that emerged in the latter half of the nineteenth century and first half of the twentieth century. The insights identify the inadequacy of these co-operative mechanisms and urge states and non-state actors to reform strategies for preventing, protecting against and responding to catastrophic events. This approach involves efforts to reconceptualize how we think about catastrophes as governance challenges. Some reconceptualizations frame catastrophe governance in security terms rather than as a charitable, humanitarian or altruistic activity. The following parts of this article explore this important and controversial shift in strategic thinking on catastrophe governance.

Conceptualizing catastrophe governance

Pollution and disease: regimes addressing direct, cross-border harms

International co-operation on the cross-border spread of harms resulting from infectious disease epidemics and industrial pollution began in the nineteenth century. In terms of epidemics, states convened numerous international sanitary conferences, starting in 1851 in response to serious outbreaks involving cholera and the plague, and countries eventually negotiated a series of international sanitary conventions from the late nineteenth century to the Second World War.[8] The mortality and fear caused by some cholera outbreaks made those epidemics disastrous events for a number of countries, and fear of further disease-related calamities provided incentives for international co-operation. Equally, or perhaps more, important were state interests in reducing the burdens on trade and commerce produced by national efforts to keep foreign diseases at bay (e.g. economic costs imposed by quarantine measures).

Approaches to the transboundary spread of diseases involved the duty of countries to notify other states of outbreaks of specific diseases in their territories with potential for cross-border spread.[9] Advance notification would allow countries to anticipate and potentially control any importation of microbial threats. The international sanitary conventions did not, however, require states to make efforts to prevent disease epidemics from occurring within their own territories and spilling over into other countries. Nor did these treaties impose duties on states to provide assistance to countries badly affected by disease epidemics.

Industrialization created greater potential for transboundary pollution, and states crafted international regimes to address it, particularly in the context of international watercourses.[10] In terms of transboundary pollution, early treaties

8 For an analysis of this history, see David P. Fidler, *International Law and Infectious Diseases*, Clareudon Press, Oxford, 1999, pp. 21–57.
9 Ibid., pp. 42–7.
10 Patricia Birne and Alan Boyle, *International Law and the Environment*, Clareudon Press, Oxford, 1992, pp. 224–6.

contained strict prohibitions, but international co-operation gradually adopted an approach that only prohibited pollution that would seriously harm the rights of other states, such as the release of very hazardous substances.[11] In these contexts, states did not frame transboundary pollution as a catastrophic problem but rather as an issue that required balanced regulation between the economic interests of countries involved.

In these examples, states conceived of epidemics and transboundary pollution occurring in other countries as exogenous threats to their national interests that required co-operation in order to mitigate potential cross-border impact. The international co-operation on epidemic diseases developed through fear of disease calamities, but this regime evolved in ways that lessened its connection with protecting against future disasters. As noted more below, the notification mechanisms used in the international sanitary conventions become a feature of catastrophe governance. Early efforts at transboundary pollution co-operation are precursors for later developments in international law that address the transboundary effects of industrial pollution caused by man-made accidents or natural disasters. Neither of these areas of co-operation, however, included requirements related to the provision of assistance or aid to countries suffering from transboundary epidemics or pollution.

Humanitarian assistance, health and human rights

Thinking on humanitarian assistance developed in relation to war and natural disasters, and the development of the policy and practice of humanitarian assistance is linked to human rights concepts. The human-rights approach holds that individuals have the right to be protected during conflicts and after disasters and to receive assistance when war or ''acts of God'' strike. Whether a wounded combatant, a civilian refugee from armed conflict or an individual left homeless by natural disaster, international efforts to ensure that assistance reaches such people connect to notions of human dignity captured by human rights thinking. This connection is not often explicit in the late nineteenth and early twentieth centuries because international humanitarian efforts began before the human rights revolution that occurred after the Second World War.

Political thinkers since the Enlightenment have argued that individuals possessed civil and political rights that shielded them from government power. The emergence of humanitarian assistance in an international context brought with it the notion that victims of armed conflict or disaster had a right to receive international assistance if their governments could not cope with their needs. The transnational aspect of this rights-based position connected the issue with international politics, raising state concerns about foreign interference with its military or domestic affairs. In the context of armed conflict, the International Red Cross movement served as a politically neutral source for provision of wartime

11 Ibid., pp. 227–8.

humanitarian assistance that could support human dignity without provoking sensitivities embedded in sovereignty. The idea of a human right to receive international assistance also motivated those who pushed to create international mechanisms for disaster relief in the first half of the twentieth century,[12] and these efforts had to confront state reluctance to base such mechanisms on a human right to receive foreign assistance because of the threat such notions posed to traditional conceptions of sovereignty.[13] Despite state reluctance, the international humanitarian community continued to advocate for the human right to receive assistance.[14]

A rights-based approach also began to influence international efforts on protecting and promoting population and individual health. Given the importance of health in the provision of humanitarian protection and assistance, the shifting perspectives on health were directly relevant to humanitarian relief efforts. As noted above, the international sanitary conventions of the late nineteenth and first half of the twentieth centuries predominantly protected the economic and trade interests of countries.[15] After the First World War, international health activities began to reflect ideas prevalent in the humanitarian assistance arena, especially the desire to provide assistance to populations in need of public health and healthcare services. This thinking matures in the human right to the highest attainable standard of health promulgated in the Constitution of the World Health Organization (WHO) in 1946.[16] The right to health encompasses more than war and disaster-related contexts, and thus is broader than the right to receive assistance in times of armed conflict or other catastrophes.[17] In addition, catastrophes produce the need to conduct triage with respect to individuals and health conditions, which produces tensions between the right to health and the exigencies of a massive humanitarian crisis.[18] Nevertheless, the right to health directly supports the human right to humanitarian assistance when catastrophe strikes, because much of this assistance addresses specific health problems (e.g. spread of infectious diseases in affected populations) and determinants of health conditions (e.g. food, water, shelter and sanitation).

12 Hutchinson, ''International Relief Union'', above note 4, p. 261.

13 See ibid. for a historical account of how the proposal for an international relief organization was systematically weakened to suit states' interests and their sovereignty.

14 The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief expressed the human rights principle and commitment in stating that ''[t]he right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries.'' Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, available at http://www.ifrc.org/publicat/conduct/code.asp (last visited 24 April 2007).

15 Although commercial interests played a central role, other factors contributed to the development of international co-operation on epidemic diseases. See, e.g., Mark Harrison, ''Disease, diplomacy and international commerce: the origins of international sanitary regulation'', *Journal of Global History*, Vol. 1 (July) (2006), p. 197.

16 Constitution of the World Health Organization, 22 July 1946, in World Health Organization, *Basic Documents*, 40th edn, World Health Organizaion, Geneva, 1994, p. 1.

17 For analysis on the scope of the right to health, see Brigit C. A. Toebes, *The Right to Health as a Human Right in International Law*, Hart Publishing, Oxford, 1999.

18 Waldman, above note 2, p. 563.

The securitization of health and disaster relief

What emerged in the past ten to fifteen years is a different way of thinking about epidemic diseases and disasters. States, intergovernmental organizations and non-governmental organizations increasingly conceptualized epidemics and disasters as threats to human, national and global security. This phenomenon is complex and controversial, but it produces a transformed governance perspective on catastrophic events. As described above, previous frameworks for thinking about epidemics, transboundary pollution and natural disasters did not view these events in security terms. Only humanitarian assistance to victims of armed conflict had security implications, and this context made the International Red Cross movement's political neutrality critical to its ability to deliver humanitarian aid and to play a role in the development of international humanitarian law.

For this article's purposes, the securitization of health and disaster relief arises from changes in thinking about threats from nuclear, radiological, biological and chemical (NRBC) weapons, infectious diseases and natural disasters. These changes converged to emphasize the security-based need to scale up prevention, protection and response capabilities, particularly as they relate to population health. This convergence emerges from the breakdown of the traditional policy and governance "stovepipes" built to deal with NRBC weapons, infectious diseases and natural disasters (figure 1). States addressed NRBC weapons through an arms control approach that sought to reduce the threat these weapons pose to national and international security.[19] Countries paid little serious attention to preparing to

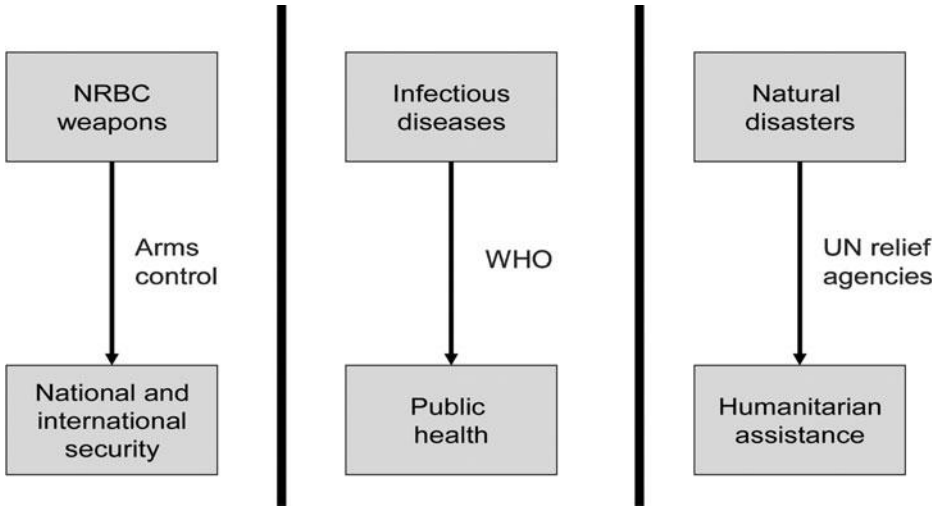

Figure 1 Policy and governance "stovepipes"

19 The leading arms control treaties for NRBC weapons are the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, *League of Nations Treaty Series*, Vol. 44, p. 65; Treaty on the Non-Proliferation of Nuclear

respond to the aftermath of NRBC weapons use,[20] and arms control treaties contain no or only general provisions that address responses to the use of the weapons in question.[21]

The rise of a new kind of terrorism in the 1990s challenged the traditional arms control approach to NRBC weapons, and forced countries to think about the need to prepare for and respond to possible NRBC attacks. States began (i) to realize that terrorist interest in potentially catastrophic violence reflected changes in the political or military motivations actors may have to develop, acquire, or use NRBC weapons; (ii) to appreciate that the technological feasibility of NRBC weapon development, acquisition and use was increasing; and (iii) to grasp the vulnerabilities of their societies to NRBC terrorism. What states confronted was a new NRBC weapons threat profile which the traditional arms control approach was ill-equipped to address, and that pointed to the need to focus more attention and resources on preparedness and response capabilities, especially concerning public health (figure 2). Thus the ability to respond to, and recover from, a NRBC

Figure 2 New NRBC threat profile

Weapons, 1 July 1968, *International Atomic Energy Agency Information Circular* INFCIRC/140, 22 April 1970; Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, *International Legal Materials*, Vol. 11 (1972), p. 309; and Convention for the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, *International Legal Materials*, Vol. 21 (1993), p. 800.

20 Some policy attention was paid to civil defence strategies with respect to possible nuclear attack, but governments tended to marginalize such strategies in their overall attempts to prevent the use and spread of nuclear weapons. On civil defence in various countries during the cold war, see Lawrence J. Vale, *The Limits of Civil Defence in the USA, Switzerland, Britain, and the Soviet Union: The Evolution of Policies since 1945*, St. Martin's Press, New York, 1987.

21 For example, the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, above note 19, provides in

attack with health and other forms of assistance became critical to national and homeland security policies.[22]

Similarly, the policy "stovepipe" for infectious diseases underwent radical change. As noted earlier, international co-operation on infectious disease threats has a long history, but rarely, if ever, in this long history were infectious diseases considered security threats, even in the wake of global disease catastrophes such as the 1918–19 influenza pandemic. Infectious diseases were public health problems handled through technical agencies trained in epidemiology and medicine. The public health approach to infectious diseases never connected its efforts to arms control strategies, even in connection with the threat posed by biological weapons. As noted above, the transformation in policy concerning NRBC weapons brought the worlds of public health and security together seriously for the first time.

In addition, the securitization of public health developed through the reconceptualization of naturally occurring infectious diseases as threats to human,[23] national[24] and global security.[25] Analyses for reforming the United Nations stressed the linkage between security and public health. The UN Secretary-General's High-Level Panel on Threats, Challenges, and Change argued, for example, that "the security of the most affluent State can be held hostage to the ability of the poorest State to contain an emerging disease".[26] This securitization process also unfolded in the revision process of the International Health Regulations – WHO's international legal rules on infectious disease control that had their origins in the old international sanitary conventions.[27] WHO framed the new International Health Regulations as an instrument designed to strengthen global health security.[28] This reconceptualization, and others that frame public health problems as security threats,[29] elevated public health capabilities to the level of security policy.

Article VII that "[e]ach State Party to this Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party to the Convention which so requests, if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention."

22 See, e.g., White House, *National Strategy for Homeland Security*, White House, Washington, DC, 2002.

23 Commission on Human Security, *Human Security Now: The Final Report of the Commission on Human Security*, United Nations, New York, 2003 (linking infectious diseases and human security).

24 White House, *National Security Strategy*, above note 22, and White House, *National Security Strategy of the United States of America*, White House, Washington, DC, 2006 (including infectious disease threats as national security issues).

25 Laurie Garrett, "The Next Pandemic?", *Foreign Affairs*, Vol. 84 (4) (2005), p. 3 (warning of the global security implications of pandemic influenza).

26 *A More Secure World: Our Shared Responsibility* (Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change), United Nations, New York, 2004, p. 14.

27 See World Health Organization, International Health Regulations (2005), Geneva, 2006. For analysis of the new International Health Regulations, see David P. Fidler, "From international sanitary conventions to global health security: the new International Health Regulations", *Chinese Journal of International Law*, Vol. 4 (2) (2005), p. 325.

28 See Fidler, above note 27, pp. 347–55.

29 See, e.g., G. John Ikenberry and Anne-Marie Slaughter, *Forging a World of Liberty under Law: U.S. National Security in the 21st Century*, Princeton project on National Security, Princeton, 2006, p. 51 (arguing that "American national security in the 21st century … is likely to be threatened by pathogens as much as [by] people."). The securitization process has also been prominent with respect to the HIV/AIDS pandemic. See, e.g., Laurie Garrett, *HIV and National Security: Where are the Links?* Council on Foreign Relations, New York, 2005.

The ''stove pipe'' in which policy on natural disasters developed also experienced change through new thinking about how states should approach natural disasters. Traditional perceptions of natural disasters considered them episodic, self-contained events that triggered the need for humanitarian assistance. Thus, as depicted in figure 1, disaster relief was handled as a humanitarian matter by agencies tasked with this mission. The increasing frequency and harsher impact of natural disasters convinced many involved in disaster planning and relief that countries needed to rethink how they approached this policy area. This rethinking involved seeing natural disasters as threats to core political interests of states, including national security and economic development, rather than as occasions for episodic humanitarianism. Natural disasters also came to be seen as threats under different concepts of security, such as human security,[30] national security[31] and global health security.[32]

As part of the reconceptualization of disaster policy, analyses began to stress the importance of in-depth disaster governance, which includes preventing disasters (if possible), protecting against disasters that cannot be prevented (e.g. earthquakes) and building robust response and recovery capabilities to address the damage done by disasters.[33] Critical to the securitization of disaster preparedness and response, and its linkages to strategies for economic development, is upgrading governmental, intergovernmental and non-governmental capabilities to handle large-scale disasters, especially capabilities to address population and individual health problems disasters spawn. As the Hyogo Framework for Action on disaster policy asserted, ''in order to meet the challenges ahead, accelerated efforts must be made to build the necessary capacities at the community and national levels to manage and reduce risk''.[34]

The end result of the collapse of the traditional ''stovepipes'' for arms control, public health and humanitarian assistance has been convergence on using security concepts to frame the policy debate and highlighting the importance of capabilities to respond to the health and humanitarian challenges the different sources of catastrophic events could generate (figure 3).

NRBC attacks, infectious disease epidemics and natural disasters are all potential sources of catastrophic events, so the securitization phenomenon represents an important development in thinking about catastrophe governance. This development, in many respects, resonates with the devastating nature of catastrophes and the problems such devastation poses for the security of

30 Amitava Basu, ''Human security and disaster management'', *Insecurity Forum*, 8 November 2005, available at http://insecurityforum.org/shirdi/670/ (last visited 24 April 2007).

31 White House, *National Security Strategy*, above note 24, p. 47 (including destruction caused by floods, hurricanes, earthquakes, or tsunamis as national security issues).

32 World Health Organization, *International Health Security Issues Paper: Invest in Health, Build a Safer Future*, World Health Organization, Geneva, 2007, p. 8 (listing natural disasters as a threat to international health security).

33 For an example of the comprehensive approach to disaster policy, see the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, UN Doc. A/CONF.206/L.2/Rev.1, 2 February 2005, available at http://www.unisdr.org/eng/hfa/hfa.htm (last visited 24 April 2007).

34 Ibid., para. 3.

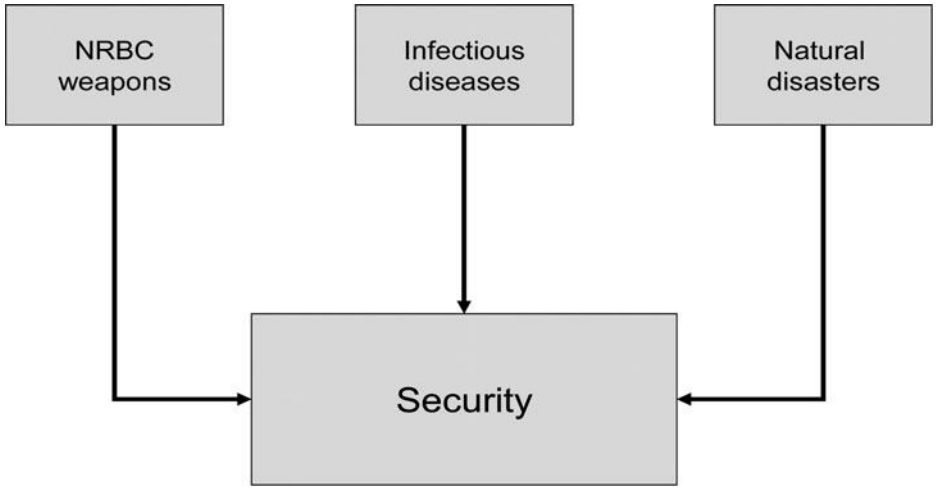

Figure 3 Policy convergence on security concepts

individuals, societies and governments. Yet the securitization of health and disaster relief suggests that, historically, security considerations did not inform the development of mechanisms for catastrophe governance. Even in the context of humanitarian assistance in armed conflict, states did not typically view such assistance as contributing to their national security. Too often states subordinated the need for humanitarian assistance to military or political objectives that required more death and destruction to produce the level of security desired. What is the explanation for the fact that security frameworks have only recently affected policy thinking about catastrophe governance?

Answers to this question could take many analytical routes, but some basic factors require emphasis. The securitization of health and disaster relief indicates that policy makers have moved away from traditional notions of security that are tied to violent military threats from foreign powers.[35] Even in the midst of catastrophic war, the central security threat is not the physical destruction caused by armed conflict but the military forces of the enemy actually causing the destruction. This reality explains why military strategy traditionally focused on how to defeat the enemy's armed forces. The broadening of the security paradigm witnessed in the last ten to fifteen years reveals the merging of two developments. First, with the end of the cold war, risk of total war between states subsided. Second, states realized that the material damage terrorist attacks, epidemics and natural disasters could inflict on societies, including rich countries, was enormous, increasing and threatening to trigger unpredictable political and economic consequences that governments would control only with great difficulty.

35 Peter Bergen and Laurie Garrett, *Report of the Working Group on State Security and Transnational Threats* (Princeton Project on National Security, 2005), available at http://www.wws.princeton.ed/ppns/conferences/reports/fall/SST.pdf (last visited 24 April 2007).

The broadening of the security paradigm has other features. The conventional view of security policy focused on the security of the state. The post-cold war period witnessed an explosion in efforts to expand the notion of security beyond state security. As a result, policy debates began to refer to, among others, human security, environmental security, health security, sustainable security and comprehensive collective security. Broader notions of security accommodate a diverse array of political interests and groupings, from those that view terrorism as a non-traditional security threat to those that want to use security to address the ''root causes'' of world problems. The frequency of the use of ''security'' to reframe policy debates across different governance areas speaks to the perceived power of this concept in political circles. The many efforts to use security to recharacterize policy problems have produced scepticism about this phenomenon. Responding to recent arguments that climate change is a security issue, Barrett noted that ''[e]verything's a national security issue these days. It's a bit of a marketing ploy.''[36]

The belief that framing an issue as a security threat can lead to more political attention, economic resources and policy action is strong, and this belief has been called ''securitism''.[37] Ironically, cynicism only reinforces the perceived strength of the security argument. As noted about the power of securitism in the world of public health,

> Some may doubt the sincerity of some efforts to connect public health and security, such as the cynical playing of the ''security card'' by public health officials and advocates desperate for more political attention and economic resources. The deeper the cynicism the stronger the argument about the triumph of public health securitism becomes. Such cynicism reflects a coldly calculated decision that public health can be improved by appealing to security concepts and considerations.[38]

Globalization also plays a role in stimulating use of the security framework. A globalized world makes terrorism and epidemic disease fluid, mobile and unpredictable threats, decreasing the prospect that prevention efforts can succeed. Likewise, scientists assert that natural disasters agitated by globally generated anthropogenic causes (e.g. the frequency and severity of storms linked to climate change) raise the possibility that some natural disasters have, like terrorism and epidemic disease, become more unpredictable, unpreventable and dangerous. From broader security perspectives, we also glimpse the potential for the ''perfect storm'': the weakening of governance capabilities by catastrophic events increases the likelihood of political unrest and violence, whether in the form

36 Quoted in Karen Kaplan and Thomas H. Maugh, ''Climate change called a security threat'', *Los Angeles Times*, 17 April 2007, available at http://www.latimes.com/news/nationworld/nation/la-sci-defense17apr17,1,6584970.story?track=rss (last visited 24 April 2007).

37 David P. Fidler, ''A pathology of public health securitism: approach pandemics as security threats'', in Andrew F. Cooper, John J. Kirton, and Ted Schrecker, eds., *Governing Global Health: Challenge, Response, Innovation*, Ashgate Publishing, Aldershot, 2007, p. 41.

38 Ibid., p. 44.

of insurgencies against failing governments, terrorism or interstate warfare. The increasing difficulties related to preventing catastrophic events focuses security interests on protection and response capabilities. This dynamic places health, humanitarian assistance and their interdependency prominently on the new agenda of security in complex and controversial ways.

Catastrophe governance under a security paradigm: implications for health and humanitarian assistance

Securitization and governance priorities

The securitization of health and disaster relief reflects not only greater awareness of the damage that catastrophic events could inflict on societies but also a normative shift with respect to creating incentives for governments, international organizations and non-state actors to take more vigorous action. Framing health and disaster relief as security challenges is a strategy to achieve reprioritization in governance processes. The appeal of security-based arguments derives from the priority policy makers are perceived to give to security threats. Framing disease problems or transboundary pollution from industrial accidents as irritants to economic and trade interests, or disaster relief as a human rights obligation, has not stimulated states to give these matters priority in national or international politics. Recasting these problems as security threats provides the opportunity to change the nature of governance discourse about these problems and how to organize political responses to them.

Securitization in the context of catastrophe governance has, however, complex consequences that require careful attention. Earlier frameworks had complicated dynamics as well, but of a different sort. For example, conceiving humanitarian assistance as linked to the fulfilment of human rights means that such assistance must always be provided when needed, whatever the source or political circumstances of the crisis. This logic feeds into the political neutrality that historically characterized the provision of humanitarian assistance in times of war or in the aftermath of natural disasters. Yet, as the lack of development of international law on disaster relief suggests,[39] states have consistently been wary of exposing their sovereignty to foreign humanitarian relief efforts without retaining as much control as possible over such efforts. In the eyes of advocates for better humanitarian responses to crises, state predilection for control is a barrier to overcome through new mechanisms and rules that limit sovereignty's remit over the need to deliver relief as quickly and effectively as possible.

Securitization of health and disaster relief in the context of catastrophes makes the relationship between sovereignty and the provision of health and

39 See, e.g., International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2000*, Geneva, 2000, p. 157 (arguing that disaster relief is a "long-neglected facet of international law", and that "it is unlikely that any other challenge looming so large in world affairs has received so little attention in the legal realm").

humanitarian assistance more complicated. Exploring this complexity requires breaking down catastrophe governance analytically in order to identify factors that influence a security-based approach to health and humanitarian assistance. As explained more below, the source, scale and severity of a catastrophe will affect the security calculations of a sovereign state with respect to preventing, protecting against and responding to catastrophic events. These calculations determine the shape of policies and thus the effectiveness and sustainability of governance responses.

The prevention, protection and response functions of catastrophe governance

Whether the threat comes from a NRBC terrorist attack, industrial accident, disease epidemic, or natural disaster, policy makers need to focus on preventing, protecting against and responding to such events (figure 4). The securitization of health and disaster policy uses security arguments to encourage governments to give higher priority to the prevention, protection and response functions of catastrophe governance. The aim is to build in-depth defences against possible catastrophic events. Past approaches have not woven prevention, protection and response strategies into an integrated whole. In some cases, such as earthquakes and hurricanes, prevention is not possible and thus is not a focus of policy efforts. Where prevention is not possible, ensuring security depends on the ability to protect populations from harm (e.g. through early warning systems) and to respond to damage that occurs (e.g. provision of assistance to victims). In other

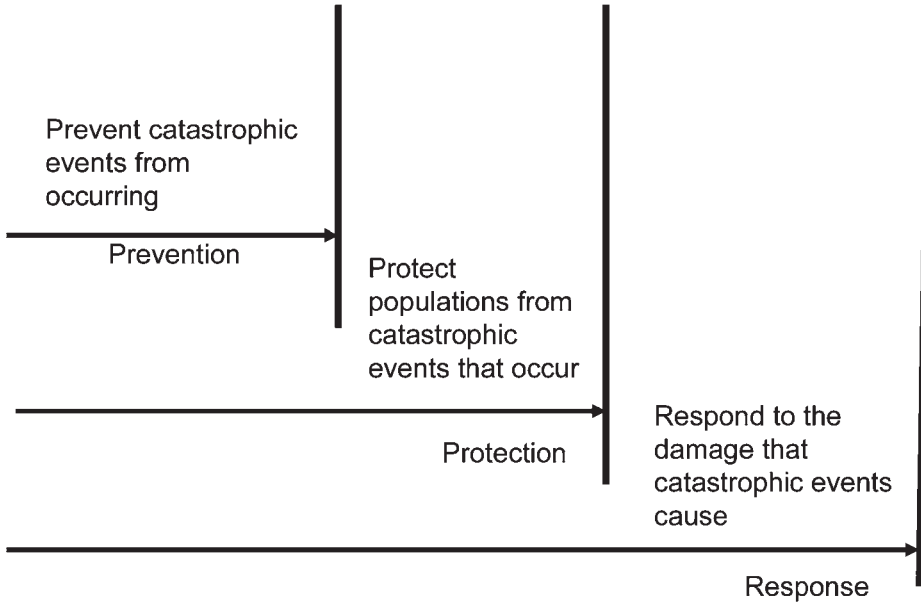

Figure 4 Prevention, protection, and response functions of catastrophe governance

cases, as with arms control, policy mechanisms emphasized prevention (e.g. prohibitions on the development and proliferation of NRBC weapons) without incorporating protection objectives and response capabilities.

Looking at potential catastrophes through a security lens stresses the need for scaling up prevention (where possible), protection and response capabilities. The securitization of health provides a good example of this effect. The potential use of NRBC weapons by terrorists undermines the prevention aspects of traditional arms control treaties, forcing countries to transform prevention strategies to address this problem. In the United States the prevention imperative produced the doctrine of preventive self-defence, implemented in the 2003 invasion of Iraq, and the policy of aggressive interrogation of detained terrorist suspects. The threat of NRBC terrorism also sparked a massive effort in the United States to protect the population (e.g. the smallpox vaccination campaign, improving surveillance and early warning systems) and to improve the ability of the public health system to respond to NRBC attacks (e.g. stockpiling drugs and medical supplies, and providing incentives for the development of countermeasures for NRBC weapons). Experts believed that many of these security approaches to the NRBC terrorism threat also strengthened the United States' ability to protect against, and respond to, large-scale naturally occurring infectious diseases, such as pandemic influenza.[40]

Security and the prevention function

Preventing catastrophes makes sense, of course, without framing the problem in security terms. The security lens, however, gives prevention a sharper edge than it has, for example, in the context of preventing transboundary pollution from industrial accidents.[41] To prevent biological calamity, a security approach may intentionally restrict or infringe sovereignty, community interests and individual rights. To avoid potentially significant and dangerous efforts to provide assistance to victims of NRBC terrorism or disease epidemics, aggressive prevention measures look attractive, despite the short-term costs they create. The security-related prevention imperative raises difficult questions that policy makers cannot avoid. For example, to prevent extensively drug-resistant tuberculosis (XDR-TB) from becoming a global health disaster, should public health authorities in affected countries be more aggressive in using compulsory measures to prevent further transmission?[42] If terrorist groups remain interested in NRBC weapons, should not

40 Christopher F. Chyba, "Toward biological security", *Foreign Affairs*, Vol. 81 (3) (2002), p. 132 (arguing that "many of the steps that are needed to prepare for bioterrorism will also improve recognition of and responses to natural disease outbreaks. Spending on biological defences therefore represents a win-win situation in which society benefits even if no further bioterrorist attacks take place").

41 See, e.g., Convention on Transboundary Effects of Industrial Accidents, 17 March 1992, *International Legal Materials*, 1992, Vol. 31, p. 1330.

42 Jerome A. Singh, Ross Upshur, and Nesri Padayatchi, "XDR-TB in South Africa: no time for denial or complacency", *PLoS Medicine*, 2007, 4(1):e50.doi:10.1371/journal.pmed.0040050 (raising the need for compulsory measures for persons infected with XDR-TB).

states use law enforcement and military capabilities aggressively to prevent catastrophic NRBC terrorism?

The prevention imperative also highlights the security importance of the source of a potential catastrophe. This imperative only gains policy traction in the context of anthropogenic catastrophes, such as the deliberate use of NRBC weapons or an industrial accident. Policy traction for prevention decreases the more the inputs of an anthropogenic catastrophe diffuse across communities, populations and countries. This diffusion, often accelerated by globalization, creates multiplying sources of anthropogenic inputs, which overwhelms national and international prevention capabilities. The diffusion effect is why policy makers generally concede that states cannot prevent pandemic influenza from emerging, drug-resistant strains of microbes from developing and spreading or (at this point) climate change from occurring. The diffusion effect is also why many governments have acted with urgency against the spread of global terrorist networks.

The source of a potential catastrophe is also important for prevention, because different sources create different prevention needs. Military and law enforcement actions to prevent NRBC terrorism do not contribute to efforts to prevent the spread of a virulent, naturally occurring infectious disease, and vice versa. Catastrophe prevention requires its own prioritization, even when states consider both NRBC terrorism and virulent epidemics to be security threats. The security framework tends to privilege prevention of deliberate catastrophes over catastrophes that have no ''return address'' because the intentional sources threaten violent attacks on societies. This reality mirrors how security thinking has historically operated; preventing or deterring violent threats has long garnered more attention and resources from governments than preventing epidemics or industrial accidents.

Security and the protection function

The need for protection strategies vis-à-vis catastrophes flows from the realization that prevention will be impossible (e.g. tsunamis cannot be prevented) or only partially effective. In short, events with catastrophic potential will occur. Protection strategies work, however, to ''harden the target'' against such events and, thus, to mitigate the resulting damage. Thus effective protection reduces the potential dangers and costs that response actions create for governments and societies. Overall, protection policies decrease the likelihood that a dangerous event will seriously threaten a country's security.

In public health, vaccination represents a protection strategy of proven efficacy. Dangerous microbes will circulate in societies, but, sometimes, vaccines render such microbes harmless to vaccinated populations. Sufficiently broad-based vaccination creates ''herd immunity'' in the population, increasing the level of protection beyond those vaccinated. Building codes that require commercial and residential structures constructed in earthquake zones to withstand earthquakes constitute protection strategies. Zoning laws that minimize population exposure to flooding protect societies from potentially catastrophic loss of life and

property. A cross-cutting protection strategy involves early-warning systems (e.g. infectious disease surveillance, tsunami alert systems, weather warnings, notification procedures for industrial accidents) that permit advance notice of impending harm.

Protection strategies make sense as a general policy matter, but we need to consider such strategies in the light of the securitization framework. The first point a security focus makes clear is that protection strategies for different potential large-scale events have little overlap. In short, producing multi-catastrophe synergies through protection policies is not possible. A tsunami-alert system contributes nothing directly to surveillance systems for pandemic influenza, and vice versa. Monitoring systems for earthquakes do not provide early warning for hurricanes, and vice versa. Radiation detectors at ports of entry do not strengthen a government's ability to detect illicit activities related to chemical terrorism, and vice versa.

The one area where experts have discussed the potential to create such synergies involves security threats from biological terrorism and naturally occurring infectious diseases. Literature on biosecurity contains assertions that building stronger defences against biological weapons contributes to stronger defences against infectious disease epidemics.[43] In terms of the objective of protection, synergies can exist, but they are not as robust or frequent as some have claimed. The strongest potential synergies arise in the area of disease surveillance, because early, rapid and accurate identification of a microbial threat contributes to protection of populations against infectious disease, whatever the source of the pathogen's presence in societies. The decision to expand the scope of the new International Health Regulations to include intentional as well as naturally occurring disease events recognizes the potential synergies disease surveillance can produce.

Outside surveillance, protection strategies for biological terrorism and for naturally occurring infectious diseases do not produce policy synergies. The smallpox vaccination campaign in the United States in 2003 illustrates this point. The US government sought to vaccinate healthcare personnel and first responders against terrorist use of smallpox.[44] This effort was a protection strategy against biological terrorism, but the vaccination campaign created no synergies or benefits for protecting US populations from naturally occurring infectious diseases. Similarly, annual influenza vaccination campaigns do not strengthen defences against biological terrorism that utilizes anthrax.

The lack of cross-cutting synergies in protection strategies for different catastrophes, and the limited nature of synergies within the realm of biosecurity, force governments to develop priorities for protection efforts. As noted earlier, the

43 In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General, UN Doc. A/59/2005, March 21, 2005, p. 27 (UN Secretary-General asserting that measures to strengthen public health "have a double merit: they would both help to address the scourge of naturally occurring infectious disease and contribute to our safety against manmade outbreaks").

44 See, e.g., Committee on Smallpox Vaccination Program Implementation, *The Smallpox Vaccination Program: Public Health in an Age of Terrorism*, National Academies Press, Washington, DC, 2005.

security framework is, in many ways, a template for prioritization, and the framework, in the protection area, tends to privilege strategies connected to the intentional use of NRBC weapons as opposed to protection against, for example, natural disasters, even though these disasters could produce greater death, disease and destruction than, say, chemical terrorism or detonation of a ''dirty bomb''.

Beyond the source of an event, the potential scale and severity of the threat affects prioritization for protection strategies under a security framework. The greater the potential geographical impact and the material damage a catastrophic event threatens, the more likely it is to register as a security priority. Many factors affect the scale and severity of a disaster event, including the mobility of the threat, its impact on life, property and social order, and the means governments have to respond to it. These factors help explain why many policy makers emphasize pandemic influenza as a security threat. Its mobility, potential to cause death and disorder on a frightening scale, the scarcity or non-existence of antivirals or vaccine, and ability to overwhelm response capacities gives pandemic influenza a more dangerous profile than many types of disasters, including industrial accidents or large-scale disasters such as the Indian Ocean tsunami.

The lack of synergies in the area of protection against catastrophes and the need to prioritize protection strategies create significant governance burdens nationally and internationally. These burdens are particularly acute for developing and least-developed countries, which are the least equipped to shoulder the responsibility of engaging in systematic and sustainable catastrophe protection policies. From the perspective of developing and least-developed countries, catastrophe protection against unpredictable events that may happen tomorrow or decades in the future competes with more pressing and immediate security and other political, economic and social problems.[45] Therefore countries with greater vulnerability have the weakest capabilities in the face of catastrophic events.

This reality raises, of course, the need for international co-operation on protection strategies. The security framework affects this need as well. By design, framing catastrophes in security terms encourages countries to rethink their own security policies. This self-regarding focus does not preclude international co-operation, as recognition of the need to build global disease surveillance capabilities attests. The security focus does, however, mean that international co-operation is most likely to occur most seriously with respect to those catastrophic events that affect a broad range of countries, namely events with transnational scale and order-disturbing severity. Developed countries' willingness to provide significant assistance to developing countries competes with the developed countries' needs to build and sustain their own capabilities to protect against and respond to the security threats that such catastrophic events pose for them. Hurricane Katrina in the United States illustrated the vulnerabilities that developed countries face and the scale of the resources these countries require to reduce their own vulnerabilities.

45 Scott Barrett, ''The problem of averting global catastrophe'', *Chicago Journal of International Law*, Vol. 6 (2006), p. 530.

In short, the security framework does not convince developed countries vastly to increase assistance for catastrophe protection or response for developing countries because the developed countries too feel threatened and unprepared. Developed countries tend to target increased assistance for developing countries towards protection capabilities for transnational threats that could potentially affect populations in developed countries (e.g. infectious disease surveillance). For catastrophes in developing countries that remain localized in scale and severity, the security framework does not significantly increase the incentives for developed countries to help developing countries. The dynamics of protection strategies under a security approach reveal developed countries exercising sovereignty in ways that privilege their security over the security of other nations. This outcome is not surprising when catastrophes are perceived as real security threats to sovereign states. Overall, more attention is paid to catastrophe preparedness under a security framework, but not in ways that significantly reduce inequalities in resources and capabilities between developed and developing countries.

Security and the response function

The last function served by catastrophe governance is response. The premise is that neither prevention (where possible) nor protection will eliminate the possibility of widespread damage from a catastrophic event which necessitates the need to respond to victims with assistance. The response function of catastrophe governance most closely relates to the provision of disaster relief and humanitarian assistance in the wake of large-scale tragedies. Providing such relief and assistance has, as noted earlier, long been a subject of national governance and international co-operation, but, traditionally, the justification for it connected to humanitarian and human rights concerns, not security. Under a security approach, effective provision of assistance in the wake of catastrophic events becomes important for maintaining political order, economic infrastructure, social stability and governmental legitimacy. As with prevention and protection strategies, the security perspective heightens the political importance of the provision of assistance beyond traditional humanitarian and moral motivations.

Viewing catastrophic response capabilities through the security lens creates some interesting, and complex, issues. Before probing these issues, understanding some problems that affected humanitarian assistance in the past proves useful. As the International Federation of Red Cross and Red Crescent Societies has argued, states and international organizations have not developed much international law on humanitarian and disaster relief outside the context of armed conflict.[46] A key reason for this lack of international legal development has been the reluctance by states to weaken their ability to control whether foreign entities provide assistance in their territories. This strong sense of sovereignty

46 International Federation of Red Cross and Red Crescent Societies, above note 39; International Federation of Red Cross and Red Crescent Societies, *International Disaster Response Laws, Principles, and Practice: Reflections, Prospects, and Challenges*, International Federation of Red Cross and Red Crescent Societies, Geneva, 2003.

opposed attempts to base humanitarian assistance on the idea that individuals had a human right to receive adequate assistance after a disaster, including foreign assistance if the state affected could not provide sufficient relief. This unwillingness to weaken sovereignty's hold on humanitarian assistance continued to be robust even as international capabilities, particularly those of non-state actors, to deliver such assistance expanded and improved.[47] Thus, even before the securitization process takes hold, the response function of catastrophe governance was highly sensitive to sovereignty concerns.

Similar dynamics developed with respect to the international human right to health. Although proclaimed in the WHO Constitution and incorporated into international human rights treaties, the right to health has suffered from vagueness and lack of specificity about what it requires from states. Like many economic, social and cultural rights, the right to health has an aspirational quality to it, leaving sovereign states subject to this right with great discretion in determining how they would comply with it. Serious efforts to clarify the right to health's requirements have really only occurred in the past decade,[48] and these efforts have generated arguments that call for more vigorous attention to the right's meaning and application.[49] These efforts parallel advocacy of the development of international law on disaster relief.[50]

Framing disaster relief and humanitarian assistance as security issues may, at first glance, appear to reinforce the strong sovereignty position taken by states in the past. Securitization may, however, have more complex effects. The rigid sovereignty stance of states in the past perhaps flowed from security and other political concerns about foreigners providing disaster relief or humanitarian assistance. This perspective did not necessarily view the disaster and its aftermath as the security threat but rather the potential foreign interference the disaster might create. The securitization paradigm considers the catastrophe itself to be the security issue, especially with respect to large-scale and severe catastrophes. Under this view, effective response capabilities become security assets rather than moral and humanitarian tools that may trigger negative political and security externalities. From a security perspective, states may have more rather than less incentive to rethink the manner in which they approached the provision of disaster relief and humanitarian aid in the past.

The aftermaths of the Indian Ocean tsunami and Hurricane Katrina help to reinforce this observation. The massive international response to the

47 Ajun Katoch, ''International natural disaster response and the United Nations'', in *International Disaster Response Laws, Principles, and Practice*, above note 46, pp. 49–50 (analysis of UN General Assembly resolutions from 1981 until 2002, showing increasing emphasis on sovereignty).

48 See, e.g., General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. C/C.12/2000/4, CESCR General Comment 14, July 4, 2000.

49 See, e.g., the work of the Special Rapporteur of the Commission on Human Rights on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, at http://www.ohchr.org/english/issues/health/right/ (last visited 24 April 2007).

50 See International Federation of Red Cross and Red Crescent Societies, International Disaster Response Laws, Rules, and Principles Programme (IDRL), at http://www.ifrc.org/what/disasters/idrl/ (last visited April 24, 2007).

devastation wrought by the tsunami not only saved thousands of lives but also sustained the Indonesian government's viability in the immediate aftermath of the cataclysm. The global capability to respond to something as massive as the death and destruction caused by the tsunami can be harnessed strategically by states to shore up their security interests in catastrophe response. Improving co-ordination and streamlining procedures for the provision of disaster relief and humanitarian assistance could, therefore, produce benefits from a security perspective, bringing the securitization perspective closer to those who, from a human rights and dignity perspective, want disaster relief provided more quickly and effectively.

Hurricane Katrina painfully illustrated the difficulties even the richest country on earth has with responding adequately to a foreseen and predicted catastrophic event. Countries with far fewer resources that face similar or worse possible catastrophic events need to see global disaster relief capabilities as critical security resources, because unilateral measures will, in many cases, not be effective. The smarter strategy is to view measures that enhance the utilization of foreign humanitarian assistance as security-enhancing moves in terms of the response function of catastrophe governance.

A security perspective on response capabilities also encourages states to improve their own national response capacities. Many countries have moved in this direction, particularly with respect to potential acts of NRBC terrorism and the possible emergence of pandemic influenza. International disaster relief efforts have also emphasized the importance of upgrading national response capabilities.[51] Unlike with protection strategies, more possibilities exist for creating synergies in the area of response. Improving public health capabilities for responding to NRBC attacks can, for example, benefit responses to dangerous naturally occurring disease events, and vice versa. Stockpiles of medicines and other items can service responses to different kinds of catastrophe, as can multi-purpose, all-hazards emergency communication technologies and facilities and response-training exercises that co-ordinate reactions of national and sub-national levels of government. The possibility for creating such response-capacity synergies strengthens a security-based outlook on the response function of catastrophe governance.

Complexity and controversy arise under a security perspective on response, however, when a catastrophic event involves suspected use of NRBC weapons. As noted earlier, this type of event triggers the highest level of national security concern, and a government subject to such an attack will not focus solely on responding to victims' needs. Unlike natural disasters, which typically have a defined source and end point (e.g. the hurricane dissipates after reaching land), governments do not know whether more attacks will follow an initial strike. The imperative to identify the perpetrators and perhaps prevent future attacks by, for example, restricting movement across national borders may complicate efforts to provide assistance to those harmed or adversely affected by the NRBC attack.

51 Hyogo Framework of Action, above note 33.

Collecting evidence that may lead to attribution may take precedence over delivering aid to those harmed or displaced by the attack. In this context, governments may be especially wary of foreign involvement in response activities, which could lead to heightened restrictions, conditions and oversight on such involvement, which would produce delays in outside assistance reaching victims.

International interest or pressure to investigate the alleged use of NRBC weapons may exacerbate a government's national security concerns. Mechanisms exist in arms control treaties to authorize and facilitate investigations of alleged use of NRBC weapons,[52] and the UN Secretary-General[53] and the Security Council[54] have power to get involved in such matters. Concerns also arose that including intentional uses of chemical, biological and radionuclear substances in the scope of the new International Health Regulations would involve WHO in arms control matters and security politics to the detriment of its public health mission.[55] How much the international community's desire to investigate, or actual international investigations themselves, would affect the speed and efficacy of response activities is not clear. The scale and severity of the crisis might influence this dynamic such that the larger and more devastating the catastrophe the more governments may privilege response needs over security imperatives related to identifying the perpetrators and preventing follow-on attacks.

Tension between security concerns and response efforts also exist with respect to naturally occurring infectious diseases. Controversy has arisen with respect to proposals that the UN Security Council should intervene when countries are not co-operating adequately with international efforts concerning dangerous biological events.[56] Security Council involvement is premised on the idea that such events, even if naturally occurring, pose threats to national and international security. Similar possibilities for international intervention in a state's handling of a catastrophe arise under the principle of the responsibility to protect.[57] Although this principle developed mainly to justify humanitarian intervention to address large-scale atrocities (e.g. ethnic cleansing, genocide), the principle could also apply to legitimize intervention in cases of state unwillingness or inability to handle the aftermath of catastrophic events. Defenders of national

52 See, e.g., Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, above note 19, Article VI(1) (''Any State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations'').

53 For discussion of the UN Secretary-General's authority to investigate allegations of chemical weapons use, see Jez Littlewood, *Investigating Allegations of CBW Use: Reviving the UN Secretary-General's Mechanism* (Canadian Centre for Treaty Compliance Paper No. 3), December 2006.

54 The authority of the Security Council comes from the power it has under the UN Charter in addressing threats to international peace and security.

55 Fidler, above note 27, pp. 365–7.

56 *A More Secure World*, above note 26, p. 47 (proposing that the UN Security Council be prepared to intervene during suspicious or overwhelming outbreaks of infectious disease to facilitate an effective international response).

57 On the responsibility to protect, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa, 2001.

sovereignty, and those focused on humanitarian and health assistance, have expressed various levels of unease with the new mixture of security considerations and humanitarian responses. This unease reinforces the dramatic transformation in policy still unfolding in these areas of world affairs.

Conclusion

The relationship between health and humanitarian assistance has always been important to governance responses to catastrophic events. The interdependence of the protection of health and the provision of humanitarian assistance traditionally appeared most clearly through the human rights framework, under which individuals are deemed to have human rights to health services and other forms of humanitarian aid in the wake of disasters. This perspective remains strong in the international humanitarian assistance community.[58] The emergence of a perspective that frames health and disaster relief as security issues has challenged the human rights ethos and influenced how states, international organizations and non-state actors conceive of catastrophe governance.

The extent to which the security approach has, in a relatively short period of time, entered into policy discourse about health and humanitarian assistance attests to the strength of its appeal. Arguments about whether the securitization of these policy areas is good or bad will continue, but, for the foreseeable future, security perspectives will remain influential in these realms. This article explored the controversies and complexities that securitization of health and disaster relief create for the governance challenges created by catastrophic events. Issues of source, scale and severity affect how the security perspective informs the sovereign state's approach to the prevention, protection and response functions of catastrophe governance.

At the heart of the securitization of health and disaster relief in the context of catastrophes is the objective of convincing states to improve national capabilities, strengthen international co-operation and develop resilient, sustainable governance strategies and capacities for catastrophic events. These tasks require building institutions and mechanisms for catastrophe governance, which is particularly difficult in international relations.[59] Behind the embrace of a security perspective is the sense that prior frameworks, such as the limited regimes addressing cross-border harms or the human rights approach to health and disaster relief, were not sufficiently strong governance foundations. They lacked either the scope required or the ability to persuade states to give catastrophe governance higher political priority. State reluctance to develop seriously the right to health in international law or to craft international law on disaster relief

58 See, e.g., Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response*, Sphere Project, Geneva, 2004, p. 16.

59 Barrett, above note 45, p. 527 (analysing the importance of institutions in preparing for catastrophes and the obstacles to creating effective ones).

stemmed largely from concerns that such objectives posed potential threats to sovereignty.

The securitization strategy seeks to convince states that sovereignty is actually better served by the building of more robust national and international health and disaster relief systems. This objective creates, however, complexities to which no simple answers exist and controversies that are not easily resolved. Securitization of health and disaster relief is no panacea for the mounting challenges that catastrophe governance confronts nationally and internationally. Although a historic transformation in policy and practice, securitization in the context of catastrophe governance relates to a sobering reality: the potential for catastrophes is increasing,[60] as is the human, political and economic damage they can inflict from local to global levels. What needs to increase are governance capabilities for preventing, protecting against and responding to these threats.

Unfortunately, viewing the threat through a security lens may not be avoidable, given the portents of what might be coming. We might be facing a Kantian dialectic with respect to catastrophe governance. In contemplating the potential for states to achieve perpetual peace, Kant argued that this long-held dream would only come to pass after states suffered through conflicts of increasing destructiveness and death.[61] The security perspective has only arisen in response to the perception that man-made and naturally occurring catastrophes are increasingly dangerous for individual, societies, countries and the international community. Progress may not occur without increasing levels of pain, whether inflicted by terrorists, tectonic violence or the travails unleashed by a global climate out of balance. The extent to which securitization affects how catastrophes may haunt humanity in the future remains to be seen.

60 Richard A. Posner, "Efficient responses to catastrophic risk", *Chicago Journal of International Law*, Vol. 6 (Winter) (2006), p. 511 ("The probability of catastrophes resulting, whether or not intentionally, from human activity appears to be increasing because of the rapidity and direction of technological advances").

61 Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, 1795, available at http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm (last visited 24 April 2007).

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INTERNATIONAL REVIEW of the Red Cross

Lessons learned? Disasters, rapid change and globalization

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Abstract

Comparing the two tsunamis of Lisbon in 1775 and of Asia in 2004, the article analyses the different paradigmatic interpretations of "Western" religious and secular causality. Based on the rational concept of risk making and risk taking, the need to accept failures and their consequences is discussed, as well as the responsibility to develop human strategies for disaster prevention and to foster living conditions which may avoid large-scale suffering.

No one ever steps into the same river twice. Charles Darwin took up this observation by Heraclites on the constancy of change, saying that in the whole of history, nothing is more certain than change. That "change" has occupied people's thoughts so intensely from ancient times until today is due to the human longing for stability.[1] Change is seen as a threat – at least when it seems likely to alter the circumstances to which people have become comfortably accustomed, and to do so faster than they are able to readjust. Viewed thus, "change" can be defined in terms of speed, or more precisely, relative speed. If this is the benchmark, everything that seems to move "too quickly" would be perceived as a threat, whereas everything that moves at a slower, achievable or even surpassable speed gives no cause for anxiety. This applies right down to the individual level, such as

conveyor-belt work, and is just as true of complex, systematic contexts such as globalization.

Rapid and radical change

The concept becomes even more interesting if applied to occurrences that are popularly referred to as ''disasters''. Fully in keeping with the concept of relative speed, Lars Clausen[2] has defined such occurrences as ''extremely rapid'' coupled with ''extremely radical change'', which in everyday terms would be described as ''sudden'' and ''terrible'' in the sense of ''something'' happening far too quickly and with such overwhelming force that people feel utterly helpless.

This was precisely the reaction to the tsunami on 26 December 2004 that is believed to have taken the lives of more than 200,000 people along the coasts of the states bordering the Indian Ocean. For those caught unawares and without warning, the tidal wave did indeed come too quickly and radically, but its suddenly so all-powerful character was itself the outcome of a sequence of different speeds which could have been used to advantage. The seismic waves generated by an earthquake travel much faster than a tsunami it creates, with the result that, depending on the distance, there were differences in arrival times varying from minutes to hours. So whereas the Andaman Islands had only two to five minutes between the earthquake and the tsunami, along the coasts of India and Sri Lanka the time lag would have meant an early warning period of as many as six hours in which evacuation and protection could have been organized – provided that notice had been taken of the quake and its potential danger recognized.

From the subsequent plans to set up an early warning system in the Indian Ocean it might be presumed that at the time it was not technologically possible to track the tsunami and that its danger could therefore not be appreciated. This, of course, is not true. The seismological station in Honolulu recorded the earthquake on 26 December 2004 and issued an appropriate warning. The station is part of a global terrestrial and satellite-based seismic monitoring system that has long been in existence and is used to measure all earth tremors – for military purposes, too. The warning from Honolulu did reach the countries later affected, but was not forwarded to the local administrative levels, or only to an insufficient extent. No news at all got through to the local residents or tourists.

1 John Dewey, *The Quest for Certainty: A Study on the Relation of Knowledge and Action*, Minton, Balch & Co., New York, 1929. See also Karl Otto Hondrich, *Begrenzte Unbestimmtheit als soziales Organisationsprinzip*, Neue Hefte für Philosophie 24/25, Vandenhoeck & Ruprecht, Göttingen, 1985, pp. 59–78.

2 Lars Clausen, ''Reale Gefahren und katastrophensoziologische Theorie'', in Lars Clausen, Elke M. Geenen and Elisio Macamo (eds.), *Entsetzliche soziale Prozesse. Theorie und Empirie der Katastrophen*, LIT Verlag, Münster, 2003, pp. 51–76.

Human and higher powers

Was this due to thoughtlessness, lack of experience or carelessness, or was it negligence, indifference or even sloth? Why did people fail to take the warning seriously, and why was it not passed on to regional and district governments, local mayors and the police? And why did the hotels in tourist resorts that were known to be earthquake-prone refuse (as they still do) to give their guests relevant real-time information, in line with the highly successful practice of similar hotel chains in other parts of the world?[3] But most of all, why have these issues – rather than completely different, predominantly emotive and ideologically polarizing topics – not been the subject of public debate? Instead, not only in Germany but throughout the world people spoke of "fate", asked about God and ultimately included the tsunami, as a punishment meted out by Allah or more recently as a "biblical flood", in a chain of cause and effect that had once before been the central feature of an earthquake – the Lisbon earthquake.

The famous earthquake that began off the Portuguese coast on 1 November 1775 and generated a tsunami devastated the capital city and vast areas of the country. Above all, however, they also shook the Western world's philosophy of life to its very foundations.[4] Essentially, the ideological earthquake revolved around the issue of whether the tectonic quake had been a demonstration of God's will and power or was a natural force which mankind had thoughtlessly disregarded. To the dismay of the clergy and the nobility, it was the latter view that was adopted by the king's prime minister, the Marquis de Pombal. He considered the damage to be the result of defective construction and town planning, inadequate organization, administrative sluggishness and especially incorrect use of wealth, which had intensified the destitution caused by the disaster.

"Those who do not remember history are condemned to repeat it", George Santayana[5] had warned, thus giving Heraclites the lie, because the events of 1 November 1775 and 26 December 2004 are so similar in terms of inertia, irresponsibility, negligence and incorrect use of wealth that it is as if we were after all stepping into the same river a second time. Have we learned so little in nearly 250 years, and don't we learn anything from our mistakes?

People assume the opposite to be true. After more than 200 years of enlightenment and techno-scientific progress we indeed ought to know where natural disasters can occur and how to deal with them, how to plan towns, build, and protect ourselves. In actual fact, however, reality is lagging a very long way behind its potential. But why do we not apply our knowledge?

3 Thomas E Drabek, *Disaster Evacuation Behavior: Tourists and Other Transients*, University of Colorado, Boulder, Col., 1996.

4 P.-W. Gennrich, "Gott im Erdbeben: Naturkatastrophen und die Gottesfrage. Eine geistes- und theologiegeschichtliche Studie", in *Wissenschaft und Praxis in Kirche und Gesellschaft*, No. 65, 1976, pp. 343–60. T. D. Kendrick, *The Lisbon Earthquake*, Methuen, London, 1956.

5 Santayana, George, *The Life of Reason: Or, The Phases of Human Progress*, 5 vols., Velbrück Wissenschaft, 1905–6 (available gratis online from Project Gutenberg 1998).

The American sociologist Lowell J. Carr[6] provided an answer as long ago as 1932, saying that if the dykes stand up to a storm tide we commend the skill of the engineers and builders, whereas if the dykes do not resist the forces of nature we do not hold the engineers and dyke-builders responsible or bemoan our general ignorance, but instead declare the occurrence a natural disaster that supposedly came upon us unexpectedly. Pombal had also reasoned in a similar manner. The cultural attitude was inappropriate to deal with the challenges of nature.

As soon as the interrelation of events is expressed like this, conclusions must be drawn. Conversely, if the superior force of nature is invoked there is nothing that anyone can do and therefore nothing that anyone needs to do. This avoids ''change'' – an avoidance in the sense not only of pleasant psychological relief but also of real inaction.

Absence of long-term, preventive protection

This inaction is reinforced by disaster relief that is literally conducive to the next disaster. Whereas the Marquis de Pombal drew the best possible conclusions from the earthquake, ranging from modern reconstruction to administrative and tax reforms, the need for adjustments of that kind after the 2004 tsunami was literally swept away by a second tidal wave: the German Red Cross alone received donations from private individuals amounting to €124.6 million, while around US$4.7 billion was donated worldwide. A further US$2 billion in government aid was approved, but that amount was not distributed. According to estimates, about US$6 billion was distributed very unevenly and the assistance did not always reach those really in need. Above all, however, it very rarely led to the kind of change that would make the affected regions and their inhabitants less vulnerable in the future, but rather to a quite different, unintended type of change, which is very often the result of too many good intentions: the excessive volume of food and clothing donated wrecked local agricultural, market and production systems, while the accelerated building of new housing led to extreme shortages of materials, harmful deforestation, profiteering and, more recently, inappropriate construction methods. There was frequently no general construction master plan because competing organizations were keen to carry out prestige projects that could be presented as success stories back home. Under pressure to provide evidence of the effective impact of donations, the tens of thousands of projects were not networked and there was no co-ordination aimed at developing a long-term, preventive protection and sustainability strategy, as had been deemed necessary by the United Nations in the International Decade for Natural Disaster Reduction.

6 Lowell Juilliard Carr, ''Disaster and the sequence-pattern concept of social change'', *American Journal of Sociology*, No. 38 (1932), pp. 207–18.

Self-fulfilling prophecy

In the twenty-first century we are thus faced with a set of contradictions. We have technical skills that allow us to observe and predict real development on earth with a relative degree of precision. Land use and vegetation, the development of settlements and mobility, energy consumption and emissions, rainfall and drinking water supplies, environmental pollution and deforestation – everything can be measured and observed by satellites and sensor systems and incorporated into decision-making processes. Multinational companies use these data for their long-term investments and the national commodities exchanges use them for forward transactions. Those organizations know about pending unrest or famines long before they actually occur. Little inclination is shown, however, to consider the ethical aspects of advance information of this kind and its inherent tendency to become "self-fulfilling prophecy". There, too, it appears more attractive to talk about disastrous famines, even if the time lag between satellite data on drought, the increase in prices of patented hybrid seeds and a pending shortage could have been avoided before the famine – the "disaster" – set in.

In the face of such man-made time lags and advance knowledge of them, can a worldwide organization such as the Red Cross remain an aid organization among competing aid organizations – or worse, a follow-up repair operation which leaves the preceding wrong conditions basically unchanged? The founding of the Red Cross gave rise to the opposite kind of obligation. Henry Dunant's *A Memory of Solferino*[7] led to the gradual development of national relief societies from which, in turn, a politically influential "structure" evolved that made the world a slightly better place. Political structures are now needed to provide solutions for our present-day "Solferinos". But what would their corresponding "Geneva Conventions" and "Additional Protocols" look like?

Excessive burden for societies

In contrast to Dunant's time, present-day industrial societies are internationally structured processing systems whose activities are conducted more and more by control and management services and hence by communication. Technically and organizationally, the processing takes place via interlinked systems in the form of intermodal operations and cascading flows of (control) data and metadata, while no distinction is made in the actual transformation process between raw materials and intermediate and finished products; instead, entire life cycles are optimized (life-cycle management) according to specific criteria. In the network of international interdependence, attempts by individual states to exert some control increasingly end up as mere symbolic gestures, while failures to exert control lead to damage increasingly beyond the influence of individual states. At the same time,

7 Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986 [*Un souvenir de Solférino*, 1862]. English version reprinted by courtesy of the American Red Cross.

what Herfried Münkler[8] pointed out about wars can also be applied to disasters. The asymmetry between achievable insignificance and successive repercussions is growing steadily and renders modern societies extremely vulnerable: a great deal of damage can be done with little effort. Even if such damage is extremely rare, it can occur at any time. And because disaster prevention must be based on the damage (which is the guideline for contingency planning), societies are consequently compelled to sustain a proportional protection potential for the entire duration (of the probability). In the long run this will place an excessive burden even on prosperous societies as well. Thus economically affordable solutions arise more and more from avoiding damage instead of its mitigation.

The risk to metabolic systems will be even more problematic, that is interaction between humankind and nature (climate, water, food and energy supplies), disruptions of the interaction between human beings and animals (SARS, BSE), disruptions of the quality of interaction (poisoning, enrichment, stockpiling), and altogether may lead to epidemic or endemic consequences, problems of adjustment or new shortages.

Structures are also falling apart or being reconstituted worldwide to create new structures. The European Union is not alone in producing new political structures with a global impact (e.g. monetary systems); other parts of the world are also joining together at a fairly high (Mercosur, Asean) or lower level (the collapse of the Warsaw Pact). Overall this is leading to fundamentally different processes and process management, as well as to other forms of international politics. In some parts of the world, for instance, the fundamental structural principle of the state monopoly on the use of force is dissolving, thus allowing tribal structures to return or to evolve into authoritarian structures and types of force that were thought to be things of the past. Instead of finding new ''solutions'', the ensuing political and economic asynchrony and asymmetry has tended to call in question the successful organizational structure known as ''democracy'' and has revived fundamentalist attitudes.

Absence of a master plan

In terms of global politics, ''out-of-area'' initiatives and ''peacekeeping'' and ''peace-enforcing'' missions point to the need for new types of solutions. These, however, will generally be fashioned by combining existing structures in an ad hoc manner, usually by arranging existing components in layers and not because a master plan has been thought up in advance. This has so far been true of global programmes of the United Nations and other multinational bodies, which, despite their holistic intentions, are dependent on the biased interests of their member states. Nonetheless, the World Bank regulates global interconnections more rigorously than do many individual states.

8 Herfried Münkler, *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*, Velbrück Wissenschaft, Weilerswist, 2006.

Yet is a ''master plan'' a real possibility? In principle it is something that should be required of a ''master'' organization such as the International Red Cross and Red Crescent Movement (hereafter Red Cross). Amid the asynchronies and asymmetries described above, what is needed more than ever is a coherent structure that operates uniformly throughout the world and can achieve harmonization. The Red Cross has long been a structure which, unlike most other organizations, adapts to problems as they come – from local up to global, but is unfortunately not integrated correspondingly. International disaster relief is precisely what shows that the Red Cross and Red Crescent societies are not making the most of their structural potential but are functioning at less than capacity. The inherent contradiction is hence that the organization is potentially global, but in the course of globalization is in danger of being overtaken (or utilized at least) by other players (such as the United Nations, the European Commission's Humanitarian Aid department (ECHO)), and thus falling behind in the level of functional integration of its national relief societies. It therefore must succeed in turning its members as radically and as rapidly as possible into world citizens concerned to provide their master plan for globally co-ordinated, concerted action in the transnational spirit of the organization's founding father.

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INTERNATIONAL REVIEW of the Red Cross

Prompt and utter destruction: the Nagasaki disaster and the initial medical relief

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Abstract

The article takes an overall look at the initial medical relief activities in Nagasaki after the atomic bomb fell there on 9 August 1945. In Nagasaki, as in Hiroshima, medical facilities were instantaneously destroyed by the explosion, yet the surviving doctors and other medical staff, though themselves sometimes seriously injured, did their best to help the victims. Medical facilities in adjacent areas also tended to the wounded continuously being brought there; some relief workers arrived at the disaster area when the level of radiation was still dangerously high. This article will in particular highlight the work of the doctors.

In the memories of many people the disasters of Hiroshima and Nagasaki have remained associated with the liberation and peace that swiftly followed the

* Thanks are due to William R. Carter and Keiichi Hayashi for their respective help and suggestions in translating a Japanese-language text of this paper into English. The author also wishes to thank Iwanami Shoten for permission to revise the map from their copyright material, Nagasaki Atomic Bomb Museum for its assistance, particularly in compiling geographical information about the city of Nagasaki as it was on 9 August 1945, and Philip Towle for his comments and productive criticism on an earlier draft of this paper. Responsibility for this paper rests, however, entirely with the author. All translations of quotations from untranslated sources are by the author.

dropping of the atomic bombs in August 1945. Before the use of the bombs a long and cruel war had continued, full of misery and death; the country that began the war in the Asia-Pacific region was Japan. After they were dropped on two Japanese cities the war soon came to an end. Quite apart from the political process of how the decision to drop them was reached, the chronological context left many with the impression that these bombs brought about the end of the war.

Most of the Allied soldiers, who had endured a cruel ordeal of up to three and a half years in Japanese army prisoner-of-war (POW) camps, felt that they would not have survived if liberation and the end of the war had come only a little later than it did. Marcel Junod, who was head of the ICRC delegation stationed in Japan and had attempted to help the victims in Hiroshima after finally getting there a month after the bomb fell, had initially been entrusted with another difficult task, namely of assisting the Allied prisoners of war held by the Imperial Japanese Army.[1] Although they certainly had no wish for any indiscriminate slaughter of the enemy nation's people, what they and their friends did very much hope to see was a quick and thorough defeat of the enemy, together with a rapid liberation and a robust peace. The belief that the dropping of the atomic bombs ended the war and prevented further victimization and bloodshed overwhelmingly became their "standard memory", while some of the former Allied POWs in Japanese captivity lamented that they owed their freedom to the atomic bombs.[2]

This article will take an overall look at the initial phase of medical relief activities in Nagasaki, where the second A-bomb was dropped. There, as in Hiroshima, an annihilating blow was dealt to medical facilities within a certain radius of the explosion's epicentre. The city's principal medical facility, the Nagasaki Medical College – today's Faculty of Medicine of the University of Nagasaki – was situated only 600 metres away. At that time the population of Nagasaki City was 240,000, and the number of practising doctors within the city had decreased by half because so many had been sent away to serve with the armed forces. With the assistance mainly of the Nagasaki Municipal Association of Physicians, arrangements had been made for a relief system combined with anti-air raid preparations and including twenty-two medical relief centres with 327 relief personnel. The Nagasaki Medical College played a key role in this effort.[3]

The Medical College president, Dr Susumu Tsunoo, returning to Nagasaki from a visit to Tokyo, had crossed Hiroshima on foot the day after it had been bombed. When he got back to Nagasaki on 8 August, he reported on the Hiroshima disaster to the college's staff and students, explaining that the weapon

1 Marcel Junod, "The Hiroshima disaster", *International Review of the Red Cross*, No. 230 (September–October 1982), pp. 265–80, and No. 231 (November–December 1982), pp. 329–44. On the subject of the Japanese treatment of Allied POWs, see also Margaret Kosuge, "The non-religious red cross emblem and Japan", *International Review of the Red Cross*, No. 849 (2003), pp. 75–94; Philip Towle, Margaret Kosuge and Yōichi Kibata (eds.), *Japanese Prisoners of War*, Hambledon & London, London, 2000.

2 See, e.g., Réne Shäfer's carvings preserved at the Nagasaki Atomic Bomb Museum.

3 For Nagasaki's anti-air-raid preparations prior to the A-bombing, see Nagasaki Municipal Office (ed.), *Nagasaki Genbaku Sensai-shi* (Atomic bomb damage of Nagasaki), Vol. 5, Kokusai Bunka Kaikan, Nagasaki, 1983, pp. 4–227; on Nagasaki's relief system organized before August 1945, see especially pp. 129–41.

used was a new type of bomb of inconceivable power. Needless to say, ''for many people it was not easy to have any idea of that new type of bomb, and it was all the harder to know what might be the best means of guarding against it''.[4]

At 11.02 a.m. on the day after Dr Tsunoo's warning, the atomic bomb was dropped on Nagasaki. The Medical College and its adjoining hospital were completely destroyed. Dr Tsunoo, who at the time of the explosion was examining a patient in one of the hospital wards, was injured by the bomb blast and was transported to a hill behind the hospital together with surviving students and staff. The cornerstone of what was supposed to be Nagasaki's emergency medical system had collapsed in an instant.[5]

Despite their injuries, the surviving doctors, nurses and students at the Medical College began soon after the explosion to attend to the bomb victims. At the same time other doctors and nurses assigned to relief work, including those of the Japanese Red Cross, were busy trying to help the disaster victims in the affected area within 4 km of the epicentre, though in some cases badly hurt themselves. Medical facilities close to Nagasaki also did their best to care for the wounded, who were continuously being brought in, and within several hours of the explosion relief workers dispatched in special brigades arrived from nearby areas to help on the spot, even though the levels of radiation were still dangerously high. The following account will mainly give examples of what happened in the area directly affected. It will in particular highlight the doctors' work. In what circumstances did they carry out their initial medical relief activities? What can we read into these activities, carried out in such a hopeless situation?

9 August 1945, 11.02 a.m.

The atomic bomb is dropped on Nagasaki

Nagasaki's topography was complex (see map). The city extended from north to south along a narrow strip of land between two steep hills some 200–360 metres high. It was roughly divided between the older city area in the Nakajima river basin and the newer city area in the Urakami river basin, and to the south it faced Nagasaki Bay. Nagasaki's air defences had been considerably reinforced since 1941 and a number of laterally entered air raid shelters had been dug into the slopes of

4 Toshihiko Kouji, *Nagasaki Ikadaigaku Kaimetsu no Hi* (The annihilation day of Nagasaki Medical College), Marunouchi Shuppan, Tokyo, 1995, p. 139.

5 Including Dr Tsunoo, 894 of the college's staff and students died, either immediately, or after escaping to the hill behind the college, or from physical after-effects of the A-bomb; the figures are based on a 1996 survey. For details of the damage to the college, see *Genbaku Fukkō 50 Shūnen Kinen: Nagasaki Ikadaigaku Genbaku Kiroku-shū* (The fifty years after the A-bombing and the recovery: Nagasaki Medical College records of the A-bombing), Nagasaki Ikadaigaku Genbaku Kiroku-shū Henshū Iinkai (Editorial Committee for Nagasaki Medical College Records of the Atomic Bombing), 3 vols., Nagasaki Daigku Igakubu Genbaku Fukkō 50 Shūnen Igaku Dōsō Kinen Jigyō-kai, Nagasaki, 1996.

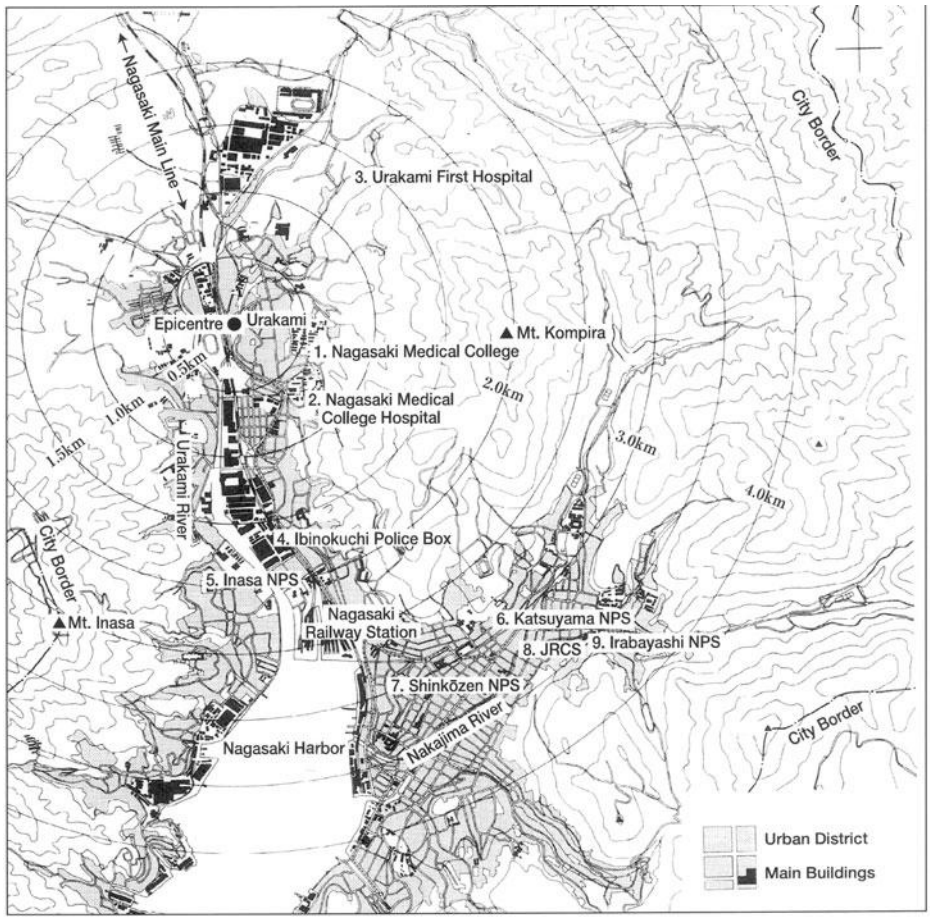

Figure The main medical relief centres immediately after the bombing of Nagasaki on 9 August 1945.* Contour lines indicated between 50 metres. ** This map is based on the materials and data in *Genbaku Saigai* (note 6), *Nagasaki Genbaku Sensai-shi* (note 25), Nagasaki no Genbaku-ikou wo kirokusuru-kai [The recording group of the A-bombed buildings in Nagasaki], and *Shinpan Genbaku-ikou Nagasaki no Kioku* [The A-bombed buildings: Nagasaki's memories], new edition, Kaichōsha, Fukuoka, 2005.

the hills. At the time of the A-bombing the city had already undergone five air raids, on 11 August 1944 and 26 April, 29 July, 31 July and 1 August 1945.

Nagasaki had only recently been added in place of Kyoto to the list of ''candidate'' cities for targeting by the new weapon and on the day the bomb was dropped it was in fact an alternative target. The first-choice target, the city of Kokura – also in the Kyushu district, in the southernmost part of mainland Japan – lay under heavy cloud cover and a direct line of sight to assist in accurately dropping the weapon was impossible. The plane carrying it was therefore rerouted

to Nagasaki, where the sky was also heavily overcast. As a result, the second A-bomb was released over the Urakami district in the newer section of the city, a few kilometres north of the original target point. It was an area inhabited by many Catholics, who had endured a long history of oppression since the Tokugawa Shogunate period.

"Prompt and utter destruction": wind blast, searing heat and radiation

The 4.5-ton plutonium bomb, which exploded at an altitude of about 500 metres, is estimated to have had an explosive force equivalent to 22,000 tons of TNT and to have released energy equivalent to approximately 20 trillion calories. In terms of conventional air raids in 1945, 22,000 tons of TNT would have had to be carried on more than 4,000 B29 bombers.[6] Such overwhelming destructive force was applied almost instantly within a certain radius of its epicentre.[7]

Roughly half of the energy of a nuclear explosion is accounted for by the blast, while heat radiation accounts for approximately one third and initial radiation (gamma rays and neutron rays) for about 5 per cent. The remaining 10 per cent is residual radiation released more than one minute after the explosion. Shōji Sawada and others have pointed out that, in comparison with TNT explosions, the characteristics of a nuclear device include a wholly different order of great explosive force (by weight, more than 1 million times that of TNT), a variety of destructive effects (whereas TNT's destructive effect comes almost entirely from blast), blast destruction characterized by "shock waves", damage from "heat rays" (the surface temperature of an atomic fireball resulting from a nuclear explosion is 7,000 degrees Celsius, while the temperature at the core of a TNT explosion is 5,000 degrees), damage from radiation (initial, residual and induced radiation that has serious effects on the human body), strong pulsed electromagnetic effects (incapacitation of electric machines and devices as well as communications systems), and composite damage caused by a combination of these various factors.[8]

The moment of explosion and immediately after

The impact of that moment at 11.02 a.m. on 9 August 1945 is imprinted on personal relics such as watches or clocks, can be seen in commemorative statues and exhibitions at the museums set up in postwar Nagasaki and is also recorded in numerous publications. The disaster was instantaneous. The ground temperature

6 *Genbaku Saigai; Hiroshima/Nagasaki* (The A-bomb disasters: Hiroshima/Nagasaki), Hiroshima-shi Nagasaki-shi Genbaku Saigai-shi Henshū Iinkai (The Hiroshima and Nagasaki Municipal Joint Editorial Committees for Records of the Damage Caused by the A-bombings), Iwanami Shoten, Tokyo, 1985 (hereinafter The A-bomb disasters), pp. 56–7.

7 Shōji Sawada et al., *Kyōdō Kenkyū Hiroshima Nagasaki Genbaku Higai no Jissō* (The joint investigations into the actual damage of Hiroshima and Nagasaki caused by the A-bombings), Shinnihon Shuppansha, Tokyo, 1999, pp. 43–44.

8 Ibid., pp. 44–45.

at the epicentre reached 3,000–4,000 degrees. The pressure of the Nagasaki blast ranged from 6.7 to 10 tons per square metre, but the time of continuous application of that pressure is estimated at only 0.4 seconds.[9]

In Nagasaki, damage extended 4.7 km from the epicentre, and those who died when the bomb exploded were mainly within a radius of 4 km. At the epicentre, heat rays caused water to evaporate from human organs, the bones of a human hand to stick to a clump of glass and a victim's skull to remain on the inner surface of a steel helmet. The Urakami Branch Prison 300 metres north of the epicentre was completely destroyed, and 139 of the inmates, prison staff and their families were killed; there were eighty-one inmates there altogether, including those in custody pending trial. Among them there were at least forty-six of Chinese or Korean nationality. The Urakami Catholic church, about 500 metres north-east of the epicentre, collapsed from the blast, only part of the walls of its main hall remaining standing. It was grievously burnt by the heat rays from the blast, and within the church edifice two priests and several dozen worshippers were killed.[10]

A boy (aged 16) who was 1 km from the epicentre and a young woman (aged 24) who was 1.5 km away describe the instantaneous destruction as follows:

> A light that was orange and like a camera's flash streaked over my head (I was standing in the shadow of a brick warehouse wall 4 metres high). Then a mother and her children who were about 10 metres away from me, together with other children running away from where I was and passing the mother with her children, instantaneously disappeared.[11]
>
> In just an instant, things on the ground blew away and were destroyed. It was a scene where everything was completely in disarray. I thought it was probably the end of this world.[12]

A man (aged 30) 1.5 km from the epicentre and a young girl (aged 9) 3 km from the epicentre described separately the situation immediately after the bomb was dropped:

> After that flash of light, there was one person after another trying to escape in my direction, and they were all turned pitch-black. Everything was burned black; bright red blood was coming out of black charred skin. There was not a single person with a complete body. One could scarcely tell the difference between men and women.[13]
>
> People without arms or legs rolled about on the ground, crying for help. Some people jumped about like rabbits, some of them even tried to depend on

9 The A-bomb disasters, above note 6, pp. 61–2.
10 *Records of the Nagasaki Atomic Bombing*, City of Nagasaki, Nagasaki, 1996, pp. 8–9, 15–32.
11 Nihon Gensuibaku Higaisha Dantai Kyōgikai (Japan Confederation of A- and H-Bomb Sufferers Organizations) (ed.), *Genbaku Higaisha Chōsa: Hiroshima/Nagasaki Shi to Sei no Shōgen* (A survey of the A-bomb sufferers: Hiroshima/Nagasaki, testimonies of death and life), Shinnihon Shuppansha, Tokyo, 1994, p. 255.
12 Ibid., p. 284.
13 Ibid., p. 269.

> a child like me, begging for water. In this wave of people you couldn't tell whether they were men or women, and which were their eyes, their noses, or their faces.[14]

The fires

Fires broke out immediately within a kilometre of the epicentre, due to the intense heat. At a distance of 2–3 km, secondary fires broke out about an hour later, and at 2.5–3.3 km, fires broke out about an hour and a half after the initial blast. A man (aged 41) who was 3 km from the epicentre stated that "Tens of thousands of homes burned all at once, and although several tens of thousands of people died, there was not one person who was engaged in putting out any of the fires, and the only thing that met your eye was the thousands of houses which were consigned to flames, as well as the dead bodies."[15] In order to get away from the inferno, those who could move at all, and even people who were seriously injured, fled into the hills surrounding the city. Many died on what they hoped would be the road to safety, making piteous pleas for water.

Among those who fled to the hills were Allied prisoners of war who had been held in a prisoner-of-war camp 1.7 km from the epicentre.[16] After the bomb fell, one POW, recalling how he looked down over what had been the northern part of Nagasaki, said, "I cannot deny the feeling that this was a "beautiful" sight. After my life of enslaved captivity that had lasted nearly 4 years, I felt that I had finally been set free."[17] Some of the prisoners of war, though surrounded by the conflagration, helped to put out fires and gave assistance to people at places to which they had fled in search of safety.

> [The prisoners of war], relying on their bodily strength, pushed aside and removed wooden timbers that had collapsed and, covered with dirt and sweat, they worked to put out the fires. For me, it was the first time that I had seen, right in front of my eyes, this beautiful sort of neighbourly love, or perhaps I should more correctly say the putting into practice of Christ's instructions to "love thy neighbour".[18]
>
> I had let a nurse apply first-aid measures, but both my daughter and myself were all covered by blood. When I got to the top of the road, a foreigner

14 Ibid., p. 300.
15 Ibid., p. 298.
16 Around the end of June 1945 a number of Dutch citizens, but also some Australians and British, had been brought there. They were forced to work for eleven to twelve hours each day in shipyards or excavating air raid shelters. At the time the A-bomb was dropped, 169 detainees remained, most of them engaged in digging air-raid shelters. Hugh V. Clarke, *Last Stop Nagasaki*, George Allen & Unwin, London/Sydney/Boston, 1984.
17 Jidayū Tajima and Shunji Inoue, *Renga no Kabe: Nagasaki Horyo Shūyōjo to Genbaku no Dokyumento* (The brick walls: the documents of the POW camps in Nagasaki and the A-bombing), Gendaishi Shuppan, Tokyo, 1980; repr. in Saburō Ienaga et al. (eds.), *Nihon no Genbaku Kiroku* (Japanese records of the atomic bombings), Vol. 13, Nihon Tosho Sentā, Tokyo, 1991, pp. 133–4.
18 Ibid., pp. 135–6.

> quickly ran up and asked (in Japanese), ''Is the baby okay?'' It was a prisoner who had been in the POW camp in Saiwai-chō town … The prisoner took out from the first aid kits tincture of mercurochrome, which he applied, and then applied bandages. He did this for all including my son and my daughter. The prisoners always had bandages they had brought along with them. Under the circumstances, I felt there was no longer any distinction between a friend and an enemy.[19]

Looking for helping hands

In the city streets, surrounded by rubble and flames, the sea of fire and tens of thousands of corpses, the survivors pleaded for help. But according to the records of the Nagasaki branch of the Japanese Red Cross Society, immediately after the bomb explosion ''the entire area surrounding the epicentre of the blast was just like a living hell, and it was no use thinking about medical assistance.''[20] A female teacher, who was in a primary school 3 km from the epicentre not long after the bomb had been dropped, recalls,

> People wounded in the blast were brought in before there was time to clean up the large lecture hall. Within just a very short space of time there were more than a thousand people, leaving hardly a place to stand. People's skin was peeling, then rolling up or drooping downward, and there were people whose eyes had popped out, people at their last breath as blood flowed in streams, and people whose voices saying ''give me water'' were becoming ever fainter. This was exactly what was meant by a ''living hell'', I was so frightened that I couldn't care for them but just went off into a faint.[21]

The first people able to do relief work immediately after the disaster were simultaneously people who themselves needed help. The more serious their injuries, the greater the probability that they would lapse into a state where they could not save those others who asked for help.[22]

> When I embraced my 5-year-old daughter, I thought about how even though she had been such a pretty child, her body was now completely covered with black burns and I could not distinguish her eyes or nose. At that time I resolved that ''this child cannot be saved, but I'd at least like to have her die holding the hands of a hospital doctor''.[23]

19 NHK Shuzai-han (NHK Interviewing Team), *Nagasaki: Yomigaeru Genbaku-shashin* (Nagasaki: Photographs of the A-bombing revived), Nihon Hōsō Shuppan Kyōkai, Tokyo, 1995, p. 141.

20 Nagasaki Branch of the Japanese Red Cross Society (ed.), *100 Nen no Ayumi* (A history of a hundred years), Nagasaki, 1988, p. 26.

21 A survey of the A-bomb sufferers, above note 11, p. 308.

22 Later on, in the recollections of persons who had survived the bombing, situations where they ''did not'' or ''could not'' save others came to take on as peculiar and continuing a significance, paradoxically, as what they ''did do'' on that day. Masaharu Hamatani, *Genbaku Taiken* (Experiences of the A-bombings), Iwanami Shoten, Tokyo, 2005, pp. 13–19, 39.

23 A survey of the A-bomb sufferers, above note 11, p. 287.

In circumstances devoid of any hope of effective help, people still earnestly sought the ''hands'' of medical doctors as a way of enabling their loved ones to die in a more ''humane'' way.

Doctors on that fateful day of 9 August

The Nagasaki Medical College

At 11.02 a.m., at the Nagasaki Medical College 600 metres away from the epicentre, 410 students had ended their summer vacations and were attending regular classroom lectures (map, position 1). Of these, 257 died instantly at the time of the explosion and the others all died after evacuation. At the hospital attached to the college, approximately 210 students were engaged in practical training; seventy-four of them died either instantly or after evacuation[24] (map, position 2). Within the Medical College, eleven emergency medical teams had been organized prior to the A-bomb disaster to deal with wartime contingencies, but in this unprecedented situation ''there was no point in thinking about putting together such rescue teams since the medical doctors had themselves fallen into a situation of needing some serious help from others''.[25]

Nevertheless, victims gathered at the college seeking treatment by the doctors. While crawling out from the rubble of the hospital, a medical student, Eiichi Kobayashi (aged 19), came across Dr Takashi Nagai (aged 37), an associate professor at the time and a surgeon well-versed in radiation technology, being supported by a head nurse while fleeing to what he hoped would be a safer place. Blood was running steadily from a wound to Nagai's head. As they and other survivors managed to reach the hospital's main entrance, a large number of people seeking help were already to be seen there.[26]

Within fifteen minutes of the explosion Dr Nagai, who as a result of his work involving radiation had earlier been diagnosed with leukaemia, was busy inside the hospital treating the wounded endlessly streaming in.

> ''Doctor, help me!'' ''Give me medicine!'' ''Look at this wound!'' ''Doctor, I'm cold. Give me clothes!'' A strange group of naked human beings crowded around us, all shouting. These were the people who somehow survived when

24 Kouji, above note 4, pp. 46, 104–5.

25 Nagasaki Municipal Office (ed.), *Nagasaki Genbaku Sensai-shi* (Atomic bomb damage of Nagasaki), Kokusai Bunka Kaikan, Nagasaki, Vol. 1, 1977, p. 503.

26 Eiichi Kobayashi, ''Watashi no hibaku taiken to hibaku iryō'' (My A-bomb experiences and medical activities), in Hibaku 60 Shūnen Kinen Jigyō Jikkō Iinkai, Nagasaki Daigaku Daigakuin I-shi-yakugaku Sōgō Kenkyūka Genbaku Kōi-shōgai Iryō Shisetsu, Nagasaki Igaku Dōsōkai (Executive Committee for the Memorial Project of the Sixty Years after the A-bombing, Atomic Bomb Disease Institute, Faculty of Comprehensive Studies for Medicine, Dentistry and Pharmacy, University of Nagasaki, and the Nagasaki Medical Alumni) (eds.), *Nagasaki Ikadaigaku to Genbaku: Hibaku 60 Shūnen Kinen-shi* (Nagasaki Medical College and the atomic bombing: Memorial essays collection commemorating the sixty years after the A-bombing), Hibaku 60 Shūnen Kinen Jigyō Jikkō Iinkai, Nagasaki, 2006, pp. 7–8.

> everything was swept into the air and hurled in all directions by the explosion. Some, in whom a spark of life remained, extricated themselves from the vast and motionless heap of dead flesh and crawled up to me. Clinging to my feet, they cried: ''Doctor, help me! Doctor, help me!''[27]

Dr Nagai had four and a half years' experience as an army medic on battlefields in China. Pausing briefly from attempting to give treatment inside the hospital, Nagai, together with the Kobayashi and others, set out for the hospital's main entrance. As the flames approached, Nagai decided to give priority to wounded patients in the hospital wards rather than give first aid to new arrivals at the hospital site. From around 2 p.m., as the fires increased in intensity, he called an end to ''rescue work'' on the hospital premises and transferred the medical relief centre very temporarily set up at the hospital's main entrance to a hill behind the Medical College, where there seemed to be no danger of similar fires. The hill was crowded with wounded people.

The Medical College campus, a scene of devastation, was engulfed in flames. Even though many of the surviving people associated with the college were seriously injured, about fifty of them, including nurses and students, were assigned to relief work. The doctors among them in addition to Dr Nagai were Associate Professor Raisuke Shirabe and Professor Kōhei Koyano, both surgeons. These doctors took charge of the remaining staff and students and carried out relief work on the campus. Dr Koyano went out to the part of the city that was ablaze and gave instructions for setting up medical relief centres, while Dr Shirabe continued his relief work after giving Dr Nagai emergency surgical treatment for a serious injury to his temple.[28]

At the time of the disaster, the ''hospitals'' in the affected area were destinations for large groups of homeless and wounded people. Physicians such as Dr Nagai, who had accumulated some battlefield experience as an army medic, or Dr Shirabe, who tried his best in desperate conditions to perform the work of a surgeon, managed, but just barely, to make what had been their state-of-the-art medical facility, now largely reduced to rubble, continue to function, at least as a ''relief centre''. This was possible only because of their discernment, their leadership abilities, their quick-wittedness and their sense of humanity.

27 Takashi Nagai, *The Bells of Nagasaki*, trans. William Johnston, Kōdansha International, Tokyo/New York/London, 1994, pp. 29–30. The original Japanese edition, entitled *Nagasaki no Kane*, was published in 1949 by Hibiya Shuppan, Tokyo, together with an appendix, ''Manira no higeki'' (The Tragedies of Manila), about Japanese atrocities in the city of Manila during the war, under the occupation censorship.

28 The fifty years after the A-bombing, above note 5, Vol. 1, pp. 189, 190–3, 458. For details of Dr Shirabe's activities, see Raisuke Shirabe and Yasuo Yoshizawa, *Ishi no Shōgen: Nagasaki Genbaku Taiken* (The medical doctors' testimonies: The experiences of the Nagasaki A-bombing), University of Tokyo Press, Tokyo, 1982.

The Urakami First Hospital and the other relief centres in the disaster area

On a hill 1.4 km to the north-east of the epicentre was the Urakami First Hospital (now the St Francisco Hospital run by Catholic monks) (map, position 3). In early August 1945 this hospital, which was primarily a school of theology and had been converted during the war into a sanatorium for tuberculosis patients, had a staff of about twenty and approximately seventy patients. As a specialist in the treatment of tuberculosis, Dr Tatsuichirō Akizuki, a Buddhist and at that time 29 years old, was in charge of medical care.[29]

At the instant of the explosion, because all the staff members were inside its brick buildings – although many were trapped under collapsed walls and shelves due to the tremendous impact of the blast – the hospital managed to get by without any deaths directly attributable to the bombing. Dr Akizuki was first asked for assistance not by people from outside, but by some of the hospital patients.[30] Then, about twenty minutes after the explosion, ''white ghost-like people'' began arriving at the hospital. What made them look like ''white ghosts'' was dust from wall plaster, and all of them in fact had serious burns. A little after noon, groups of wounded with blackened burns trudged one after the other up the hill to the hospital, where they were able see Dr Akizuki. When they got to the hospital forecourt, their first words were often ''Is this the hospital?'' and ''Are you a doctor? Please examine me''.[31] The brick hospital ward had caught fire from the roof and was aflame.

> If I had only not been a doctor, I don't know how much easier my feelings would have been. I might have been happy to escape disaster with my hospital colleagues. However, I am a doctor. And since the wounded patients and patients with burns all over their bodies were groaning in the hospital's yard, how could I simply ignore them? The hospital ward had burned down, and medicines and medical equipment had been consumed in the fire. However, so long as there were patients for me to care for, I had to fulfil my duties as a doctor.[32]

Since there were emergency citizens' rations of unpolished rice in the storehouse which had come through the fire unscathed, Akizuki and the Urakami relief workers built an oven out of the rubble and made the rice into rice-balls. By

29 Akizuki had formerly been a radiology assistant working under Dr Nagai and had himself previously suffered from tuberculosis. Yamashita Akiko, *Kaiteiban Natsukumo no Oka: Hibakuishi Akizuki Tatsuichirō* (The hill of summer clouds: Tatsuichirō Akizuki, an A-bombed medical doctor, rev. edn), Nagasaki Shinbunsha, Nagasaki, 2006, pp. 19–24.

30 The material on Tatsuichirō Akizuki in this paper is derived mainly from his *Nagasaki Genbaku-ki: Hibaku Iishi no Shōgen* (Records of the Nagasaki A-bombing: Testimonies of an A-bombed medical doctor), Kōbundō, Tokyo, 1966, repr. in Saburō Ienaga et al. (eds.), *Nihon no Genbaku Kiroku* (Japanese records of the atomic bombings), Vol. 9, Nihon Tosho Sentā, Tokyo, 1991; *Shi no Dōshinen* (The concentric circles of death), Kōdansha, Tokyo, 1972; *''Genbaku'' to 30 Nen* (Thirty years since the ''A-bomb''), Asahi Shinbunsha, Tokyo, 1975.

31 Akizuki (1991 (1966)), above note 30, pp. 279, 282.

32 Akizuki (1975), above note 30, pp. 22–23.

4 p.m. the Urakami First Hospital had nearly collapsed in the fire. It was nevertheless the only remaining medical care facility in the Urakami district surrounding the epicentre.[33]

The Shinkōzen National Primary School to which Dr Koyano had gone was one of the designated wartime emergency shelters (map, position 7), 3 km south of the epicentre. It, too, was damaged by the blast, but not long afterwards it started to provide aid for the wounded. However, it had to be closed a few hours later when secondary fires broke out in the afternoon of 9 August, although it was reopened on the 11th.[34] A large number of wounded also came in search of medical treatment to the clinic of the Japanese Red Cross Society's Nagasaki branch (map, position 8). The clinic had also been damaged by the explosion, but Dr Ikuyuki Takiguchi and others, including Red Cross nurses, tirelessly provided emergency treatment.[35]

When the bomb fell there were approximately seventy private practitioners and retired medics in the city of Nagasaki: twenty of them died, twenty were injured and somewhat fewer than thirty remained active in Nagasaki during the aftermath.[36] Thus a considerable proportion of these doctors took part in medical relief activities immediately after the disaster. In addition to the medical relief centres mentioned above, two others, in national primary schools in the Inasa district (map, position 5), which was 2 km from the epicentre, and in the Katsuyama district (map, position 6), which was 2.9 km from the epicentre, were operational quite soon after the bombing; it was also reported that one medical relief centre was set up in a private residence and another in a Buddhist temple in the city.[37] The doctors had to cope with extreme psychological stress as well as an acute shortage of material. In conditions where the severity of patients' injuries was extreme and the lack of proper equipment and material was overwhelming, the doctors' sense of personal responsibility that they must carry out their duties and obligations as physicians was all the greater.

Relief missions dispatched from neighbouring areas: the Ōmura Naval Hospital

Masao Shiotsuki (aged 25), who worked at the Ōmura Naval Hospital (now the Ōmura National Hospital), 19.5 km from the epicentre, had just graduated from the Navy Medical School.[38] First there was the flash of the A-bomb, and then, 55 seconds later, ''there was a tremendous boom as though an ordinary bomb of

33 The A-bomb disasters, above note 6, p. 50; Atomic bomb damage of Nagasaki, above note 25, pp. 473–6. In the Urakami district, apart from the Urakami First Hospital, the main building of Mitsubishi hospital (3.5 km from the epicentre) barely maintained its medical facilities but was also assigned to relief work.

34 Atomic bomb damage of Nagasaki, above note 25, p. 559.

35 A history of a hundred years, above note 20, pp. 16–17.

36 Atomic bomb damage of Nagasaki, above note 25, pp. 377–8.

37 Ibid., pp. 475–503.

38 Masao Shiotsuki, *Doctor at Nagasaki: My First Assignment Was Mercy-Killing*, Kōsei Publishing, Tokyo, 1987 (original Japanese edn: *Hatsushigoto wa ''Anrakushi'' datta*, Kōbunsha, Tokyo, 1978).

medium size had exploded in the immediate vicinity'', shattering many window panes at the hospital.[39] Just one hour later the first report came through the naval communications network, saying that the same type of bomb as that dropped on Hiroshima had also been dropped on Nagasaki. Following this report a ''special relief mission'' duly aware of the dangers of radiation was organized, with Shiotsuki's superior officer as its leader. Shiotsuki remained in the Naval Hospital as the corps leader's replacement officer on duty.

The Ōmura Special Relief Mission dispatched to Nagasaki set up temporary relief facilities at what remained of the fire-ravaged Ibinokuchi police station 1.6 km from the epicentre (map, position 4), and also, about four or five hours after the bombing, at the Inasa National Primary School 2 km from the epicentre (map, position 5). A special relief mission dispatched from the Isahaya Naval Hospital, which was closer than Ōmura to the Nagasaki city centre – Isahaya was situated 25 km by road north-east of the city, whereas Ōmura was 35 km away by road – began to provide medical assistance even earlier (between three and four hours after the disaster) at the Irabayashi National Primary School 3.4 km from the epicentre (map, position 9).

According to a nurse who was part of the Red Cross Relief Team No. 362 dispatched from Ōmura – and it should be noted that the nurses who organized these relief activities were all sent by the Japanese Red Cross Society – they made a forced penetration into the flames by truck and, ''amidst a painting of hell that threatened to make one fall into a faint'' yet at the same time ''frantically suppressing fear'', carried out relief activities even after nightfall, until they had exhausted all the medical supplies they had brought; only then did they return.[40] According to Major Masatoshi Katsu, an army doctor who was the Isahaya Special Relief Mission leader in charge of directing the activities of about 50 other people, their special relief mission could not give treatment at night even though they had brought along enough bandages and medicine, because there were ''no electric lights''.[41]

Transport of wounded by the ''relief train''

At about 5 p.m. a telephone call came through to the Ōmura Naval Hospital from the mayor of Ōmura city, asking for help for Nagasaki's wounded people. It pointed out that because the ''Nagasaki Medical College and all the treatment centres both within [the city] and on its periphery had been demolished'', the wounded were to be transported from the disaster area to Ōmura on a ''relief

39 Ibid., pp. 14–17.

40 Photographs of the A-bombing revived, above note 19, pp. 130–2.

41 City of Nagasaki (ed.), *Nagasaki wa Kataritsugu* (Nagasaki hands down the story from one generation to the next), Iwanami Shoten, Tokyo, 1991, p. 143. In addition to those of the two naval hospitals at Isahaya and Ōmura, a relief team from the National Obama Sanatorium also provided emergency medical care on the day of the bombing; it was the first relief team sent to the disaster area by any civilian organization. Atomic bomb damage of Nagasaki, above note 3, pp. 616–71; above note 25, p. 475.

train'' and then onwards from the train station by truck, and so suitable preparations along those lines were requested.[42]

In Nagasaki, this relief train played a major part in assistance to and evacuation of the wounded. The Nagasaki main line railway (see map), which had been disrupted by the A-bomb, was very quickly repaired, and at 1.50 p.m. on 9 August the first relief train was able to reach a point just 1.4 km from the epicentre. After picking up wounded from the fiercely burning disaster area, the train then headed back through the flames to nearby areas with facilities for medical treatment. Four relief-train runs were made before midnight that same day, transporting about 3,500 wounded.[43]

At the time, the Ōmura Naval Hospital was considered a relatively large hospital, with the capacity to house 1,700 patients. The number of patients there when the bomb was dropped was 200, plus 864 staff members including medics and nurses attached to the hospital. Thorough preparations had been made for immediate admission of 1,000 casualties if any such need should arise.[44]

It was about 8 p.m. when, under Shiotsuki's supervision, the first group of wounded were transferred to military trucks from the first relief train that arrived at Ōmura Station. On seeing the condition of the wounded brought in by the relief trains, everyone at the Ōmura Naval Hospital stood appalled, gripped by tremendous horror:

> In the open loading compartment, people had been stacked until there was no space left, and the living were indistinguishable from the dead. Their hair had been singed by the fire, their clothes were in rags, and their exposed flesh was burned and covered in blood. When we shone our flashlights on them, we could see countless fragments of glass, wood, and metal still embedded in their faces and backs and arms and legs. It was hard to believe that these were human beings. To make matters worse, a pitch-black substance like coal tar adhered to the faces and backs of all of them without exception. The shock that the NCOs and ordinary soldiers received was undoubtedly just as great as my own. As they all stood there looking on and holding their breath, not one of them moved. Many of those NCOs were combat veterans.[45]

During the approximately three hours between 8 p.m. and 11 p.m. on the 9th, as many as 758 patients were accommodated in the Ōmura Naval Hospital.[46] Many of the wounded brought in by the train died before reaching their destination. Those who were transported later on the relief trains had injuries that were generally less serious. However, they all arrived barefoot, with torn clothing

42 Shiotsuki, above note 38, p. 45.

43 The A-bomb disasters, above note 6, p. 51. The large number of wounded were taken by ''relief train'' and trucks not only to Ōmura but also to army, naval and ordinary hospitals in the adjacent areas such as Isahaya, Kawatana and Shimabara.

44 Atomic bomb damage of Nagasaki, above note 25, pp. 518–20.

45 Shiotsuki, above note 38, pp. 46–7.

46 Afterwards, the director of the Ōmura Naval Hospital said, ''I am quite sure that there must have been no other military hospital which could have in this way accommodated so many recently seriously wounded people in such a short time.'' Atomic bomb damage of Nagasaki, above note 25, pp. 521–2.

and serious burns. At midnight most of the patients were in agonizing pain and still waiting for some kind of treatment. After careful consideration Shiotsuki gave those patients who clamoured for water, but were near death, as much water as they wanted, and administered morphine to those who were simply in too much pain. Shiotsuki could but consider that his first assignment as a doctor was "mercy-killing".[47]

10 August

The Nagasaki Medical College

By the next morning, the fires in Nagasaki were for the most part extinguished and the utter confusion had somewhat subsided. Many people had died during the night; the site of the disaster had become a ruin. There were so many dead bodies in the Urakami river that the surface of the water could not be seen. Survivors tried to fend off the fierce summer sun and, if completely unable to move, waited to be evacuated. Others wandered through the smouldering ruins, searching for missing family members; some voices could be heard from beneath the rubble. There were dead or wounded lying in the air-raid shelters. In the medical relief centres, great numbers of people groaned, shouted, raged, became insane. Most were beyond any medical treatment and died pleading for water.

Even at the Nagasaki Medical College, injured people whom Nagai and others had desperately tried to save were dying one after another. On the day after the A-bomb attack, Nagai, who had previously contracted leukaemia and was now continuing to help patients and search for missing colleagues in an environment polluted with radioactivity, was near exhaustion:

> Even though patients on the verge of death were groaning on the floor before my eyes, I lacked the impulse to try to do anything about it. Of course no sanitary materials remained, and I had no energy for dressing wounds. I could only ask, "How do you feel?", provide some water to drink, or give them some pumpkin to eat. I was sorry about not doing more.[48]

In any case, there was very little that Nagai and others could have done. An employee of the Medical College (aged 15), who was 3 km from the epicentre and helped in relief activities at the college from 10 August on, summed up the situation as follows:

> Almost everyone said, "give me water", but we had a hard time because there wasn't enough water. We brought ampoules of glucose from the hospital's

47 Shiotsuki, above note 38, pp. 50–3.

48 See Takashi Nagai, *Nagasaki Idai Genshi Bakudan Kyūgo Hōkoku* (Nagasaki Medical College reports on the atomic bomb relief work), Asahi Shinbunsha, Tokyo, 1970, pp. 214–16; the quotation is from pp. 277–8.

> underground storage room, and had them drink that instead of water. We couldn't help them, and could only watch as their breathing came to a stop.[49]

The Urakami First Hospital and the relief activities in Nagasaki

At 8 a.m. on 10 August, Dr Akizuki of the Urakami First Hospital started to examine his patients. Some Urakami people gathered in the hospital yard; they were all volunteers and willing to do whatever they could to save the wounded. It was only Dr Akizuki's deep sense of being a doctor that caused him to remain in the devastated hospital and care for his patients:

> Yet that was far from giving real medical treatment. It was just that, being a doctor, I was making these rounds as if pursued by something I cannot quite explain, because I didn't have any medicine or medical implements with me.[50]

Also on 10 August, the Nagasaki Prefecture set up a ''local relief measures headquarters'' at Ibinokuchi. It was assigned the task of evacuating wounded people trapped under collapsed houses or who had escaped to nearby mountainous or forest areas but had then been unable to move further. It also removed corpses, cleared streets and roads, and provided food for the victims.[51] Some medical relief teams arrived in Nagasaki from naval hospitals in other parts of Kyushu, such as Kurume and Saga. A nurse who came on that day said,

> Coming into the city, I was astounded at how terrible things were, and I could hardly say anything at all. On arriving at a relief centre for medical assistance I couldn't help but cover my eyes with both hands. I know I am a professional nurse, but it was just too frightful, too pitiless, too much a scene from a different world. The demand of ''Miss, water, let me drink some water'' was coming from every direction. When that voice could be heard no longer it meant that the person uttering it had breathed his (or her) last. Anyway, the fact that I couldn't do much was difficult for me, truly deplorable.[52]

Questions of ''racial discrimination''

The relief measures headquarters at Ibinokuchi issued the following guidelines: (i) first priority was to be given to the freeing of trapped survivors; (ii) medical attention was to be given first to those wounded persons whose lesions were relatively minor; and (iii) victims with burns covering as much as half of their bodies were to be left for later attention.[53] However, this strict rule of ''first trying to save those whose lives can possibly be saved'' gave rise to some friction when it came to providing emergency medical aid.

49 A survey of the A-bomb sufferers, above note 11, p. 302.
50 Akizuki (1975), above note 30, p. 40.
51 Atomic bomb damage of Nagasaki, above note 25, p. 386.
52 A survey of the A-bomb sufferers, above note 11, p. 345.
53 Atomic bomb damage of Nagasaki, above note 25, p. 386.

On 10 August a man from the Korean peninsula was brought to a primary school in Isahaya that was being used as a medical relief centre. He had been exposed to the atomic explosion while standing in front of the Nagasaki railway terminal station 2.4 km from the epicentre (see map) and had extensive burns on the left side of his body, from his face down to his waist. At the primary school he saw that some forty to fifty Koreans had been left in one of the classrooms, looking like "charred and festering lumps of meat". Representing his fellow Koreans, who were unable to speak Japanese, the Korean patient conferred with a Japanese official at the school:

> "Did you ask the Koreans their names and addresses?", I [the Korean patient] asked. "Well, I [the Japanese official] was too afraid to … And besides, I don't understand their language." I retorted, trembling with anger, "Do you people think that settles the matter? You brought these Koreans to Japan against their will, and you think that's okay?! For what purpose were we Koreans led into to such a horrible situation?! They won't last much longer. They're not likely to recover now. But just because of that, do you think it's okay to leave them here like this?" "But then, there's nothing more we can do for them." Listening to this reply, I shouted out, with a sensation that my chest would burst, "That won't do! Can that kind of thing be allowed?! Are you Japanese intending to apply discrimination against Koreans?!" "But then could you tell me what we should do?"[54]

The Korean patient suggested finding an interpreter, and the Japanese official tried to find one but was unable to. The Korean patient thus had to begin, by himself, making a list of names and addresses of all the wounded people in the classroom, but after writing down the twelfth name he lost consciousness. The next day he was taken to the Isahaya Naval Hospital, but "there all they did was to dab a little bit of something on the wounds".[55]

Historians would be unable to provide evidence that during the initial medical relief activities in Nagasaki there were "no cases" of ethnic discrimination, for there are no historical records which definitely prove that such cases did not occur. On the other hand, there are several testimonies, at least during this *initial* period, of Korean A-bomb victims that do not mention any discrimination on the part of Japanese but on the contrary even make a point of referring positively to "being helped" by Japanese individuals.[56]

54 Nagasaki no Shōgen Kankō-kai (Publishing Committee for Testimonies of Nagasaki) (ed.), *Nagasaki no Shōgen, Dai Yonshū* (Testimonies of Nagasaki, 4th collection), 1972, re-ed. Sadao Kamata and quoted in Saburō Ienaga et al. (eds.), *Nihon no Genbaku Kiroku* (Japanese records of the A-bombings), Vol. 11, Nihon Tosho Sentā, Tokyo, 1991, pp.177–84.

55 Ibid., p. 184.

56 For example, a Korean labourer who was A-bombed on 9 August and whose life had previously been saved by Dr Shirabe during the air raid of April 1945, referred to Dr Shirabe in an interview conducted by the Publishing Committee for Testimonies of Nagasaki in 1975 as "the person who saved my life, my god of life", expressing profound thanks. See Nagasaki no Shōgen Kankō-kai (Publishing Committee for Testimonies of Nagasaki) (ed.), *Nagasaki no Shōgen, Dai Nanashū* (Testimonies of Nagasaki, 7th collection), 1975; re-ed. Sadao Kamata and quoted in Saburō Ienaga et al. (eds.), *Nihon no Genbaku Kiroku* (Japanese records of the A-bombings), Vol. 11, Nihon Tosho Sentā, Tokyo, 1991, pp. 435–7.

The Ōmura Naval Hospital

Since the previous day chief medical orderly Yasumasa Iyonaga (aged 25), a member of the Ōmura Special Relief Mission which carried out relief operations at Inasa, had spent twenty hours in non-stop relief work without sleep or rest, and had used up all his medical supplies. At that point his relief team returned to the Ōmura Naval Hospital, but on arriving there they were assigned to ward duty without being given a chance to rest. The wards at Ōmura were filled to overflowing with the wounded, just like those they had seen in Nagasaki. Iyonaga realized that they could do nothing but look on helplessly. He gathered together the orderlies and nurses who worked under him and told them,

> Rather than increase their sufferings with treatment that will ultimately do them no good, try to make their deaths as easy and painless as possible. If you have any religious convictions, now is the time for you to show them and give moral support for the dying. Look after each and every one of them until the end comes.

He wept as he said this.[57] A young man who had been 2 km from the epicentre and was brought to the Ōmura Naval Hospital towards midnight on 9 August gave the following account:

> What they called ''treatment'' was in name only. They only dabbed some mercurochrome on the wounds and that was all they did. Then I wrapped my body, covered with blood and mud, in the bed's white sheet and a blanket, and began to sleep, probably looking as if I were dead. When on the next day [August 10] I woke up and it seemed to be around noon, a nurse gently placed a spoon of rice gruel in my mouth. With her cheerful smile, I found myself shedding tears involuntarily. I was impressed at how kind the several army doctors and the more than a dozen nurses were. Indeed, they were surely angels in white clothing.[58]

The nurses sent by the Japanese Red Cross continued their tireless and devoted activities, while Dr Shiotsuki was completely at a loss. At the Ōmura Naval Hospital, with its relatively ''complete'' facilities, surgical operations for broken bones or for lacerated wounds were possible. However, the only available treatment there for burns was to apply some antiseptics. And there seemed to be no end to the fragments of glass, wood and metal that had to be plucked out piece by piece from all over the patients' bodies.

> As for the strange internal symptoms that gradually began to appear, there was nothing we could do but shake our heads and throw up our hands in despair. One patient, for example, was having an excruciating time breathing. When I applied the stethoscope to his chest, I could hear a strange rattling noise every time he drew a breath. I could even hear a sound like someone stepping on

57 Shiotsuki, above note 38, pp. 57–62.
58 A survey of the A-bomb sufferers, above note 11, pp. 260–1.

> broken glass. I immediately had an X-ray taken. I had thought that the wounds on his chest and back were simply cuts, but in fact pieces of glass and other unidentifiable objects had penetrated straight into his lungs. How could such a thing possibly have happened? But more puzzling than the cause of his condition was the proper treatment. I simply did not have the slightest idea how I was going to remove so many foreign objects.[59]

Dr Shiotsuki made up his mind and told the patient that he had contracted pneumonia, and that although he would be uncomfortable for a day or two, the pain would gradually go away; nevertheless, he kept on giving injections of morphine. By the next day the patient had died. "Such incidents happened again and again."[60]

11 August and afterwards

Sinkōzen: preparing to launch full-scale relief activities

In part of the Nagasaki area, fires were still burning even on the morning of 11 August. The medical relief centres were all full, and the wounded, whether outside or inside so-called hospitals, were plagued by innumerable flies, maggots, mosquitoes and lice. That day the largest of the relief teams (the First Relief Contingent of 249 members, belonging to the Hario Naval Battalion) arrived in Nagasaki, and from 12 August on, it could be seen that the relief system was gradually becoming better organized.[61]

On 11 August, the Hario Relief Team cleaned up the Shinkōzen National Primary School and camped there overnight. Most of its members moved on to Urakami on the 12th. The team had three specialized trucks and thus had great advantages in terms of mobility. The rumour soon spread among the city's people that a relief team had been dispatched to the Shinkōzen National Primary School, and patients gathered there in the hope of receiving medical treatment. Wounded from the area around Nagasaki station, almost all of them in very serious condition, were transported to Shinkōzen. On 12 August an advance contingent from a branch of the Sasebo Naval Hospital arrived at Shinkōzen. Medical supplies had not yet arrived, but in the meantime sea water from the port area was scooped up into metal barrels, disinfected by boiling and then sprinkled with watering cans over the motionless patients. At Shinkōzen, it was not until 15 August that "medical treatment" in the true sense could be given, and it was not until the 16th that the relief centre could be renamed a "hospital".[62]

59 Shiotsuki, above note 38, p. 72.
60 Ibid, pp. 72–3.
61 Nagasaki hands down the story, above note 41, p. 144.
62 Atomic bomb damage of Nagasaki, above note 25, pp. 496–99. On 6 October 1945 the Shinkōzen Relief Hospital became a subsidiary hospital of the Nagasaki Medical College, with Dr Raisuke Shirabe as its director.

Setting up temporary relief centres at the Nagasaki Medical College, Nameshi and Mitsuyama

At dawn on 11 August the task began of transporting back to the site of the Medical College – using litters made from pieces of wood that had escaped the conflagration – the wounded evacuated to the hill behind the college on the day of the A-bomb explosion. They were brought to the temporary medical relief centre which the dispatched relief teams had set up in front of the college's main entrance. Amid all the rubble, it took an hour to carry the seriously wounded the 400 metres to the site of the college. With the help of the army and the police, the work of removing the dead, otherwise cleaning up the site and accommodating more wounded people proceeded apace. In the burnt-out classrooms the relief workers discovered a number of bones of students who just two days before had been attending lectures, neatly laid out according to the locations of their desks and seats.[63]

When army personnel arrived to provide assistance, Dr Shirabe resolved to improve the medical treatment to be offered to all the patients of the Medical College. With the army's permission, he opened a temporary medical relief centre in the Nameshi neighbourhood, 4 km from the epicentre. The relief team led by Dr Shirabe left the Medical College on the evening of 11 August; after arriving at the new location they set up the temporary relief centre in an ordinary family dwelling, started examining the victims who had come to Nameshi seeking refuge and began treating the wounded. If a patient needed to have one of his legs amputated, relief workers would go to a nearby family's home to borrow a saw and, after disinfecting it in a washbasin, would use it to sever the bone. All in all, the medical care available had improved. Nevertheless, a large number of the wounded brought there soon became afflicted with diarrhoea and bloody stools and died, one after another, about a week after the bomb fell.[64]

Dr Nagai, leading his own medical relief team, also left the Medical College in the evening of 11 August to open a temporary relief centre in the Mitsuyama district, about 5 km from the epicentre, where many wounded were thought to have fled in search of safety. At 4 p.m. the next day, Dr Nagai's relief team began making rounds to give medical examinations. Every house visited was crowded with wounded people. About a week after the bomb fell, Dr Nagai and the other relief team members could no longer walk properly due to hunger, fatigue and general physical weakness resulting from radiation. However, Dr Nagai writes that ''Whenever I paid a house visit, any patient but also the patient's whole family would be extremely grateful.'' During this period, the members of his relief team suffered from stomatitis, hair loss, high fevers, diarrhoea, suppurating wounds and symptoms of reduced white blood cell count; they were frequently so

63 Nagai (1970), above note 48, pp. 215–16.

64 Raisuke Shirabe, ''Nagasaki Ikadaigaku genbaku hisai fukkō nikki''(A diary of the A-bomb disaster until the recovery of Nagasaki Medical College), in The fifty years after the A-bombing, above note 5, Vol. 1, pp. 33–97; see especially pp. 43–58.

ill that they had to take to their beds. Dr Nagai and his twelve colleagues nevertheless gave treatment to over 125 patients and carried out rounds of house visits for two months.[65]

The Urakami First Hospital: establishing its "emergency hospital"

On 11 August a man whose skin had been scorched black came to Dr Akizuki. The patient appeared to be "carrying on his back something like a white rice-ball", but when he came close it turned out that what the doctor had thought was a rice-ball was in fact a cluster of countless white maggots.[66] At the Urakami First Hospital many people began to die, even though they had not suffered burns.[67]

Likewise on the 11th, representatives from a police garrison came to see Dr Akizuki and told him that a special emergency hospital was to be established on the hospital's premises. More and more serious casualties were brought in. "Among them were people who managed a forced smile, out of gratitude for the expectation that they would now probably be able to get some medical treatment."[68] Like private physicians who were carrying out their own solitary relief work within the disaster area, Dr Akizuki was the sole physician staffing the Urakami First Hospital. Although he objected in desperation, the police garrison people soon left him with some 200 seriously ill patients, their whole bodies covered with wounds. They also left him a pack of medicines.

> What was inside the pack was just a few bandages, fifty gauze patches, some absorbent cotton, one pound of zinc-containing essential oil, tincture of iodine, some alcohol, and some candles. But this wouldn't suffice for even one day. Three hours went by after the police garrison people had departed. Still only ten people had been treated. There were still far more than a hundred of the wounded who had not received any treatment at all.[69]

At 10 o'clock in the evening of the 11th, Dr Akizuki, completely tired out after three days of strenuous work, finally stood up and brought his medical examinations for the day to an end. Some of the patients who had still not been seen by him uttered cries of despair at the prospect of being left unattended and made last-minute pleas for treatment. On his outdoor pallet, Dr Akizuki wrapped himself in a blanket and wept.[70]

65 Nagai (1970), above note 48, pp. 217–20.
66 Tatsuichirō Akizuki, "Genbaku hibaku no jittai wo kataru koto koso watashitachi no gimu" (Our duty is to tell what the atomic bombing really has done to us), in Nagasaki no Shōgen Kankō-kai (Publishing Committee for Testimonies of Nagasaki) (ed.), *Nagasaki no Shōgen, Dai Isshū* (Testimonies of Nagasaki, the 1st collection), 1969; re-ed. Sadao Kamata and quoted in Saburō Ienaga et al. (eds.), *Nihon no Genbaku Kiroku* (Japanese records of the A-bombings) Vol. 11, Nihon Tosho Sentā, Tokyo, 1991, p. 27.
67 Akizuki (1975), above note 30, p. 28. "They often began suffering from severe stomatitis, they would show swelling in the area around the mouth, and would complain of diarrhoea with bloody stools."
68 Akizuki (1991 (1966)), above note 30, p. 327.
69 Ibid., p. 328–9.
70 Ibid., p. 330.

Ōmura Naval Hospital: unusual happenings

In the afternoon of 11 August, at the Ōmura Naval Hospital, medical orderly Iyonaga reported to Dr Shiotsuki that some of the patients there were beginning to lose their hair. Since the patients themselves were shocked to discover this, Dr Shiotsuki, taking Iyonaga's advice that he should pretend to be making his rounds quite normally as if there was no cause for alarm, slowly approached the bed of a female patient who was showing these symptoms. She was not very seriously injured and had that morning had borrowed a mirror and comb from one of the nurses, but when she had started to run the comb through her hair, it had fallen out in clumps. Dr Shiotsuki told her the lie that hair loss often happened to people with burns and that it would stop after a few days. At midnight the next day she died.[71]

The situation at the hospital changed radically. People with only mild symptoms who seemed to be on the road to recovery suddenly began dying. Their skin would show purple spots, blood would ooze from their gums, and if they were given injections of glucose or vitamins, their skin started to fester at the points where injection needles had been introduced. The same symptoms appeared not only in the patients, but also in women from Nagasaki helping with the relief work together with nurses sent by the Japanese Red Cross. These women had all been in the disaster area on the day the bomb exploded. They also died one after another. On their deathbeds they always asked to hold Shiotsuki's and other medical workers' hands.[72]

The "true frightfulness" of the A-bomb

Less than a week after the bomb fell, the faces of those at the Urakami First Hospital who were relieved to have escaped immediate death began to turn dark. "There were many whose hair fell out overnight, who excreted blood from their noses and mouths, and who suffered from diarrhoea accompanied by blood. Even people without any visible wounds, who thought that they had been miraculously spared, later died one after the other from radiation, which vitiated the entire body."[73] These sudden deaths began in places relatively near the epicentre, and after 16 August their number increased daily. About two weeks after the bombing, such deaths spread to households just below Dr Akizuki's hospital.

On 3 September, Dr Shirabe fell ill with acute radiation sickness.[74] Dr Nagai also took to his sickbed.[75] Dr Shiotsuki, who was doing his best to help the

71 Shiotsuki, above note 38, pp. 62–3.
72 Ibid., pp. 78–81.
73 Akizuki (1975), above note 30, pp. 31–2.
74 Dr Shirabe lost his sons to the disaster, but overcame his radiation sickness and devoted the rest of his life to medical elucidation of the A-bomb disease. He died in 1989. For details, see Raisuke Shirabe, "My experience of the Nagasaki atomic bombing and an outline of the damages caused by the explosion", available at www-sdc.med.nagasaki-u.ac.jp/n50/start-E.html (last visited 11 May 2007).
75 Dr Nagai died in 1949. His biography is given in Johnston's introductory chapter in the English edition of Nagai (1994), above note 27, pp. v–xxiii.

bomb victims at the Ōmura Naval Hospital and had not once entered the disaster area, saw his white blood cell count drop, though only temporarily, to as low as 3,000 per cubic millimetre.[76] Even he was suffering from radiation sickness because of his continuous and direct contact with victims who had been exposed to high levels of radioactivity. Dr Akizuki at the Urakami First Hospital was also suffering from radiation sickness.[77]

> The terror of the atomic bomb was not just that of the instant of the explosion. I was forced to experience its true frightfulness during a period of about 40 or 50 days from the end of August to the end of September or the early part of October. People who were exposed to radiation at a distance of from 500 to 2,000 metres from the epicentre almost all died within a 40-day period.[78]

It was during this period that Dr Marcel Junod of the ICRC started trying to save victims of the disaster in Hiroshima. According to a 1950 survey, 73,844 people died in Nagasaki up to 31 December 1945 because of the A-bomb, while 74,909 people were counted as ''wounded'', though still alive, at the end of that year.[79]

Conclusion

If the numbers of dead in instances of indiscriminate urban bombing are compared, the number of people killed by the A-bomb attack on Nagasaki was considerably less than the approximately 100,000 who died in the Tokyo air raid on 10 March 1945 carried out by 344 B29 bombers using ''conventional'' weapons. The total area destroyed by fire in that air raid was 40 square kilometres, as opposed to the 6.7 square kilometres of the Nagasaki A-bombing.[80] In any case, the advent of the atomic bomb was an unprecedented threat to the principles of ''humanity''. The promptly and utterly destructive nature of nuclear weapons meant that one of the greatest concerns expressed precisely by the International Committee of the Red Cross (ICRC) ever since the First World War – namely, the possible use of indiscriminate weapons in flagrant violation of human dignity and values through inhumane air attacks against non-combatants – had in the very worst sense become a reality.

76 Shiotsuki, above note 38, pp. 84–5. After the war Dr Shiotsuki specialized in neurophysiology; he was an eminent member of the Japanese medical community with his impassioned critiques and ''rebel spirit''. He died in 1979.

77 Dr Akizuki revived the Urakami First Hospital and made enormous efforts as a leading figure in the anti-nuclear and peace movement in Nagasaki. He struggled with critical A-bomb disease for his last thirteen years, and died in 2005.

78 Akizuki (1972), above note 30, p. 143.

79 *Records of the Nagasaki Atomic Bombing*, above note 10, p. 14.

80 The total area destroyed by fire in the Nagasaki A-bombing was approximately 6,712,455 sq m, according to the Nagasaki Municipal Office. Atomic bomb damage of Nagasaki, above note 25, p. 246.

As Shiotsuki said, the A-bomb forced on the Nagasaki doctors who took part in the initial medical relief activities ''a reality in which nothing they had learned from textbooks was of the slightest avail''. Although made to question the very meaning of their being doctors under such circumstances, they did their best to care for the ''people who had no chance of surviving, for whom nothing remained but agony''. In view of the ''prompt and utter destruction'' of which Japan was warned by the Potsdam Declaration on 26 July 1945, and which was brought about by the atomic bombs, it is clear that law and custom alike were ineffective; the concept of ''war'' and hence that of ''peace'' changed radically thereafter. On 5 September 1945, just a month after the dropping of the Hiroshima A-bomb, the ICRC issued a grave warning of the dangers inherent in the new weapon.[81]

Needless to say, throughout Japan and elsewhere during the war there were innumerable doctors like Dr Nagai and Dr Akizuki who had to carry out relief work after enemy attacks in circumstances equally hopeless for many of the victims. The grieving of the Nagasaki doctors for their patients echoes that, for example, of the POW doctors in the cruel conditions of the camps built by the Japanese army along the route of the Burma–Thailand railway. With all their amazing improvisation, ingenuity and creative thinking, POW doctors such as Lt.-Col. (later Sir) Edward Dunlop of the Royal Australian Army Medical Corps and Capt. (Professor) J. Markowitz from Canada succeeded at least to some extent in saving their patients' lives.[82]

What, then, of the doctors in Nagasaki? To what extent were the Nagasaki doctors able through their efforts to provide medical care during that initial period, to save their patients' lives? After the war Dr Shiotsuki knew that he never again wanted to have any part in ''mercy-killing''; Dr Nagai, from a religious standpoint, eventually accepted the ordeal of the A-bomb and called for an attitude of reconciliation; Dr Akizuki expressed doubts about an attitude such as that of Dr Nagai and instead directed all his ''anger and sadness'' to keeping the memory of what happened in Nagasaki during those days alive. Fifty years after the war ended, François Bugnion, in *Remembering Hiroshima*, wrote that during the Cold War period the disasters of Hiroshima and Nagasaki were a sufficiently strong deterrent among the nuclear powers – together with their firm belief in what came to be called the doctrine of ''mutually assured destruction'' – to restrain any thought of actually using nuclear weapons again, but that although

81 As a result, at a Preparatory Conference of Representatives of Red Cross Societies held in Geneva in 1946, a resolution calling for the prohibition of the use of nuclear power for military purposes was adopted. Furthermore, at the 17th International Conference of the Red Cross held in Stockholm in 1948, the ICRC presented a report which referred to the 1946 resolution and earnestly asked all states to prohibit the use of nuclear energy for military purposes, and also to prohibit the use of any other indiscriminate weapons.

82 See Nobuko Kosuge, ''Taimen tetsudō no nihongun horyo shūyōjo ni okeru fuhai, sokkyō, saisei'' (The Japanese POW camps along the Burma–Thailand Railway – decay, improvisation, and regeneration), in Hayato Kosuge (ed.), *Fuhai to Saisei: Shintai-i-bunkaron III* (Corruption and regeneration: Body, medicine and culture III), Keiō Gijuku University Press, Tokyo, 2004, pp. 304–25. See also Jack Bridger Chalker, *Railway Artist: the War Drawings of Jack Chalker*, Leo Cooper, London, 1994.

the threat of full scale war had receded since the end of the Cold War, the danger of "nuclear proliferation" was greater than ever and had become the most serious threat hanging over the human race.[83] If the disaster of Nagasaki, like that of Hiroshima, has served as a deterrent, this is probably in part because those Nagasaki doctors have made us acutely aware of the nuclear disaster through the desperate records they have bequeathed to us.

Since the end of the Second World War nuclear disarmament has thus been at the very heart of disarmament efforts. Yet today there are an estimated 27,000 nuclear warheads, nations have emerged which are trying to bolster their "security" and strengthen their negotiating power through the possession of such weapons, and incidents occur in which murders or assassinations are committed by means of radioactive nuclear materials. In this so-called "second nuclear age",[84] will the disasters of Hiroshima and Nagasaki continue to act as a deterrent for the possessors of nuclear weapons, forcing them to give up the idea of actually using them? Or will they serve the opposite purpose, namely as a precedent for speedily terminating a war? Could it in fact be possible that making people aware of the "prompt and utter destruction" caused by nuclear weapons – as this article, by chronicling those desperate relief activities, seeks to do – might tempt some military planners into actions that would confirm our worst fears?

83 François Bugnion, "Remembering Hiroshima", *International Review of the Red Cross*, No. 306 (May–June 1995), pp. 307–13.

84 For the discussions about a "second nuclear age", see especially "Five minutes to midnight", *Bulletin of the Atomic Scientists*, available at www.thebulletin.org/minutes-to-midnight/board-statements.html (last visited 11 May 2007).

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Humanity amid conflict, terror and catastrophe: hypothetical but possible scenarios

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Abstract

This article offers an understanding of the nature, scale and complexity of two hypothetical yet possible events and their potentially overwhelming impact upon health, security and socioeconomic productivity. It describes a no-warning CBRNE incident and a gradual rising-tide emergency with a newly emerging infectious disease, summarizing a range of likely response actions, impacts and constraints, particularly for the humanitarian community.

Over the past decade conflict-generated emergencies and armed confrontations have caused a huge death toll and considerable human suffering and displacement worldwide. Hundreds of thousands of people are affected by violent conflict and militant activity, to which United Nations and non-governmental organizations provide life-saving humanitarian services, often in difficult and dangerous circumstances with limited humanitarian space. In recent years, terrorism has become a stark reality for many of the world's civilians caught up in armed conflict situations where both crude and new weapons of terror are being used. The first fictitious worst-case scenario depicts detonation of "dirty bombs" in a highly populated city in a developing country, entrenched in conflict, strife and terrorist

activity. It aims to give a glimpse of the pandemonium and chaos that could ensue, and the security constraints and restrictions that aid organizations are likely to face.[1]

The humanitarian community is also at times faced with catastrophic public health emergencies and the increased risk of global spread – that is, across national boundaries.[2] The second hypothetical scenario portrays the possible mutation of avian flu into a virulent human virus and a newly emerging "high hazard pathogen" which would cause a pandemic with global catastrophic impact on all sectors of society over a protracted period. Some of the possible health effects and social impact are elaborated to raise awareness of the need for contingency planning and preparedness, especially among health and humanitarian sectors.

It should be noted, however, that these scenarios are illustrative and speculative only – although intended to be realistic. The likelihood and impact of their occurrence has been based on open reporting and conjecture, and should not be construed to reflect, or necessarily be supported by intelligence reporting, threat or risk assessment. Moreover, all outcome figures and the likely impact of the hazards described are estimates and have not been modelled mathematically or scientifically, but they should give the reader an indication of possible dimensions involved in these plausible worst-case scenarios.

Armed conflict scenario with deliberate chemical and radiological release

Chronology of events

As on most mornings the deafening sound of artillery fire and explosions echoes across the capital. A bomb-laden chlorine tanker crashes into an ammonia storage unit, causing a massive explosion, propelling columns of smoke and flames into the air. Firefighters try to contain the hazard but are hampered as a black plume unleashes toxic gas, killing tens of workers inhaling the poisonous fumes. People are overcome with breathing difficulties, and more than 100 civilians are hospitalized, complaining of chest pains and burning sensation of eyes and skin.

Minutes later, simultaneous bombs with a ball-bearing packed charge detonate in another city, targeting the college campus and local bazaars – creating a giant fireball with flames instantly swallowing up bystanders and leaving a mass of charred, lifeless bodies and wounded people strewn everywhere. Then, as a gathering of thousands of pilgrims begin an annual ritual and procession, another

1 See also Anthea Sanyasi, "Extreme Emergencies: humanitarian assistance to civilian populations in middle and low income countries following chemical, biological, radiological and nuclear incidents", Intermediate Technology Development Group, United Kingdom, 2004.

2 See "Global crises, global solutions", available at www.who.int/csr/resources/publications (last visited 25 June 2007).

enormous explosion shakes the foundations of a holy site, collapsing its structures and leaving a crater in the ground. Fires erupt everywhere, with huge billows of acrid smoke drifting across the skyline as black clouds turn daylight to thick fog. Eyewitnesses report seeing hundreds of people blown to bits by the blast, with blood-splattered body parts hurled over wide areas and injured people lying among them. Survivors tell how they tried to pull casualties from the rubble and carnage, some people still ablaze and entangled in burning wreckage.

Amid all the terror and chaos, electronic devices on foreign military patrols alarm detecting radiation isotopes, and soldiers can be seen hurriedly donning gas masks. Security is tightened as the police take control and set up a cordon, diverting traffic and causing a massive gridlock. Adding to the tension, military police fire rounds into the air, stopping and searching motorists at random, and demanding to see identity papers. Smoke bombs attempting to screen security cars provide futile protection against tertiary detonation of new armour-piercing roadside bombs.

Immediate response

Fire and rescue brigades try to douse sporadic fires and search for survivors trapped amongst smouldering debris. A body holding area is cordoned off while police collect shredded parts for forensic examination. Emergency service sirens scream incessantly as ambulances and paramedics arrive but then quickly retreat in search of protective clothing and masks. In desperation, some survivors in the blast area commandeer pick-up trucks and wooden carts to transport badly injured people to hospital. Specially equipped military medics are mobilized to triage casualties at the scene, prioritizing only those most likely to survive. The few hospitals functioning in the city soon become overwhelmed with hoards of self-presenters and bomb casualties strewn on floors and corridors, excluding any possibility of precautionary decontamination or lockdown.

Panic and pandemonium

Interpreters serving with foreign forces leak information to the local population about the detonation of a ''dirty bomb'' with a radiological dispersal device. As rumours abound, the fear of radiation from fallout reverberates, and pandemonium breaks out as the crowd attempts to escape the disaster zone. People are seen running in all directions, trying to cover their nose and mouth, although there is nothing to see or smell except for smoke and smouldering debris. Police command units give orders to the crowd not to touch anything and to shelter outside the extended cordon. This triggers a huge stampede as people surge ahead and some less able are trampled and left injured on the ground. Most of the nearby buildings are already war-damaged and the barred windows provide little protection from drifting particles. Tourist hotels and bars are told to turn off all air-conditioning, fans and vents. Stall vendors try to cover their wares and shops pull down shutters as looters rampage.

Public warning and informing

Police cars with loudhailers instruct everyone to find safe shelter and wash themselves in case of contamination, although daily water restrictions and shortages leave only enough for drinking. Panic-stricken people try to get news on radio and television but transmission is poor. As warning sirens alert surrounding communities of a catastrophic incident, children inadvertently let out of school find their homes out of bounds and Red Crescent volunteers start to trace families.

Deadly threats

As the shock value of the deadly attack reaches its intended targets, security authorities are put on maximum alert. It becomes apparent that the radiological dispersal device had been detonated with the intent of instilling in the population fear of a lingering exposure risk.

Information leaks out that the bomb contained a highly radioactive source and that intelligence has received warning threats of more remotely controlled "dirty bombs" with increasingly lethal content, planted in other cities throughout the country. The breaking news and horrific scenes shock the rest of the world, and international scientists speculate that if sophisticated high-grade radiological materials were to be used, there could be mass fatalities and fallout contamination remaining for some time to come.

Taking the threat seriously and preparing for the worst, security services scale up and troops are put on standby. Not knowing where "dirty bombs" might go off next, blast barriers are placed at all strategic buildings and checkpoints in the capital.

Contingency plans?

In the midst of all this chaos, a stream of mortars hit the main hospital, causing severe damage and more casualties. Questions are asked about viable contingency plans, and the authorities wonder how they would evacuate the most vulnerable population area, containing thousands of people, and the main hospital, overflowing with casualties. How would transport arrangements on such magnitude of scale be possible when the city is already suffering its worst fuel crisis ever?

With the exodus of medical personnel and most international humanitarian organizations and the spate of attacks on civilians, only a sparse number of aid agencies remain. The ongoing violent conflict, curfews, armed checkpoints and new restriction zones present huge security constraints for the humanitarian community in gaining access to the affected population.

Major incident management

Analyzing the different aspects of the events, the management of such a scenario would have to address multiple problems of which the most important ones are outlined briefly.

Emergency response to a chemical hazard

"Chlorine bombs" in the form of chlorine storage tanks and gas canisters are now being used as terrorist weapons.[3] This is not an entirely new hazard threat, since the deliberate release of chlorine occurred also in the First World War and has been used in recent bomb attacks in Iraq. If released into the atmosphere, chlorine liquid would evaporate to a volatile gas. It would disperse quickly, especially if the weather was warm and there was an appreciable wind. When combined with nitric acid or ammonia gas, high concentrations of chlorine in high temperatures would produce a very unstable explosive compound and "toxic gas", requiring gas-tight chemical protective suits and breathing apparatus by emergency services. A dynamic risk assessment might detect the presence of secondary devices and other potentially hazardous substances from the explosion. Given that there was access to appropriate equipment, chemical experts would be able to conduct air tests from the smoke plume, and monitor air quality and quantity of material on site and its concentration and form if the cloud had not already dispersed.

Chlorine health effects

The level of exposure of the general public would be dependant on the size and concentration of the chlorine gas release in the air, and the wind direction and speed, as well as the distance from the immediate hazard zone. The fumes would cause some fatalities within minutes and casualties with breathing difficulties, and skin and eye irritation, necessitating clinical decontamination. A feeling of suffocation, chest pain and tightness, abdominal pain, nausea, headache and dizziness would occur immediately following substantial exposure to fumes, although people would generally make a complete recovery.[4] Nevertheless, a threat of further chemical bomb attacks would probably increase a widespread fear of exposure to even more lethal substances.

The radiological dispersal hazard

There is also a real risk that terrorists may acquire and develop radiological materials[5] that can cause casualties,[6] widespread fear and chaos. A radiological dispersal device is a radioactive source combined with conventional explosives, which could be in the form of a *crude* weapon with low yields. The detonation of a dirty bomb could cause a volatile gas and radioactive particles to be expelled into

3 Sharon Benn, "Chlorine cache found in Iraq", available at www.washingtontimes.com (last visited 23 March 2007). See also Peter Brookes, "Terror formula intensifies", available at www.military.com (last visited 1 March 2007).
4 See www.hpa.org/chemicals&poisons/chlorine (last visited 15 April 2007).
5 See "Dirty bomb seizures rise", *The Times* and *Sky News*, 6 October 2006. Armed Forces Radiobiology Research Institute (AFRRI), Medical Guidelines: Evacuation, Sheltering, and other Public Health Measures.
6 Immediate or chronic, realized or perceived casualties.

the atmosphere, borne away by a breeze and dispersed rapidly downwind, becoming diluted with distance.

Fallout radiation would contain *beta particles* which can travel short distances in tissue if large quantities are involved. Main fallout risk would be shortly after detonation around ''ground zero'' and would continue to emit for one to two days from a cloud containing radioactive materials, depending on wind and weather conditions. Some 800 sq m or even up to 15 km above the relocation threshold could become contaminated by radioactive dust. However, it is likely that a plume-modelling resource to understand the movement of radiological material in the urban environment would be available only within a military domain, if at all.

The risk to first-emergency responders who might have been exposed to higher radiation doses at the explosion scene would depend on the length of time spent in the hazardous area and their distance from the source. Radiation detectors would be able to locate external radioactive material at great distances, but would incident responders in a developing country have such equipment to hand?

Incident management and personal protective equipment

Hazardous materials contingency plans might outline how, within minutes of a catastrophic incident, frontline emergency responders such as fire and rescue services and police tackle the immediate hazardous zone. Only first-responders with appropriate personal protective equipment would be allowed to work within the inner protective cordon around the immediate hazard zone. Self-contained breathing apparatus might be required by firefighters to put out vehicle fires, which produce dangerous chemical fumes.

Western military forces would be expected to don respiratory masks immediately, but having these to hand would depend on the perceived CBRNE threat, as briefed by intelligence. Moreover, military forces are likely to intervene in a major incident only if radiation dose rates are significantly high, since force protection would be their primary objective.

Other emergency services would use a lower level of personal protective equipment, although it is unlikely that all local responders, least of all ordinary citizens, would have easy access to chemical protective coveralls and butyl gloves.

Although radioactive contamination risk is assumed to be low, for those without appropriate protective equipment, specialist knowledge or training, an unknown lethal hazard would probably instil immense fear among responders and the ''worried well''.

Civilian protection

A communications strategy and procedure would be required to warn and inform civilians and ensure human safety and security. Advice would generally be ''to go

inside, close all air conditioning and vents, tune into the local radio and await further instructions''. Sheltering in-place would be the likely protective measure for people within a few kilometres'' radius of a radiological incident site, but if expected to be longer than two days or radiation doses were found to he high, the evacuation option should be considered.[7] Some people might spontaneously evacuate and reside with host families. Others would need temporary safe shelters, survival relief items and clean water for emergency decontamination and drinking. Civil contingency planning would also need to consider possible full or partial evacuation of hospitals, residential centres and closed institutions such as prisons situated within the affected area.

Radiation exposure and health effects

The explosive component of a radiological dispersal device would kill bystanders in the immediate vicinity by blast and shrapnel, with possibly 20 per cent direct blast fatalities. There would be about 70 per cent minor injuries from the explosion and inhalation of radioactive material from dust and smoke.[8] Conventional injuries would probably exceed those caused by a short-term external irradiation and inhalation hazard from the smoke plume, which might last locally for one minute or for over an hour if a fire ensued. Some casualties could have thermal-like burns but there might be few burns units in close vicinity of a blast area. Moreover, hospitals might lack medical staff, knowledge, treatment protocols and training to deal with radiation injuries.

External contamination would be in the form of deposits of dispersed radioactive material, such as dust on the skin, which can be washed off with a bucket of water and a sponge, and removal of outer clothing would generally reduce contamination by some 80 per cent. Only gamma emitters would present any immediate risk in wound contamination, but health professionals would need to be informed of the type of radiological risk.

It can take hours of exposure to accumulate enough radiation from a dirty bomb to cause radiation sickness, as particles are easily shielded. Potassium iodide tablets would be ineffective, since radioactive iodine is unlikely to have been used in a dirty bomb.

Psychological impact

Probably the most important effect would be the psychological impact of a radiation dispersal hazard, which could instil shock, intense anxiety, grief and fear

7 AFRRI Medical Guidelines: Evacuation, Sheltering, and other Public Health Measures to reduce/avert radiation dose, 25 February 2003, p.10, available at http://www.aapm.org/meetings/05AM/pdf/18-2637-79236-706.pdf.

8 AFRRI Guidelines on dealing with deceased persons following radiological terrorism, 25 February 2003, p.30, available at http://www1.va.gov/emshg/docs/Radiologic_Medical_Countermeasures_051403.pdf (last visited 25 June 2007).

of a longer-term health risk. People caught up in the disaster zone may complain initially of nausea, muscle tremors, dizziness, hyperventilation, psychosomatic symptoms, and later fatigue caused by anxiety, requiring supportive treatment. Acute anxiety could also induce psychogenic vomiting and other stress-related symptoms in both survivors and helpers. Uncertainty and lack of information would add to the fear of, and preoccupation with, the threat causing chronic conditions with carcinogenic effects. Moreover, psychosomatic symptoms caused by severe anxiety could have an overwhelming impact on scarce medical healthcare facilities.

Emergency triage and medical treatment

Given the stringent security restrictions in most armed conflict situations, triage protocols and emergency care at the scene would probably be limited. Nowadays, in CBRN mass casualty planning in Western counties, reverse triage would be used on the basis of ''the best for the most'' needing emergency first aid. This means that those who can be saved are treated first, whereas the most severely injured and expected to die would have lower priority. This procedure would be counter-intuitive to most medical and clinical staff, and would need to be planned and trained for.

Clinically guided resuscitation and treatment of life-threatening injuries would always take precedence over measures to address radioactive contamination or exposure. As a casualty would not present an acute radiological contamination hazard to medical personnel and healthcare staff, life- or limb-saving medical or surgical treatment should not be delayed.

If mass decontamination at the incident scene were possible, it should be carried out at least fifty yards downwind from the treatment area, but delayed evacuation of casualties to medical facilities could also have health consequences.

Radiation monitoring and decontamination

Generally a radiological dispersal incident is unlikely to be very harmful to caregivers within the local community, but they would clearly need to be convinced of this. Radiation monitoring equipment, if available, would be used by hospital staff wearing standard barrier clothing and surgical face masks to detect internal exposure (dose rates) or external contamination (particles of materials) on the body.

A clinical decontamination area, segregated and operated by gender, could be made as part of the medical treatment facility. Medical and clinical staff would also need to decontaminate themselves after the treatment and decontamination of patients.

Hospital care

With the likelihood of regular attacks, rapid provision of emergency drugs and equipment to support the Ministry of Health would be needed. ICRC and other humanitarian organizations already provide medical and surgical teams and supplies to hospitals in most large cities affected by armed conflict to help with the major influxes of casualties, but already overstretched hospitals might lack sufficient supplies of intravenous (IV) fluids, blood banks and oxygen. Another healthcare consideration following bomb explosions is that disabled blast victims could increase the existing demand for orthopaedic devices and physiotherapy.

Recurrent shortages and disruption of fuel, gas and power would necessitate provision of additional generators for hospitals and health clinics. Lack of electricity supply would have a life-threatening impact, too, on specialist and intensive-care equipment in hospitals and refrigeration of mortuaries. Communication channels for vital public health information on the hazard and protective measures could also be affected.

Longer-term health consequences

The long-term health risk would stem mainly from inhaling loose radioactive dust, and consequences would include possible reduced life expectancy, latent cancer risk and decreased fertility. Another possible risk is death from radiation injury infections during the phase of manifest illness as the immune response becomes depressed, increasing infectivity and virulence of diseases.

Where public health protection measures are possible, individuals in the affected area should be placed on a clinical register so that long-term surveillance and monitoring for health effects can take place. This might be difficult in a country ridden with widespread conflict, where revealing one's identity to the authorities could mean imminent death. Casualties and survivors may also include perpetrators and militants. Furthermore, given increasing security constraints, international medical relief organizations might have difficulty in gaining access to support monitoring of health effects and psychological trauma.

Body handling issues

Normally, bodies or body parts should not be moved by rescue workers except to shield them from fire, as it would be necessary to preserve evidence at the disaster scene – though this may not always be the case in some conflict zones. In radiological incidents, the dose rate from contamination might prevent recovery of bodies by the police until protective shielding can be arranged. Hence safe handling of the deceased would need to be considered by those occupationally exposed.

It should be noted, however, that a deceased person externally exposed to a lethal amount of radiation would not become radioactive, nor require special precautions, unless they are externally contaminated and still have radioactive

material on them. Before handling, contaminated bodies should be evaluated by radiation safety personnel wearing protective clothing such as butyl gloves, mask and gown as well as a personal dosimeter.[9] It is questionable whether this is likely in a volatile conflict context in a low-income country.

Considering other constraints, the issue of unidentified bodies could pressurize the work of coroners, and lack of mortuary space might highlight the need to establish special disaster mortuaries. There may be incineration issues for cremations, depending on the type of radiation source, but burial would not constitute a radiation hazard.

Most importantly for civilians, if procedures such as identifying the deceased, notifying next of kin, conducting post-mortems and issuing death certificates are not carried out, there may consequential issues for families in proving rights to property, other inheritance or benefits – but would countries entrenched in armed conflict take pains to ensure that such procedures are carried out?

Humanitarian aid considerations

The humanitarian response to a radiological dispersal incident would be similar to that required to cover basic needs of a displaced or deprived population. Conflict and security concerns would nevertheless limit aid agencies' presence on the ground and access to people in need. Red Cross and Red Crescent volunteers and medical auxiliaries would only be allowed to work in the so-called ''clean area'' outside a hazard exclusion zone.

Rapid needs assessment profiles would need to prioritize areas of operations among displaced populations in affected areas, given that local community ''life support'' systems and social support networks would be severely disrupted. If evacuation were to be implemented, destitute evacuees might have to reside in temporary shelters in public or abandoned buildings or with local families, and would need supplies of commodities such as safe food, clean water, clothing, blankets, hygiene kits, jerry cans, generators, and cooking and household equipment.

Some humanitarian agencies would likely have pre-positioned regional emergency stockpiles to draw upon. The ICRC, in co-operation with the Red Cross or Red Crescent Society, generally delivers emergency relief to civilians in conflict-ridden countries, but assistance could only be piecemeal in the face of the immensity of needs and access constraints.

Canned or sealed containers of food would still need to be washed before opening, whereas fresh food or unpackaged foodstuffs left in the open in the immediate vicinity of a radiological dispersal blast or contaminated with radioactive dust during the cloud passage would not be edible. The food security situation could be dire, especially as many children in conflict zones are likely to

9 See AFRRI Medical Guidelines, above note 7, p. 29.

suffer from some form of malnutrition or chronic illness, needing nutritious supplementary food. Water in sealed or closed systems would generally be ''safe'', although any additional daily trucking and delivery of drinking water to hospitals and health facilities could prove an enormous logistical burden.

Special-needs populations, such as infants, the elderly and the physically impaired, would warrant particular attention, and family tracing and reunification might be needed for separated children and relatives. With education disrupted and the fear of a continued radiation threat preventing children returning to school or concentrating on studies, aid agencies might even consider provision of emergency school supplies and remote out-of-classroom learning opportunities. Continuity of livelihoods, too, might be difficult in the face of sporadic attacks, breakdown of utilities and diminishing employment opportunities.

Consequence management

There would be numerous considerations for government authorities in the aftermath of a catastrophe-level incident. The overall response should be in line with national plans and arrangements – if they exist. A large-scale evacuation would require considerable transportation means and a government may request military assistance, should this be necessary. Any mass population movement is likely to put pressure, too, on public service utilities, necessitating further rehabilitation of vital components of local water and sanitation infrastructure.

Overall, the major clean-up process could prove long and difficult in trying to detect any remains of radioactive contamination in cracks on surfaces. The likely particulate nature of the radioactive source would mean that airborne particles would be deposited on underlying surfaces, and while the ''plume'' hazard period is short, the deposited material will persist until it decays, or is weathered away or removed. Water jets and sandblasters would be required for cleaning surfaces. Furthermore, vehicles, equipment and clothing exposed in the hazard zone would require decontamination. Shortages of water and electricity outage would also impose severe restrictions on any other than essential use, and alternative supplies might be needed. Disruption of critical infrastructure and utilities during the clean-up and monitoring period would also cause knock-on economic damage and considerable concern.

Environmental contamination

Contamination of the environment, such as surface contamination in soil arising from an airborne radiation release, can be transferred through the food chain and subsequently eaten. Generally, as most radioactive sources, and hence most incidents, involve only small masses, food supplies from exposed crops are most likely to remain safe, although environmental and health and safety authorities would need to monitor this.

Any surface water would likely be contaminated by radiation fallout and can be detected using radiation devices, although this is quite difficult and would

require competence in reading such equipment. Water authorities would hence need to take steps to remove any particulates from drinking water by using reverse-osmosis plants, but these are not readily available in a poorly resourced country. Further monitoring of the quality of groundwater would be required, although radioactive decay would reduce contamination levels over time.

Security issues for humanitarian organizations

In armed conflict situations, humanitarian organizations are constantly weighing up security constraints preventing access to vulnerable groups, and similarly, in a CBRNE incident humanitarian organizations would be restricted in helping the affected population within the hazardous and secured areas.

If aid agencies are constrained by lack of capacity or high-security risk, military contingents may be requested by a government to assist in delivery of a relief effort. In complex emergency situations, civil/military liaison would generally be confined to intergovernmental organizations such as UNSECOORD, UNHCR and UN-OCHA, whereas non-governmental humanitarian organizations would likely restrict direct contact with a military contingent in order to maintain their core humanitarian operating principles of neutrality, impartiality and independence.

Conclusions

In a climate of increasing terrorist activity, new ''dirty wars'' with the deliberate release of CBRNE materials make it difficult for humanitarian organizations in the absence of state security to protect vulnerable civilian populations and ameliorate human suffering when they are also restricted in their outreach and movements.[10] Many international aid organizations may have already left a conflict area in the face of danger and lack of neutral ''humanitarian space''. The enormous scale of violence, logistics obstacles and security constraints in an escalating armed-conflict context makes humanitarian assistance to the most vulnerable an almost impossible task.

In a dirty bomb incident, security restrictions may limit humanitarian assistance to emergency measures such as the provision of safe shelter or ''temporary safe havens'' and essential relief, clean water and food. If security conditions permit access, humanitarian agencies might also give support to overstretched hospitals and clinics, special-needs populations, elderly people and vulnerable groups. The greatest issue, however, would be in helping to mitigate the psychological stress and social disruptive effects of radiological and chemical terrorism.

Essentially, the question arises as to the extent to which humanitarian organizations would have sufficient knowledge of protective measures and

10 See ''Iraq: growing needs amid continuing displacement'', 30 January 2007, available at www.unhcr.org (last visited 25 June 2007).

restrictions in CBRNE incidents to be able to provide support to affected civilian populations.

A pandemic scenario with global catastrophic effects

Chronology of events

Outside an armed conflict, major emergencies such as pandemics have similar disruptive impact, although the development of pandemics may progress in phases and allow preparation to some degree for a humanitarian response by early action and preparatory measures. Again, the supposed scenario looks at a potential unfolding of events and focuses on planning and preparedness.

Emergence of a novel strain of influenza

A highly virulent virus with a new sub-type – to which there is no existing population immunity – is ravaging the world. Despite early warning by the World Health Organization (WHO), accelerated by the rapid pace of international travel and trade, ''Dragon flu'' took fewer than four weeks to spread from south-east Asia through the Middle East to Egypt and the African continent, making a worldwide influenza pandemic threat stark reality. The devastating wave was observed simultaneously, not only in North America but also the southern hemisphere, with up to seven million deaths in Asia and epidemics in many other parts of the world. Forecasts of a global death toll of many millions could make it very serious, with potentially similar indications to the deadly 1918 pandemic of increased risk of infection, particularly among young adults.

Emergency measures

World influenza experts met to discuss the new virus and advise on action. WHO warned of an impending humanitarian disaster and urged local and international media to boost coverage of pandemic flu to make more and more countries across the world aware of the uniqueness of this highly infectious disease. It advised governments urgently to prepare for a cumulative clinical attack rate of up to 50 per cent of the global population, and to expect a case fatality rate of 3 per cent. Stock markets plunge and concern for gross domestic products (GDPs) rises as the pandemic impacts on the global economy. Attempts to contain initial outbreaks and slow down the pace of spread prove difficult as WHO early control measures are overtaken by the vicious virus. Europe and the United States, struggling to contain epidemics taking hold, brace themselves and activate rehearsed contingency plans while imposing strict public health infection control regimes.

The European Union called an emergency debate, the United Nations and the International Partnership on Avian and Pandemic Influenza held teleconferences on the implementation of response measures, while the WHO and the Pan

American Health Organization (PAHO) made urgent appeals for additional funding for Africa, south-east Asia and Latin America. The pandemic has severely hit sub-Saharan countries, where one in twenty people die and one in two are struck down by acute respiratory illness, putting thousands more lives at risk of bacterial pneumonia and respiratory failure. A lethal flu pandemic strain, added to HIV/AIDs and other chronic health conditions in poor countries could cause millions of deaths and uncounted cases of disease and hospitalizations. It would also have grave economic consequences, impacting especially on low-income countries and impoverished people, and make the UN Millennium Development Goals even more difficult to achieve.

Port health and displaced people

Learning from past experience during avian flu outbreaks, governments were advised that it would be futile to consider further evacuation of their national citizens from other foreign countries, and most embassies have refused to support repatriation of deceased nationals. At a high-level summit, EU leaders urged member states not to close their borders after flights operated by the main airlines to countries in south-east Asia had been suspended, but advised against all but essential travel to affected countries. Health-screening control measures at borders were deemed ineffective, and the ban imposed on international travel had severely affected trade and tourism. In some African countries border closures had triggered clashes between police controls and nomadic tribes, also stranding thousands of migrant workers and transient communities, disrupting traditional livelihoods. Pandemic implications for internally displaced people caught up in armed conflict situations, such as in Gaza, the West Bank, Iraq, eastern Chad, Sudan, northern Uganda and Colombia are dire, as their citizens are already disadvantaged without guaranteed state security and ''protection rights''.

Infection control measures

The numbers of people with influenza in all countries throughout the world continue to rise, but there is very little evidence-based data available as national surveillance systems begin to collapse, despite the enormous efforts of the WHO. Well-resourced Western countries try to reduce the control and spread of the virus through targeted distribution of anti-viral drugs, while in low-income countries excess mortality rates soar. An extraordinary meeting of the United Nations nominates an Emergency Relief Co-ordinator for Pandemic Influenza and Special Representative for Africa – the continent most severely affected. The African Union appeals to Western countries to increase their contribution of anti-viral drugs to the WHO global stockpile for low-income countries where stocks are alarmingly low and distribution restricted to high-risk groups. The ethical question of leaving out other especially vulnerable groups causes great controversy.

Public information campaigns

Ministries of health do their utmost through public health advice and services to mitigate the spread, but many people fail to understand the gravity of the situation. Aid agencies too drive community information campaigns with messages "Respiratory and hand hygiene – as coughs and sneezes spread diseases", but lack the local skills of outreach hygiene-promoters and animators, who also fall ill with this deadly strain of influenza. As human resources diminish within all sectors, local radio programmes try to relay self-help messages and reassure citizens that only a portion of the population will be infected with influenza but fail to mention that the Dragon Flu virus may re-emerge in several pandemic waves, the second possibly more severe than the first.

Increasing demand, diminishing resources

In developing countries, national stockpiles and community pharmacies are rapidly depleted, while the demand for protective face masks and antibiotics increase public stockpiling and black market trading. In Zimbabwe, Angola and other southern African states, armed forces are mobilized to control volatile security incidents and social instability as demands for scarce commodities and food staples grow.

Driven by the perceived level of risk, extensive public hysteria and media coverage, the United States and China import additional supplies of ventilators, while health economies in low-income countries suffer from having too few ambulances, laboratories, pharmacies and medical treatment centres to cope with the growing demands. Lack of ventilators and oxygen supplies mean that only life-threatening surgery and treatment can be performed, and humanitarian aid agencies contribute medical teams and equipment to developing countries to support swamped hospitals and community health posts.

Overwhelmed health facilities

New laboratory results obtained by WHO reveal that the virus shows indications of becoming resistant to frontline antiviral drugs, evidenced by increasing numbers of infections and excess deaths worldwide. Some countries declare "a state of emergency" as health systems and other vital infrastructure start to collapse.

As public panic ensues and people become more anxious about their health and survival, community clinics are overrun with hundreds of outpatients, and short-staffed, under-resourced health facilities everywhere are overwhelmed.

Reports of hospital closures and withholding of health services add to the burden of health in countries already coping with high morbidity. Also, rumours abound of some rural doctors withholding treatment from elderly people in favour of working-age adults, youngsters and children.

With depleted public services some of the worst-hit countries in south-east Asia and Africa have to resort to traditional medicine or simply go untreated.

Healthcare issues

The fear of contracting a new deadly virus which may lead to millions of deaths and orphaned children haunts those already living in poverty and deprivation. People who are chronically ill, frail, elderly or suffering from HIV/AIDs fear that their weakened immune systems will succumb to new infections. The availability of voluntary support groups, traditional birth attendants and outreach health workers drastically declines, and the WHO deploys additional resources to bolster ministry of health attempts to maintain core essential services.

Pharmaceutical companies in many countries request foreign help to create a pandemic vaccine for the new strain and sub-type as they lack the necessary technology and expertise. Only certain categories of workers and high-risk groups will be offered the vaccine initially, but the manufacturers predict that it will be six months before the first batches become available.

Impact on public-service sectors, commercial enterprise and industry

With human resources greatly diminished in all sectors, efforts to continue livelihoods as far as possible are hampered by public transport disruptions and absent operators and drivers. As more and more workers go sick and services decline, mounds of rubbish pile up in gutters and streets, causing environmental pollution and a massive public health risk due to the attraction of rodents, insect pests and other vectors and domestic scavengers.

National emergency planning arrangements are activated in most countries as fuel shortages take hold, affecting critical national infrastructure and impacting severely on commercial and industrial activity and everyday life. Imports decline and retail trade suffers everywhere as shops and stores close, markets dwindle and more people are forced to stay at home. Developing countries see their population's coping capacities decline and have no means of providing compensation for financial loss.

Social distancing measures

The closure of schools and educational institutions are in force, but other social distancing measures, such as the prohibition of large public gatherings, prove harder to enforce. Following decisions in most countries not to cancel national days and religious events, the public are advised to avoid crowds wherever possible and to restrict celebrations to family circles. Consequently many leisure and sporting events and tourist attractions almost everywhere see a considerable fall in demand as people stay away.

Dignity for the deceased

While rich Western countries are actively turning greenfield land into landscaped burial grounds and cemeteries,[11] less-resourced countries have no alternative but to consider mass graves, raising issues of body identification and measures to enable future retrieval. Given the unexpected number of deaths, some countries contemplate erecting temporary tented mortuaries in central parks and wasteland, but lack sufficient refrigeration units. Sickness among cemetery and crematoria staff aggravates funeral delays, and perceived contagion from dead bodies also hampers the performance of traditional rites and rituals to honour the deceased.

Recovery from the pandemic

Having acquired immunity to further outbreaks of this strain of influenza, those people who have survived and recovered from the pandemic are mobilized to assist others to cope. Exhausted support services and aid agencies start to develop comprehensive staff rosters and action plans in preparation for the second wave of the flu pandemic, forecast with a lull of only twelve weeks.

Pandemic influenza preparedness

A newly emerging influenza strain – a question of when, not if

Worldwide pandemics of influenza resulting in high morbidity and mortality occur when influenza A-viruses undergo major antigenic shifts. A new human strain of influenza emerges – a novel A-virus subtype, markedly different to previously circulating flu viruses.[12] A pandemic can arise at any time of the year, in several waves of infection, and spread around the globe within about four to six months, given the high rate of international travel. Few people will have initial immunity, allowing the virus to spread rapidly from person to person with increased and sustained transmission in the population, and potentially affecting millions of people in many regions and countries. The world has already had several threats with pandemic potential, making the occurrence of the next one just a matter of time.[13]

Clinical considerations of the pandemic influenza virus

Historical accounts can illuminate planning for possible future pandemics, but each pandemic life-cycle would be different, and until the novel influenza virus starts circulating it is impossible to predict its characteristics and full effects.

11 "Greenfield graves for bird-flu victims", *The Times*, 5 March 2007, p. 23.
12 "Bird flu showing new strains and is heading west", *CC News*, 16 April 2007, www.ccnmag.com (last visited 25 June 2007).
13 "Pandemic Preparedness", available at www.who.int/csr/disease/influenza (last visited 25 June 2007).

However, it is likely to be more serious than "ordinary" flu and may cause illness in 25 per cent to 35 per cent of the population. Epidemic peak would be after *circa* fifty days and a serious pandemic could cause tens of millions of deaths worldwide. Secondary illnesses and complications might be around 25 per cent, and hospitalizations 4 per cent, with some 25 per cent requiring critical care resources – doctors, nurses, beds and equipment.[14] Influenza infections may exacerbate underlying medical conditions and may cause serious complications such as bacterial pneumonia.

Seasonal influenza can affect any age group, but usually causes the most serious complications in vulnerable groups such as elderly and chronically ill people. Remarkably, in the 1918 flu pandemic young adults were the most severely affected and many victims died rapidly of viral pneumonia. However, global and national demographies have changed greatly since then, as have health standards and medical advancement in developed countries.

Infection control measures

National policies on the type and use of protective face masks for clinicians would need to be made. In a healthcare setting, the option may be to use surgical face masks for only those at risk of spread from close contact with patients who are coughing or sneezing, whereas high-efficiency face masks would be needed by clinicians performing aerosol procedures. For others it would be futile to wear face masks as they may not fit well enough to provide sufficient protection and would only cause an added spread of infection and potential environmental hazard in disposing of them.

Medical countermeasures

In developing countries there may be different models and levels of care provided by health services. Some countries are developing a pre-pandemic vaccination strategy using the avian flu H5N1 vaccine, and the WHO is exploring the feasibility of setting up a world stockpile with a means to ensure that developing countries are able to access pandemic flu vaccine supplies.[15]

Medical countermeasures such as antiviral drugs will not be a panacea. Apart from attempts to contain initial spread during the early stages of outbreaks, general preventive prophylaxis using antivirals are not regarded as an effective or practical response strategy for a pandemic, as millions of doses would be required. Early antiviral treatment, within the first twelve hours, is thought to reduce by one day the duration of an infection and the likelihood of complication and further spread of the disease, but it is not possible to know their full effectiveness until the virus is circulating. However, these drugs would be the only major clinical

14 Estimates of likely impact.

15 Robert Roos, "WHO: global H5NI vaccine stockpile may be feasible", available at www.cidrap.umn.edu (last visited 25 June 2007).

countermeasure available in the absence of a specific vaccine for the new strain of influenza.

Priority groups and ethical issues

Public concern and demand for infection control treatment and medication from primary care services would undoubtedly be high. Limited stocks would possibly reduce availability of antiviral drugs during a pandemic, necessitating prioritization among essential and frontline workers, at-risk groups and infected individuals. Priority groups might include healthcare workers, patients with early signs of complications, high-risk groups, elderly people and children under 16 years.

Ethical questions would arise in many countries around the prioritization of treatment for pandemic flu complications over other serious illnesses, and the rationing of intermediate care beds, ventilation equipment, antiviral drugs, antibiotics treatment and future vaccines. If medical resources and treatment were targeted to young adults and the working population, there could be a risk of discrimination, especially ageism, and failure to respect all members of society equally. What rights of access to healthcare would transient populations, refugees and other displaced people have?

In the distribution of scare resources based on needs assessment, aid agencies would also wish to respect other humanitarian principles, such as treating people with concern and dignity, fairness, ''minimizing harm'' – physical, psychological, social and economic – and inclusiveness, taking account of the disproportionate impact of the pandemic on certain groups.

Healthcare staff would also be affected, perhaps disproportionately so, given their potential exposure to infectious people. Not only would some become ill themselves, but others could be absent because of the illness of family members, closed schools and lack of childcare. This could cause a conflict of interest between personal and professional priorities in caring for sick relatives and maintaining job demands.

Distribution of reduced medical supplies – a logistical challenge

With reduced services, ''just-in-time'' hospital delivery systems would not be effective. Community pharmacists would run out of supplies of drugs, and pre-positioned buffer stocks and planned community-level arrangements would need to be in place in readiness for the distribution of anti-viral drugs and antibiotic treatment to individuals or their helpers. In industrial countries, systems set up with special pandemic call centres and telephone helplines may become overloaded, with limited capacity for initial triage and referral. Might some countries even use a ''military-style triage'' system in exceptional circumstances in worst-case times?

There could be many other difficult questions. For example, how would antiviral drugs be affordable and accessible to impoverished populations in

different corners of the world? And how would populations who are isolated in rural districts be helped, and those who do not have the mobility or someone to collect a course of treatment? Moreover, without a comprehensive national database system to validate and register distribution of antiviral drugs, how would misuse and black-market trading be controlled?

Given the logistical challenges of providing healthcare to remote communities and the reduction in pharmacy supply chains, would co-operative ventures form to share resources and stocks and operate medical distribution systems?

Other healthcare needs

Consideration would also be needed to ensure treatment and care for people in residential and mental health institutions and other densely populated centres where influenza spread would probably increase. But who would provide for healthcare needs of people suffering malnutrition, impoverished street children, homeless destitutes, newly arrived immigrants and forced migrants?

Mortuary and burial issues

Provision for excess mortality and disaster or temporary mortuaries might also need to be considered as well as sites for burial and cremations and religious issues. Clearly, cultural and religious myths would need to be dispelled about the burial of infected bodies.

Mass vaccination

Once the new strain of influenza had been detected, manufacturers and pharmaceutical companies would begin the development and licensing of a new vaccine for all age groups above 6 months. Ministries of health with the support of medical organizations would need to mobilize mass immunization campaigns, and aid agencies might be requested to donate trained vaccinators and additional supplies of automatic syringes and refrigerators for cold chains.

Public communications

Guidance and health information would need to be disseminated to the population at an early stage of an impending pandemic. But how would health promotion material be relayed to transient people and migrant and mobile communities who do not have access to local media channels? And where health clinics and posts have reduced services, would health promotion messages by other means be feasible and effective?

Impact on livelihood economies and public services

Social and economic disruption and restricted movements would make it difficult to sustain livelihoods and might deny access to basic health care, particularly for

women and children. With reduced capacities for crop cultivation and production, the food security situation may have to be assessed, and supplementary feeding considered for malnourished children in developing countries.

Small-scale cottage industries and income-generating opportunities without resilient business continuity contingencies would mean reduced household economies, and less spending on food, nutrition and health and essential asset investment. Livelihood support measures might include bolstering local capacity, using local skills and deploying people where best utilized.

Government national preparedness and cross-ministerial response plans would need to address continuity of essential public services such as power, food and drinking water supply, transport, communications and community health services, and might even consider bringing back retired professionals. But how will humanitarian support organizations maintain and sustain operational capacity when social mobilization means are limited?

Summary of the likely characteristics and consequences of a pandemic

The features of a global pandemic might be:

rapid geographical spread through trade and travel links;
no previous immunity and widespread illness;
millions of deaths;
possible age-specific mortality;
overwhelmed medical and health facilities and resources;
lack of hospital beds and critical care facilities;
short supply of medical countermeasures and stocks;
potential resistance to antiviral drugs;
significant economic and societal effects;
implementation of control measures and social distancing;
staff shortages and reduced productive capacity in all organizations and sectors;
limited services and reluctance to travel and to use public transport; and
severe disruption to public and commercial services.

Impact on the internal functioning of organizations would include areas such as production, service delivery, fund-raising, finance, administration, human resources, travel and transport.

Individual organizations may also have staff deployment restrictions, and occupational health issues such as duty of care, health & safety, and provision of protective clothing. Essentially, limited surge capacity might hamper international humanitarian aid support to a global pandemic. Every organization would therefore need to develop their own ''business continuity'' plan to ensure robustness and resilience of their services.

International humanitarian action

Response to a pandemic would involve wider international engagement between regional groups, intergovernmental organizations and multinational fora. The WHO, as the leading international health organization, the European Centre of Disease Prevention and Control (ECDC) and other developed health systems would offer advice, guidance, technical support and scientific expertise to governments, whereas regional bodies such as the European Union and the African Union might have an overall co-ordination role of their continents.

Overarching preparedness measures would be to ensure

that the pandemic contingency plans were in place;
global horizon scanning and initial surveillance;
early warning and alerting mechanisms;
stockpiling of antiviral drugs and antibiotics;
means of rapid public communication; and
the strengthening of vulnerable risk communities.

Preparedness and rapid response mechanisms of UN country teams would also be necessary as countries without comprehensive multisector pandemic preparedness and action plans might request international support.

During the initial pandemic period, humanitarian organizations would have to consider operational tasks such as mapping institutional capacities, planning and deployment of response surge capacity, supply of personal protective equipment for healthcare staff, positioning stocks of materials and relief supplies, and organizing logistics and delivery systems. They would also be concerned with social support to vulnerable groups and displaced populations and maximizing safety net activities.

Medical organizations might be tasked with assisting in the application of targeted public health actions and strengthening hospital capacity at provincial and district levels in efforts to sustain medical and health systems, services and resources.

Other resilience measures might involve training of local health staff and community leaders, supporting ministries of health with hygiene promotion and eventually assisting with mass vaccination campaigns.

Conclusions

Contingency and intervention planning for a public health emergency of international concern will be essential, and pandemic preparedness plans can essentially be used as a framework for any novel highly infectious disease threat or epidemic that would affect large numbers of people.

WHO has defined phases in the progression of an influenza pandemic, from the first emergence of a novel influenza virus to wider international spread in a pandemic. This allows a programmed escalation of the response, although transition between phases may be rapid and distinctions blurred.

Emerging avian flu viruses have already demonstrated their ability rapidly to reassort and mutate to create a new strain that may eventually be passed between humans. Once a new subtype of a virus spreads to pandemic proportions the WHO and other health organizations will be looking at available critical and epidemiological data for early control and containment measures. Early action and emergency preparedness will be required to aid national responses and support ministries of health, and UN and other humanitarian organizations. Inter-agency pandemic influenza contingency plans with response strategy, implementation and support plans would therefore need to be ready for the emergence of a global pandemic.

Final remarks

Chemical, radiological, nuclear and explosion incidents and newly emerging diseases will present new risks and challenges to relief agencies and civilian populations. Events such as suicide bombs and the deliberate release of dangerous substances will happen without warning and activate official command, control, co-ordination and emergency response procedures. CBRNE incidents will have major political ramifications and trigger tight security measures, restricting humanitarian access to civilian populations in need. With the increasing threat of terrorism, relief agencies operating in armed conflict environments and complex emergencies should be aware of the likelihood of major emergencies, in which they might only have limited humanitarian space to operate and relieve the suffering of populations in need. Humanitarian assistance agencies can adopt an ''all hazards risk approach'' for contingency planning and preparedness, strengthening their security and emergency operational procedures and stockpiling and logistics capacities to provide appropriate post-incident support.

A gradually occurring novel disease with pandemic potential and worldwide impact over a protracted period would also have a considerable disruptive impact, particularly on the health and social welfare sectors. Preparedness measures could be enhanced by planning for a pandemic on an inter-agency basis and building robust resilience of services, and strengthening local support organizations and their coping capacities.

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Who will assist the victims of use of nuclear, radiological, biological or chemical weapons – and how?*

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Abstract

It is uncertain who will assist the victims of use of nuclear, radiological, biological or chemical weapons if an international response is required, and how this assistance can be provided without undue risk to those providing it. The use of such weapons or any other release of the materials of which they are composed cannot be considered as presenting a uniform risk. There are a variety of risks, each with its own implications for getting help to the people affected and for the health and security of those bringing that help. The political implications are serious and complex. This brief review shows the difficulties inherent in assisting the victims or potential victims of use of nuclear, radiological, biological and chemical weapons.

Despite having no specific plans to assist the victims of an NRBC event,[1] the ICRC intervened several times during the twentieth century in armed conflicts in which nuclear, chemical and biological weapons were used or allegedly used. Its experience on those occasions has revealed the difficulties involved in bringing assistance to the people affected and ensuring the security of ICRC staff. It has also raised complex legal, political and diplomatic questions. The issue of assisting the victims of an NRBC event has been even more challenging and complex.

* This article reflects the views of the authors and not necessarily the views of the ICRC.

There is increased dialogue among international players[2] about the risk of use of NRBC weapons by states and non-state entities. This dialogue has been amplified by concerns arising from such events as the release of sarin gas in the Tokyo subway in 1995, the sending of ''anthrax letters'' in the United States in 2001, the use of a fentanyl derivative to end the Moscow theatre hostage crisis in 2002, the purported presence of NRBC weapons in Iraq before 2003, the investigation of the use of polonium^{210} in a murder enquiry in London in 2006 and the use of ''chlorine bombs'' in Iraq in early 2007. Each international player, understandably, looks at the risk of use of NRBC weapons from the point of view of their own particular interest or mandate. Another concern therefore is that by having a mandate to assist and protect all victims of armed conflict and other situations of violence, the ICRC accepts that, as in the past, it may be called upon to assist these victims in any way it can. Obviously, attempting to fulfil its mandate has profound implications for the health and security of ICRC staff. Furthermore, the ICRC may already be present in the conflict zone when an NRBC event takes place.

To address these concerns we began by reviewing the ICRC's action hitherto in relation to use of nuclear, radiological, biological and chemical weapons and analysing all available material pertaining to the risk of such use in the future.

No formal methodology was used to generate our risk assessment. It is based on information provided by sources such as government experts, independent experts, wide reading and participation in numerous conferences and think tanks. Our work has brought us into contact with most, if not all, of the principal international players and has enabled us to make observations with respect to their possible roles and capacities. We based our dialogue with them on their perception of the risk involved and on the basic question reflected in the title of this article: in those NRBC events which would have a high impact in terms of the ''human cost'' and would require an international response, who will assist the victims of use of NRBC weapons – and how will this assistance be provided? Whilst this question was deemed extremely complex by all players, it is rendered more complex still if we extend consideration of an assistance response to all NRBC events.[3] We have dealt with this wider set of risks only in passing.

1 ''NRBC weapons'' means any weapon or device used as a weapon which utilizes nuclear fission or fusion, radioactivity with potential to cause effects on human health, toxic chemicals or biological agents. ''An NRBC event'' means any use of a nuclear, radiological, biological or chemical weapon. It also means a situation in which there is a high probability of use of such weapons. It includes accidental release of NRBC materials in the event of an attack with conventional weapons on an NRBC facility, as well as allegations of use.

2 ''International player'' refers to any agency, whether governmental, military, the United Nations, the ICRC, other components of the Red Cross and Red Crescent Movement or non-governmental organizations which could potentially be involved in mounting an assistance response across international borders for the victims of an NRBC event.

3 ''Assistance response to an NRBC event'' includes potentially bringing ''assistance to victims'' and ''staff security''. It includes strategies to prevent use or repeated use which may involve dialogue with authorities with respect to their obligations under international law. It also includes aspects relating to

This article gives a brief insight into the history of the ICRC's intervention in contexts where NRBC weapons have been used or allegedly used. We then describe our assessment of the risk of use of NRBC weapons and identify eleven separate risks. A heterogeneous risk assessment necessitates a heterogeneous approach both to assisting victims and to staff security, and we have therefore attempted to give a realistic indication of the expected "human cost" pertaining to these eleven separate risks. We give an overview of how this risk assessment might apply to international players collectively; we do not name any specific government or organization. The conclusions we draw may help to advance thinking among international players with respect to this extremely complex issue.

Normative and preventive legal activities are not considered in this article. These are undertaken by a variety of international players within the framework *inter alia* of the 1968 Nuclear Non-Proliferation Treaty, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention and Security Council Resolution 1540. Preventive work in relation to scientists working in the academic world or industry likewise is not considered.

Use of NRBC weapons: not a new issue for the ICRC

Many of the fundamental questions and dilemmas relating to assistance today for victims of use of NRBC weapons and to staff security have been identified in internal ICRC discussions over the last seventy years. The ICRC's history with regard to NRBC weapons raises issues that warrant clear policy guidelines for any international player.

- In response to the use of gas in the First World War, the ICRC issued a forceful appeal to all belligerents.[4] This provided, in part, the necessary momentum for states that ultimately concluded the 1925 Geneva Protocol.
- The activities of the ICRC in relation to use of chemical weapons in the Italo-Ethiopian War in Abyssinia have been described by a former staff member in his memoirs. These activities were heavily criticized as a result of archival research.[5]

diplomatic dialogue and public communication. "Assistance to victims" means both specialized and general assistance to the people affected. It also means provision of general and specific means for the protection of potential victims from exposure to the effects of NRBC weapons. "Staff security" means consideration of all aspects of security and health of staff (whether expatriate or national) in relation to preventing exposure to and suffering from the effects of NRBC weapons.

4 Appeal of the International Committee of the Red Cross to the belligerents against the use of poisonous gases, 8 February 1918.

5 Marcel Junod, *Warrior without Weapons*, ICRC, Geneva, 1982. See also Rainer Baudendistel, "Force versus law: the International Committee of the Red Cross and chemical warfare in the Italo-Ethiopian war 1935–1936", *International Review of the Red Cross*, No. 322 (March 1998), pp. 81–104.

- The ICRC was involved in providing medical supplies to hospitals after the atomic bombing of Hiroshima in 1945.[6]
- In 1952 the United States submitted a proposal to the UN Security Council requesting that the ICRC investigate the alleged use of biological weapons in the Korean War; the investigation never took place.[7]
- Some of the most difficult dilemmas the ICRC would face in mounting an assistance response today became evident as early as the conflict in Yemen in 1967, in which chemical weapons were used.[8] The visit of ICRC staff, including a medical team, to areas where chemical weapons had allegedly been used raised a multitude of complex issues. These included the question of whether the ICRC should issue protective masks to the civilian population (thereby appearing to verify the allegations); the risk of exposure of ICRC staff to chemical agents; the possibility of ICRC staff coming under attack to prevent their witnessing the effects of use of chemical weapons; and whether an ICRC team assisting victims should carry out scientific investigations to verify the allegations. The question of public disclosure of the reports by the ICRC became a prominent feature of diplomatic exchanges and in the media.[9]
- Only public statements issued by the ICRC on the use of chemical weapons during the Iran–Iraq war can be made known here. The two press releases issued by the ICRC in 1984 and 1988 both imply that Iraq was the user.[10]

The ICRC can learn a number of lessons from its previous involvement in this matter:

- The question whether and how to provide assistance automatically raises issues relating to the confirmation of alleged use.
- Public statements pertaining to an NRBC event that are made by an organization such as the ICRC are of keen interest to many states.
- Assistance and denunciation are easily confused at field level.
- Where verification of allegations is lacking, a politically driven dialogue rapidly overrides concern for the victims. Information pertaining to verification of allegations is manipulated. Anyone in a position to verify alleged use might be in danger.
- The use or alleged use of chemical weapons by a state makes for extremely difficult decisions within an institution such as the ICRC, which go beyond the

6 See François Bugnion, ''The ICRC and nuclear weapons: from Hiroshima to the dawn of the 21st century'', *International Review of the Red Cross*, Vol. 87 (September 2005), p. 511.

7 United States of America: Draft resolution submitted on 20 June 1952 on the question of a request for investigation of alleged bacterial warfare, UN Doc. s/2671.

8 The Stockholm International Peace Research Institute, analysing the political and media aspects of the allegations, concludes that of the fifty or so incidents of alleged use of gas in Yemen, only two have a significant quantity of substantiating document evidence.*The Problem of Chemical and Biological Warfare*, SIPRI, Stockholm, 1971, Vol. I, pp. 225–38.

9 Ibid.

10 ICRC press release No. 1481, ''Wounded of the Iran/Iraq conflict: appeal of the ICRC'', 7 March 1984; ICRC press release No. 1567, ''Iran-Iraq conflict: the ICRC condemns use of chemical weapons'', 23 March 1988.

dilemmas pertaining to assisting the victims and staff security. There are major political and diplomatic implications as well.
- There are complex issues relating to staff security. In addition, examining and exhuming dead bodies is potentially very hazardous, as could be taking samples for subsequent analysis.

The risk of use of NRBC weapons

"Risk" is scientifically defined. It is a function of two variables, namely the probability of an event occurring and the effects of that event. This section therefore deals with the probability of use of different kinds of NRBC weapons; the section following describes the effects resulting from their use. (The effects equate with what we have understood as the "human cost" and, in particular, the numbers of direct deaths and injuries.)

Our risk assessment relates to the probability and effects of eleven different possible uses of NRBC weapons anywhere in the world.[11] It differs from a risk assessment of all possible NRBC events; in our opinion, an attempt to make such an assessment would prove meaningless. We have given these eleven risks, as compared with each other, a rating of high, medium or low probability. This is based on a retrospective analysis of how frequently certain weapons have been used in the last hundred years, the current perception of experts of the likelihood of use and our understanding of the interface of technical, tactical and political considerations. We recognize that our assessment must not be seen as static. The risk could change very rapidly if, for example, a state were to threaten a nuclear strike. Our risk assessment pertains to use of:

- nuclear weapons (low)
- improvised nuclear devices (low)
- "radiological device" (medium)
- highly infective and contagious anti-human biological agents with global implications (low)
- bacterial agents which are infective but whose effects can be treated and of which human-to-human transmission is controllable (low)
- non-contagious agents (medium)
- infective and contagious agents against animals or plants (medium)
- chemical warfare (low)
- limited or small-scale use of chemical weapons (high)
- "new" chemical weapons (medium)
- riot control agents (high)

An important point with regard to the probability element of this risk assessment is that probability of use may be influenced by perceptions resulting

11 The definitions given below are for the purpose of generating our risk assessment. They contain terminology drawn from disarmament conventions.

from the ''war on terrorism''. For example, the probability of terrorist use of certain NRBC weapons is perceived as more likely than their use by states. The risk assessment inevitably carries a political dimension which is difficult to refine. In other words, politically influenced perception of the probability may be very different from the real probability.

In an armed conflict the probability of an NRBC event that does not involve confirmed use of NRBC weapons is likely to be higher than the probability of confirmed use.

Effects of use of NRBC weapons (the ''human cost'')

For each of the eleven risks listed, the effects of use of a particular NRBC weapon are based primarily on our understanding of the direct effects that are likely. These direct effects are the number of people killed, injured or rendered sick. (There are many indirect effects, such as social or industrial disruption, possible impact on health long after the event and impact on the environment.) This section gives an overview of the effects and some implications for assisting survivors and for staff security. The management of remains of those killed is not considered here.

Providing assistance in such an environment would take a very heavy toll on the psychological well-being of those who are closest to the victims, whether the latter are survivors or dead.

The use of nuclear weapons[12]

The number of victims will vary greatly, depending on the number of nuclear weapons used as well as the yield and location of the explosion(s). Obviously a nuclear weapon used in a desert or at sea against a discrete military objective will have less immediate human cost than if such a weapon was used in a populated area. The direct causes of injury to humans following a nuclear explosion are, first, thermal (heat) radiation resulting in large-scale firestorms that cause burns and other severe injuries; second, blast waves and accompanying high-speed winds that cause injuries similar to those from conventional explosives; and, third, radiation and radioactive fallout, causing radiation sickness.

The chances of survival will be determined mainly by the extent of exposure to heat, blast or radiation, which in turn is determined by the yield of the bomb and the person's proximity to the epicentre. A great many of those exposed are likely to die in the following days or weeks. In addition, there are long-term effects on health. Radioactive particles and radioactive fallout can cause cancers and birth defects.

12 ''Nuclear weapons'' refers to nuclear weapons produced by a state and which provide destructive energy through nuclear reactions (fusion or fission). The yield of a nuclear weapon may vary from less than 1 kT to up to 10 MT (= 10,000 kT). It cannot be excluded that these weapons could be acquired by non-state entities, but the likelihood of this occurring is considered minimal, in particular compared with the acquisition or development of improvised nuclear devices.

Describing the management of radiation sickness is beyond the scope of this article. Specific prophylaxis (e.g. with iodine tablets) or treatment for radiation sickness will have a limited effect on the overall chance of survival. Even in the most sophisticated facilities, treating large numbers of people with severe burns is extremely difficult, time-consuming and expensive. Less ambitious but effective treatment would take the form of general supportive measures (general care, dressings, antibiotics, pain relief, etc.) Assistance would also include provision of shelter, uncontaminated water, food and clothes.

The main risk for anyone bringing assistance to survivors of the use of a nuclear weapon is from exposure to the radioactive material that will be present in the dust, water or air. The time that any one person could spend working in a contaminated area would be limited.

Improvised nuclear devices[13]

Use of an improvised nuclear device is likely to be an isolated incident. If fusion or fission were achieved, the effects would be similar to a smaller-yield nuclear weapon. The number of victims will be determined by whether or not the explosion takes place in a populated area. The implications for assisting victims and for staff security are similar to those described above with reference to the use of nuclear weapons.

The use of a ''radiological device''[14]

The radioactive material used in a radiological device could theoretically cause radiation sickness as well as long-term radiation effects. These effects are difficult to quantify or predict. They are likely to include other long-term effects. The main effects of the use of a ''dirty bomb'' would come from the detonation of the conventional explosive – that is, death and injuries from blast and fragments. Depending on where it is used, the main effect from the radioactive material in a dirty bomb would probably be widespread panic with subsequent economic disruption. Decontamination of even a small area of a city would require large resources and would be time-consuming. A difficult technical and political question would relate to the ''safe'' level of radioactivity at which the population could return. It is deemed more likely that such an attack would be carried out by a non-state entity and would target a populated area.

13 ''Improvised nuclear device'' means a device developed mainly by non-state entities and which provides destructive energy through nuclear reactions (fusion or fission). However, compared with nuclear weapons such devices are rudimentary. The expected yield is probably between 1kT and 20 kT.

14 ''Radiological device'' refers to any device that utilizes radioactive material to harm people or for dissemination into the environment. This includes radioactive gases, powders or liquids. When explosives are used to disperse the radioactive material from a source other than a nuclear explosion, it is commonly referred to as a ''dirty bomb''. In such a case, the explosive would cause most of the injuries to people and material damage, whereas the radioactive material would cause disruption mainly through the psychological impact. In the long term, there is a theoretical risk of a variety of health problems.

The immediate needs of the survivors would be similar to those resulting from an attack using a conventional explosive, although with an additional and vital need for decontamination (the issue of radioactive fragments embedded in the human body has not been addressed in surgical literature). Uninjured people contaminated with radioactive dust might only need washing; this would nonetheless require some specific measures and special training for healthcare personnel.

The main risk for anyone bringing assistance to survivors of use of a radiological device is from exposure to radioactivity. However, the levels of radioactivity will not be comparable to those resulting from detonation of a nuclear weapon or an improvised nuclear device.

The use of a highly infective and contagious anti-human biological agent with global implications[15]

The intentional release of anything such as smallpox, SARS (severe acute respiratory syndrome) or influenza is potentially, in terms of magnitude of effects, one of the most serious of all NRBC risks. A number of factors combine to make the potential effects so severe:

- the attack is likely to be silent (i.e., the target population and authorities are unlikely to know it has taken place);
- the incubation period may be up to three weeks after exposure;
- the disease may spread rapidly as a result of extensive international air travel;
- diseases caused by these agents can be highly lethal;
- there would be widespread panic and economic collapse.

The SARS outbreak of 2003 (a natural outbreak) indicates the potential widespread impact on health and the economy. This is reflected in experts' predictions about the possible mutation of H5N1 avian influenza to a strain transmissible from human to human. An uncontained smallpox outbreak would almost certainly result in a global public health and economic catastrophe. The SARS outbreak and the concerns about avian influenza, combined with the experience gained in controlling smallpox epidemics in the past, obviously help in contingency planning to combat a deliberate release of highly infective and contagious agents. In other words, assisting victims falls within the domain of public health preparedness for any major epidemic.

In terms of staff security, any person working in an area affected by such an epidemic should have the necessary vaccinations and medication in advance.

15 "Biological weapon" refers to a biological agent and the means to deliver it. "Biological agent" means any living organisms or a toxin (a poison produced by a living organism) that cause disease in, or harm to, humans, animals or plants. Biological agents can cause an effect on the target and may be contagious (i.e., the infection can be transmitted onwards) or not. They may be delivered as liquid droplets, aerosols, or dry powders. The release of a biological agent can also be achieved by traditional delivery systems for weapons such as artillery or aircraft, or by more rudimentary means (e.g. by introduction into the water supply or by letters), or by accident.

However, the very fact of being in possession of vaccines and medication or samples or even of having access to transport out of the area might be a security risk in itself. Staff could be attacked by people who have no vaccines, no medication and no adequate means of transport.

The use of infective bacterial agents of which human-to-human transmission is controllable and whose effects can be treated

Use of agents such as cholera or plague would result in a classic, potentially containable epidemic. The victims and potential victims would be treated with appropriate antibiotics and other means. It is unlikely that deaths would be in the thousands as long as a public health response was possible.

Such situations are manageable both at national and international levels within the existing public health responses. International players already have a wide experience of treating such outbreaks, albeit those from natural causes. However, if it is proven that an outbreak results from an intentional release of an agent, this would change the investigation of its origin and the political/media environment. It should not change the management of the epidemic.

As in a natural outbreak, a standard public health approach including prophylactic antibiotics or vaccinations would reduce the chances of disease spreading to those bringing assistance. Serious illness among staff may be possible if the final diagnosis is unknown and, for example, the wrong prophylactic antibiotics are used. Another threat for international players could arise from any state, group or person trying to suppress public knowledge of the attack or the nature of the disease agent.

The use of non-contagious biological agents

Non-contagious agents such as anthrax, botulinus toxin or tularaemia could be delivered by air or put in food or drinking water. The anthrax letter attacks in the United States in 2001 showed how widespread the panic is in comparison to the number of people directly affected. Whilst some such agents can be highly lethal, the diseases they cause are not contagious.

In the event of a single use, the delay in confirming the nature of the agent used and that it was a deliberate release may mean that the full effects are suffered before specific treatment can be given. If international help is requested, the delay is likely to be longer, and so assistance for the victims may arrive long after the outbreak has run its course (unless the international agency is already present in the country concerned). Individual victims can be treated in ordinary medical facilities once the diagnosis is made. Measures to prevent the disease from spreading to other people are not necessary. However, decontamination of an area or building requires specialized equipment and training. It should be noted that vaccinating against anthrax involves a course of injections over several months.

Most concerns about staff security should be covered by maintaining a level of caution, having medical advice and treatment readily available and taking

common-sense measures to avoid contamination (for example, following guidelines about opening suspicious packages).

The use of infective and contagious agents against animals or plants

Biological agents can be directed at animals and plants. The degree of economic damage (collapse of markets, disruption of food supplies, loss of livelihoods, etc.) or more catastrophic effects such as starvation are obviously determined by how widespread the agent's effects are.

The requisite assistance activities (e.g. food and seed distribution, and animal vaccination) have been well tried and tested by international players in responding to natural events. However, those players involved in providing assistance may not be so involved in investigating whether the disease outbreak was intentional or not.

Our understanding is that the only potential anti-animal agent that carries major implications for staff security is avian influenza. Apart from that, one can assume that it would be safe to work in an area where there is an outbreak of an animal or plant disease. Again, the most serious security implications could come from anyone wishing to deny access to international agencies or to prevent confirmation of the nature of the outbreak.

Chemical warfare[16]

Chemical warfare is most likely to occur as an attack involving a state's armed forces; it could take place on a large scale and would need sophisticated delivery systems. The number of people affected will depend on the amount of the agent used and atmospheric conditions such as wind direction and rain. The nature of injuries sustained will depend on the kind of agent, for example whether the agent exerts its effect on the skin, nerves or respiratory system.

Assisting victims and preventing exposure all depend on knowing that an attack has happened or is likely to happen. This may be far from obvious. If people arrive at hospital with ''burns'', it may only be discovered later that they are suffering from the effects of a chemical weapon. Successful treatment of such cases requires their decontamination and subsequent treatment according to the agent used. As it is necessary to protect hospital staff from secondary exposure, and as working for any length of time in protective suits is not feasible, any health facility would quickly be paralysed by the arrival of even a small number of people affected by a chemical agent.

16 ''Chemical warfare'' means use of chemical weapons by a state or organized military body. ''Chemical weapon'' means a toxic chemical which produces incapacitation, serious injury or death, and the means to deliver it. It covers nerve agents, blister agents, blood agents and choking agents. A toxic chemical can be released via a weapon designed for this purpose or by more rudimentary means such as by piercing plastic containers which contain the agent or by simply placing a container of chemical next to an explosive charge.

The means to protect any group, whether the general population or staff, include special shelters, decontamination, detectors, distribution of protective clothing and distribution of auto-injectable antidotes.

The main implication in terms of staff security is the probability of contamination. This would be greatest for international players when called upon to assist victims, rather than simply being near to, entering or living in an area that is attacked. All potential measures to reduce the risk of exposure, such as protective masks, detectors and sealed rooms, do not necessarily ensure protection and certainly give rise to more difficult questions. There are also security implications for international agencies if their staff only – and not the population at large – have protective measures at their disposal.

Limited or small-scale use of chemical weapons

A single attack with a chemical weapon employing an improvised or low-tech delivery system is likely to target a crowded area. Such an attack is unlikely to cause a large number of deaths among those exposed. The number and nature of injuries will depend on the kind of agent and the amount released. Many hundreds of people will, however, be gripped by panic once it is known that a chemical weapon has been used.

Unless international agencies are already present, and even if they have a medical facility on the spot, they are unlikely to be involved in assisting the victims because the needs resulting from a single attack are relatively small. But this may change if multiple such attacks are anticipated.

The implications for staff security are less serious than in chemical warfare unless an attempt is made to provide immediate assistance. The nature of the agent is unlikely to be confirmed in time to be able to respond with specific measures such as antidotes.

Use of "new" chemical weapons[17]

The use of a fentanyl derivative to end the Moscow theatre siege was the first time a therapeutic agent was used in a tactical situation. Until then, fentanyl derivatives had been considered "non-lethal" chemical weapons. One hundred and twenty people died purportedly because of respiratory failure and because medical care was lacking in the critical minutes after the attack. Most such "new" chemical weapons are those which might incapacitate by reducing the level of consciousness, such as analgesics and anaesthetic drugs.[18] An attack is likely to be "silent" and the agent used may not be identified until much later.

17 "New chemical weapons" refers to a variety of new chemicals – many of them related to pharmaceuticals – which are being considered for use as weapons. These may be termed "calmatives" or "incapacitants". They are purportedly being developed for law enforcement purposes because there is a perception that their use will cause few deaths.

18 V. Nathanson (ed.), *The Use of Drugs as Weapons: The Concerns and Responsibilities of Health Professionals*, British Medical Association, London, 2007.

There may be specific antidotes capable of reversing the effect almost completely (naloxone, for instance, is the specific antidote for the fentanyl derivatives), but the nature of the agent may not be known soon enough to administer them.

The implications for staff security are considerably less serious than those of chemical warfare or limited or small-scale use of chemical weapons. Direct exposure is unlikely, and as these agents are likely to be ''medicines'' when given in another dose in another context, the probability of significant exposure for those bringing assistance is low (the situation is similar to that of hospital staff treating a person with a drug overdose).

The use of riot control agents[19]

States regularly use riot control agents for law enforcement. However, the use of riot control agents as a method of warfare is prohibited by the 1993 Chemical Weapons Convention. International players need to recognize why use of riot control agents falls within our risk assessment and why being present for whatever reason in an area of conflict where riot control agents are widely used can be complicated and even dangerous. The reasons are, *inter alia*:

- the documented use of chemical weapons in twentieth-century conflicts was in most cases preceded by the use of riot control agents;[20]
- an attack using riot control agents in a tactical situation other than riot control would not be announced as such. Hence if military personnel were targeted, they might treat it as an attack with chemical weapons and respond in kind;
- if riot control agents are used and there are dead bodies lying on the ground, it will not be clear whether they have been killed by conventional weapons or by the parallel use of a chemical weapon.

In the event of widespread use of riot control agents alone, it is unlikely that there would be any specific assistance needs. If the people targeted with riot control agents need medical assistance, it will probably be for injuries from parallel use of conventional weapons, including blunt instruments. Respiratory support may be required for those who inhale riot control agents in a confined space from which they cannot escape. A small proportion of people may be sensitive to inhalation of small quantities of riot control agents because of pre-existing health problems such as asthma.

The main issue with regard to staff security does not stem from the use of riot control agents *per se*, but from not knowing whether riot control agents or

19 ''Riot control agent'' refers to a chemical substance which can produce, in humans, sensory irritation or disabling physical effects which – if it is used appropriately – disappear within a short time after exposure to it ends (e.g. tear gas).

20 *The Problem of Chemical and Biological Weapons*, Vol. I, *The Rise of CB Weapons*, ch. 2, ''Instances and allegations of CBW 1914–1970'', Stockholm International Peace Research Institute, Stockholm, 1973. For the Iran–Iraq war (1980–9), see ''World armaments and disarmament'', *SIPRI Yearbook*, Stockholm, 1985, pp. 206–8.

chemical agents have been used or that use of riot control agents might precede use of chemical weapons. The staff security considerations cited in the section on chemical warfare could therefore apply, depending on the context.

Overview of international players in terms of assistance to victims of use of NRBC weapons

The title we chose for this article highlights a critical question: in any context requiring an international response, who will assist the victims of use of an NRBC weapon, in particular victims of an event that represents a ''low probability/high impact'' risk – and how? When we put this question to a wide range of international players, a number of important points emerged about their resources, competences and capacities collectively. These points may be useful for consideration and help to advance discussion on assistance for victims and potential victims of an NRBC event.

Many states, especially in western Europe and North America, have developed national capacities which could be deployed rapidly and effectively in response to NRBC events. However, when it comes to the deployment of such national capacities at international level, states are only just starting to address the many issues involved, such as political sensitivities inherent in intervening in a foreign country, legal issues related to customs examinations, or co-ordination between themselves or with existing international organizations.

The majority of international players understand ''assistance'' to mean assistance to the state affected, and not necessarily assistance to the people affected. Most of them assume, moreover, that any assistance activity will be initiated by a request from the affected state. Obviously, such a request would not be forthcoming if the government in question was the user or potential user of a nuclear, radiological, biological or chemical weapon. Another assumption is that other states will offer help in the form of personnel and material.

No international player would be working in isolation in a ''low probability/high impact'' NRBC event. Any action to assist victims (and, in the case of contagious biological weapons, to prevent further spread) would have to be co-ordinated at a global level. Factors complicating this co-ordination include:

- the fact that realistic co-ordination mechanisms are in their infancy;
- lack of clarity as to who would be responsible for co-ordinating such a response;
- cancellation or prohibition of flights into or out of a contaminated area;
- the question whether the event involved an accidental release, a natural outbreak (in the case of a biological weapon), an alleged use or an intentional release; the distinction carries heavy political, security and media implications.

Assisting victims of an NRBC event is perceived by some as being reliant on military expertise. However, this expertise pertains, understandably, to

protecting one's own forces and to continuing to function militarily in a contaminated environment or in the presence of a threat. It does not necessarily reflect a capacity to assist hundreds or thousands of non-military victims.

Broadly speaking, nearly all international players have a security policy which involves a withdrawal of staff in the event of use of NRBC weapons. This policy may not be consistent with

- the mandate of that organization to assist victims (as is the case, for example, of the ICRC);
- the practicality of getting staff – whether international or national – out of an area where they may be at risk;
- the fact that some ''NRBC events', such as a deliberate cholera outbreak in a refugee camp, may present no significant risk to those bringing assistance and may precipitate an influx of staff to the area affected.

International players have given little consideration to the impact of NRBC events on their legal responsibilities for health and security of their staff in terms either of potential risks during the event or of longer-term implications of exposure to NRBC agents; the latter may include an impact on reproductive health.

Few international players have considered the security, legal, political and media implications of possibly being in possession of information pertaining to verification of alleged use of an NRBC weapon.

Conclusions

There are many reasons for concern as to who will assist the victims of use of nuclear, radiological, biological or chemical weapons if an international response is required, and how this assistance can be provided without undue risk to those providing it.

This concern stems first from the ICRC's experience over the years with regard to the use of such weapons; second, from the numerous uncertainties about the real risks involved and hence as to whether, which and to what extent resources should be mobilized in advance; and, third, from the uncertainty as to whether and how the various international players will act, which will do so, and how and to what degree any action would be co-ordinated.

Given our risk assessment and our overview of international players in this domain, the critical question reflected in the title of our article remains unanswered. A number of points must therefore be made to aid future thinking about who will assist the victims of an NRBC event – and how.

NRBC weapons cannot be treated as a single category of weapon and certainly not as ''weapons of mass destruction''. With respect to use of such weapons, each risk we have identified has its own distinctive combination of

probability and effects on victims. This in turn has risk-specific implications for assisting the victims and for staff security.

In terms of probability, our risk assessment pertains only to *use* of NRBC weapons. We have described eleven separate identifiable risks. The effects, or the human costs, associated with each risk are considered mainly in terms of the potential number of deaths and injuries. Obviously, a broader risk assessment would include the probability of displacement of people or social or economic disruption. The probability of events involving the use of those NRBC weapons likely to have the greatest impact on the victims and potentially posing the greatest problem for international players is low. These ''low probability/high impact'' risks include the use of nuclear weapons, the use of highly infective and contagious biological agents, and chemical warfare. In contrast, some risks, such as use of biological agents with low potential for human-to-human transmission, could be addressed relatively easily and safely within existing capacities.

Some Western countries have plans and capacities at national level to address some or all of the risks we have identified. However, an effective international assistance response which would be of direct benefit to surviving or potential victims and which provides adequate security for staff is not possible at present. To our knowledge, no government, international organization (including the ICRC and other components of the International Red Cross and Red Crescent Movement), non-governmental organization or collaborative body has either realistic plans or the capacity to mount such an international response.

For international players embarking on creating a capacity for an adequate assistance response to ''low probability/high impact'' NRBC events, huge initial investments together with long-term commitments are required. These investments are not only financial; they include massive investment in human resources and commitments to maintaining this new capacity, especially in training. Political motivation and willingness to co-ordinate efforts are also required.

Any player considering preparations, plans or training to respond to man-made NRBC events must accept that any expertise and capacity gained would inevitably be called upon to help deal with an accidental release of NRBC agents and natural outbreaks of widespread disease. Furthermore, the latter are more likely. Such preparations must be compatible with existing plans to control natural outbreaks of disease such as SARS and avian influenza.

The nearest international players are to being collectively prepared for a ''low probability/high impact'' event is in their ability to cope with a deliberate release of highly infective and contagious anti-human biological agents with worldwide implications.

An unplanned, unco-ordinated and badly executed assistance response is likely to be ineffective. For persons providing that assistance, it may make an NRBC event more dangerous than it need be.

Dialogue among international players on this complex issue is in its earliest stages. Further work is required to understand better the roles, resources,

capacities and collaboration mechanisms of all international players who might be involved in assisting victims of NRBC events.

The evident lack of an international capacity to help such victims underscores the inescapable fact that to prevent the use of nuclear, radiological, biological and chemical weapons is an absolute imperative.

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Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis

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Abstract

In both disasters and armed conflicts, domestic regulatory control over the entry and operation of international humanitarian relief operations can significantly affect their ability to address the critical needs of affected persons. The types of regulatory problems that arise, such as customs barriers, visa issues and taxation of aid, are often similar, but both the underlying dynamics and the applicable international law can be quite different. This article analyses these similarities and differences and suggests distinct steps that might be taken to move forward in the two contexts.

In the wake of a major disaster or an armed conflict,[1] the lives and dignity of affected persons may depend on international humanitarian relief. In both contexts, the regulatory approach taken by domestic authorities can enhance the ability of international humanitarian actors to provide this relief in a timely and effective manner. Too often, however, it has just the opposite effect.

* The views and opinions expressed in this article are the author's and do not necessarily represent those of the International Federation or its member societies. Elements of this article were drawn from a larger study of IDRL currently being prepared by the International Federation.

This paper will take a comparative look at the common regulatory problems and the applicable international law for relief in armed conflicts and non-conflict disasters. It will argue that many of the problems are similar. These include both regulatory barriers, such as bureaucratic delays in the entry of personnel, goods and equipment, as well as regulatory gaps, for instance, with regard to mechanisms speedily to provide domestic legal recognition of international relief organizations. In both disasters and conflicts, the ability and willingness of domestic authorities to address these problems are impacted by factors including the distraction and reduced administrative capacity stemming from their own efforts to respond to the emergency, the unique need for speed inherent in humanitarian operations and, in particularly high-visibility emergencies, the increasingly large and diverse community of international actors who seek to intervene.

Yet there are also substantial differences. In armed conflicts, security is an overwhelming concern from several points of view. Armed parties who worry that international relief will favour their enemies. Humanitarian actors who fear for the safety of their staff and material. Meanwhile affected persons, who must be as concerned about being attacked as meeting their basic needs. Also, particularly in internal armed conflicts (currently the predominant form of warfare), there is frequently more than one de facto authority exercising regulatory power over international humanitarian relief efforts. These factors lead to more deliberate barriers than are commonly found in disaster settings. On the other hand, in disasters there is an expectation (sometimes unfulfilled) that domestic authorities will take the primary role in humanitarian aid efforts and not only facilitate the access of international humanitarian aid where needed, but also co-ordinate it and monitor its effectiveness. In armed conflict the expectations are quite different, due to the status of the domestic authorities as parties to the conflict.

There are also important differences in the character and content of the applicable international law. For disasters, the relevant norms are scattered among instruments from different sectors with varying degrees of specificity and geographic reach, providing at best incomplete guidance. In contrast, in armed conflict international humanitarian law has much broader acceptance and scope and provides for some very specific rights and obligations. However, even in international humanitarian law, there are ambiguities about the extent of the obligations of domestic actors to consent to and facilitate international relief, particularly in internal armed conflicts. What is clear is that there are substantially fewer conditions that may legitimately be imposed on international humanitarian organizations before allowing them access in conflict settings than in disasters.

This paper will suggest that progress ought to be possible across the board on solving the common regulatory problems in both disasters and conflicts. However, there are also strong reasons to take distinct steps toward this goal in the

1 For the purposes of this article the term ''disaster'' will be considered not to include armed conflicts.

two contexts, because of both their differing dynamics and the specific requirements of international humanitarian law.

General obligations to allow and facilitate international humanitarian relief

Before turning to the individual regulatory issues, it is helpful briefly to recall what international law provides in general concerning the obligations of domestic authorities to allow and facilitate humanitarian assistance. The relevant norms can be found in the domains of human rights (applicable to both conflicts and disasters), international humanitarian law (applicable only to conflicts), refugee and internally displaced person (IDP) law (which may or may not be applicable in a particular conflict or disaster setting), and an ''other'' category, increasingly known as ''international disaster response laws, rules and principles'' (IDRL) (with primary application to disasters).

Human rights law

With a few notable exceptions,[2] the major human rights instruments do not directly refer to international humanitarian relief. Some scholars have asserted, therefore, that there is no general right to receive such relief.[3] However, existing human rights instruments do set out a great many related rights, such as the rights to life,[4] food,[5] housing,[6] clothing,[7] health,[8] and livelihood.[9] These rights have been

2 See the discussion below concerning references to refugee and displaced children in the Convention on the Rights of the Children and the African Charter on the Rights and Welfare of the Child. There are also a number of references to international relief in expert-produced ''soft-law'' documents. See, e.g., Council of the International Institute of Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance (April 1993); Institute of International Law, Resolution of the Institute of International Law on Humanitarian Assistance (Bruges Session 2003), Article II(2); Resolution of the Institute of International Law on the Protection of Human Right and the Principle of Non-Intervention in Internal Affairs of States (Santiago de Compestela Session 1989), Article 5, as well as the Guiding Principles on Internal Displacement, also discussed below.

3 See, e.g., Yoram Dinstein, ''The right to humanitarian assistance in peacetime'', *Naval War College Review*, Vol. 53 (Autumn 2000), p. 77 (stating that ''[i]t is impossible to assert, at the present point, that a general right of humanitarian assistance has actually crystallized in positive international law.''); Peter MacAlister-Smith, ''The right to humanitarian assistance in international law'', *Revue de Droit International de Sciences Diplomatiques et Politiques*, Vol. 66 (1988), pp. 224–5 (asserting that ''[a] legal right to humanitarian assistance already exists in certain restricted circumstances… [h]owever, extending the right to humanitarian assistance to the situations of greatest need is a difficult task which remains to be achieved'').

4 See, e.g., Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (1948) (hereinafter UDHR), Article 3; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (hereinafter CCPR), Article 6(1); Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (hereinafter CRC), Article 6(1); American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, Article 4(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222 (hereinafter ECHR), Article 2(1); and African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (hereinafter AfCHPR), Article 4.

read to imply certain obligations with regard to international humanitarian assistance.

The human rights treaty bodies[10] consider that states have three levels of obligation with respect to each human right: the duty to respect (i.e. refraining from itself violating them), protect (i.e. protecting rights-holders from violations by third parties) and fulfil (i.e. undertaking affirmative actions to strengthen access to the right). Thus, for example, the UN Human Rights Committee has asserted that it is not a sufficient observance of the right to life for a state to avoid arbitrarily executing its own citizens, or to protect citizens against private violence; it must also take positive steps to reduce mortality, such as measures to ''eliminate malnutrition and epidemics''.[11] This would therefore imply an obligation to allow access to international humanitarian relief when it is required to avoid loss of life.[12]

The Committee on Economic, Cultural and Social Rights (the equivalent of the Human Rights Committee for the International Covenant on Economic, Social and Cultural Rights) has made this more explicit in the context of economic and social rights. For example, in General Comment No. 12, the Committee determined that the right to food includes a core right to be free of hunger, which is violated if hunger exists on a state's territory and it cannot show that it has made ''every effort'' to address it immediately, including by seeking international assistance.[13] Likewise, ''the prevention of access to humanitarian food aid in

5 See UDHR, above note 4, Article 25, International Covenant on Economic Social and Cultural Rights, 16 December 1966, 999 UNTS 3 (hereinafter CESCR), Article 11(1); CRC, above note 4, Articles 24(2)(c) and 27(1). Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 513 (hereinafter CEDAW), Articles 12(2) and 14(2); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, 17 November 1988, O.A.S. Treaty Series No. 69 (1988), repr. in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1, p. 67 (1992) (hereinafter Protocol of San Salvador), Article 12.

6 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 11(1).

7 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 11(1). See also CRC, above note 4, Article 27(3).

8 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 12. See also CRC, above note 4, Article 24(1); AfCHPR above note 4, Article 16(1), Protocol of San Salvador above note 5, Article 10.

9 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 6.

10 The treaty bodies are expert committees created by many of the major human rights treaties with authority to comment on both general and specific issues of state compliance. See generally Office of the High Commissioner for Human Rights, Fact Sheet No. 30: The United Nations Human Rights Treaty System, available at http://www.ohchr.org (last visited 3 July 2007). Among them are the ''Human Rights Committee'', the treaty body for the International Covenant on Civil and Political Rights, and the ''Committee of Economic Social and Cultural Rights'', the treaty body for the International Covenant on Economic, Social and Cultural Rights.

11 See Human Rights Committee General Comment No. 6, The right to life (Article 6), 1982, para. 6, republished in UN Doc. HRI/GEN/1/Rev.6, p.131 (2003).

12 Notably, moreover, the right to life is non-derogable, even in situations of national emergency. See CCPR, above note 4, Article 4(2). It is therefore one of the civil and political rights that is always applicable in situations of disaster and armed conflict.

13 Committee on Social, Economic and Cultural Rights, General Comment No. 12, The right to adequate food, UN Doc. No. E/C.12/1999/5 (1999), paras. 6 and 17.

internal conflicts or other emergency situations'' is a violation of the right to food.[14] Thus, even though economic and social rights such as the rights to food, housing and health are generally considered subject to ''progressive realization'' over time,[15] it would be inappropriate for a state simply to throw up its hands in the face of a crisis when international assistance would be available.[16]

It is therefore arguable that existing human rights instruments imply a right to assistance in situations of crisis and a certain obligation on states to seek international support if their own means are insufficient to address humanitarian needs. However, they provide no specificity as to the means that should be employed for the request and facilitation of international relief or who should provide it.

International humanitarian law

International humanitarian law provides both obligations for armed parties to accept international humanitarian relief when it is needed and some level of detail of the kinds of legal facilities providers should receive. The scope of these duties varies in the text of the Geneva Conventions and their first two Additional Protocols, depending on whether recipients are in occupied territories in an international conflict, in a state party's own territory during an international conflict, or in a state experiencing an internal conflict. However, arguments have been made that customary law is beginning to bridge these differences.

Pursuant to Article 59 of the Fourth Geneva Convention, if ''the whole or part of the population of an occupied territory is inadequately supplied'', an occupying power ''shall agree'' to relief schemes provided by states or ''impartial humanitarian organizations'', conditioned only on the right to search their consignments, regulate their timing and routes and receive assurance that their assistance will only be used for the needy population.[17] Likewise, under Article 62 civilians in occupied territories are guaranteed the right to receive individual assistance ''subject to imperative reasons of security''.

14 Ibid., para. 19.

15 See CESCR, above note 5, Article 2.

16 But compare the more permissive language of paragraph 16.6 of the FAO Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security, reprinted in the Report of the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Rome, September 23, 2004, FAO Doc. No. CL 127/10-Sup.1, annex 2 (providing that states ''should provide food assistance to those in need, may request international assistance if their own resources do not suffice, and should facilitate safe and unimpeded access for international assistance in accordance with international law and universally recognized humanitarian principles, bearing in mind local circumstances, dietary traditions and cultures'').

17 Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (hereinafter Fourth Geneva Convention). As noted below, these requirements apply to all contracting parties, and the last condition refers to guarding against misuse ''by the Occupying Power''. However, it is reasonable to assume, as the ICRC's Commentary on this section does, that the point is to guard against misuse by all belligerents. See Jean S. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958 (hereinafter ICRC GC IV Commentary), pp. 322–3.

In contrast, both Article 70 of the First Additional Protocol (applicable to a state's own territory in interstate conflicts) and Article 18 of the Second Additional Protocol (applicable to internal conflict) state that relief actions "shall be undertaken, subject to the consent" of the parties concerned.[18] The ICRC commentary to these sections and many scholars insist that consent to humanitarian relief may not be arbitrarily withheld without running afoul of the prohibition of using starvation as a method of warfare.[19] Moreover, a comprehensive study of customary international humanitarian law completed by the ICRC in 2005 found sufficient state practice consistent with this position to assert it as a rule of customary law.[20] In addition to practice in the field, the study notes the large number of UN Security Council, General Assembly and Commission on Human Rights resolutions that support the thesis that humanitarian access is not considered optional in any type of armed conflict.[21] However, there is still debate on this point.[22]

The Fourth Geneva Convention also specifically calls for free passage of "medical and hospital stores and objects necessary for religious worship", as well as food and other items if the latter are specifically destined for children, expectant mothers and "maternity cases", subject again to search and to assurances against diversion and misuse. This obligation applies not only in all territory of the parties to an international conflict but also to other states through which the consignments might transit.[23] Moreover, under Article 30, persons in need are guaranteed the right to solicit assistance from international humanitarian actors.[24]

18 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 (hereinafter First Additional Protocol).

19 See Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, 1987 (hereinafter ICRC AP Commentary), pp. 820 and 1479; Michel Bothe, "Relief actions: the position of the recipient state", in *Encyclopaedia of Public International Law*, Vol. 4, Max Planck Institute for Comparative Public Law and International Law, 1982, pp. 92–3; Ruth Stoffels, "Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps", *International Review of the Red Cross*, vol. 86 (September 2004), p. 522; Joakim Dungel, "A right to humanitarian assistance in internal armed conflicts respecting sovereignty, neutrality and legitimacy: practical proposals to practical problems", *Journal of Humanitarian Assistance*, May 2004, s. 2.3.1.1.

20 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross, 2005 (hereinafter ICRC Customary Law Study), pp. 193, 196–7.

21 Ibid., p. 198; see also Stoffels, above note 19, pp. 521–2 and n.16. A representative example is Security Council Resolution 1460, UN Doc. S/RES/1460 (2005) on children in armed conflict, which "underlin[ed] the importance of the full, safe and unhindered access of humanitarian personnel and goods and the delivery of humanitarian assistance to all children affected by armed conflict".

22 See, e.g., David Forsythe, "Human rights and humanitarian operations: theoretical observations", in Eric Belgrad and Nitza Nachmas (eds.), *The Politics of International Humanitarian Aid Operations*, Praeger, 1997, p. 45.

23 See ICRC GC IV Commentary, above note 17, p.181 (explaining that this provision "applies to all such consignments, when they are intended for the civilian population of another contracting party, whether that party is an enemy, allied, associated or neutral State").

24 See Fourth Geneva Convention, Articles 30 and 62. See also Fourth Geneva Convention arts 62 (on individual relief) and 142 (on relief to detain individuals).

Beyond merely granting access, the Fourth Geneva Convention and First Additional Protocol also impose affirmative duties to promote it. Occupying powers must "facilitate [relief schemes] by all means at their disposal".[25] State parties in international conflicts must grant the ICRC, the other components of the International Red Cross and Red Crescent Movement and "to the extent possible" other humanitarian organizations, "all facilities within their power",[26] and "facilitate [their humanitarian work] in every way possible".[27] In other words, as noted by the ICRC Commentary, parties should, as much as possible, "cut[] out red tape".[28] Again, these duties apply not only to the belligerents themselves, but to all states parties, including states of transit.[29]

No similar language on facilitation is applied to internal conflicts in the Second Additional Protocol.[30] Still, the ICRC Commentary to Article 18 argues that its provision that relief actions "shall be undertaken" implies that, "[o]nce relief actions are accepted in principle, the authorities are under an obligation to co-operate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys".[31] Moreover, the ICRC's customary law study concluded that customary law rules have formed in both international and internal conflicts requiring parties to "allow and facilitate rapid and unimpeded passage" of relief, and "ensure freedom of movement of authorized humanitarian relief personnel".[32] Again, the ICRC study was able to rely on a number of resolutions of the UN Security Council in addition to other sources for the notion that "full, safe and unhindered access" is required.[33]

International law on refugees and displaced persons

Armed conflicts and disasters often result in population displacement. Armed conflicts are also frequent backdrops to the kinds of persecution required for refugee protection by the Convention Relating to the Status of Refugees of 1951,[34] and persons fleeing the generalized effects of conflict are recognized as refugees by the Convention Governing the Specific Aspects of Refugee Problems in Africa of

25 See ibid., Article 59.
26 See First Additional Protocol, Article 81(1).
27 See ibid., Article 81(3).
28 See ICRC GC IV Commentary, above note 17, p. 328.
29 See, e.g., Fourth Geneva Convention, Article 23; First Additional Protocol, Articles 70(2), 81(2)–(4); ICRC Customary Law Study, above note 20, pp. 198–9.
30 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609 (hereinafter Second Additional Protocol).
31 See ICRC AP Commentary, above note 19, p. 1480.
32 See ICRC Customary Law Study, above note 20, pp. 193 and 200.
33 See, e.g., UN Security Council Resolution 1261, UN Doc. No. S/RES/1261, para. 11 (1999); see also ICRC Customary Law Study, above note 20, pp. 195–6 and nn.70–3 (citing over two dozen other such resolutions).
34 Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150 (hereinafter 1951 Refugee Convention), Article 1.

1969[35] and the Cartagena Declaration on Refugees of 1984.[36] Persons displaced by disasters are not normally considered refugees under the definitions of any of these instruments, but refugee law may nevertheless be relevant in a disaster setting where refugees happen (*i.e. persons displaced due to persecution or conflict*) to be present.

While not entering into great detail on international relief, global and regional refugee law instruments do call on states to co-operate with the UN High Commissioner for Refugees (UNHCR) in the exercise of its mandate,[37] which includes providing protection and assistance to refugees. Moreover, both the United Nations General Assembly[38] and UNHCR's Executive Committee[39] have made it clear that access to refugees should be guaranteed to both UNHCR and other ''approved'' humanitarian organizations.

Likewise, both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child provide that refugee (and, in the latter case, also internally displaced) children should be provided ''appropriate protection and humanitarian assistance'', and that states should ''co-operate'' with international actors in their efforts to ''protect and assist'' such children.[40]

Persons fleeing both armed conflict and disasters can be considered IDPs pursuant to the most prominent international instrument in this area, the Guiding Principles on Internal Displacement.[41] The Guiding Principles has express provisions on the duty of states to allow humanitarian access to international humanitarian actors for persons displaced by conflicts and disasters (among other causes).[42]

35 Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45 (hereinafter African Refugee Convention'), Article1.

36 Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984–5) (hereinafter Cartagena Declaration'), rev. 1, at 190–3.

37 See Convention Relating to the Status of Refugees, July 28, 1951, Article 8, 189 UNTS 150; Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984–5), rev. 1, pp. 190–3, para. (e).

38 See, e.g., UN General Assembly Resolutions 51/75, UN Doc. A/RES/51/75 (1996), para. 6 (''[e]mphasiz[ing] the importance of ensuring access by the Office of the High Commissioner to asylum-seekers, refugees and other persons of concern in order to enable it to carry out its protection functions''); 47/105, UN Doc. A/RES/47/105 (1992) , para. 20 (calling on states to ''ensure the safe and timely access for humanitarian assistance'').

39 See, e.g., UNHCR Executive Committee Conclusions 79 (XLVII), para. (p) (47th Sess. 1996) (''stress[ing] the importance of UNHCR's being granted access to asylum applicants and refugees in order to enable the Office to carry out its protection functions in an effective manner''); 72 (XLIV), para. (b) (44th Sess. 1993) (calling on states to ''afford UNHCR and, as appropriate, other organizations approved by the Governments concerned prompt unhindered access' to refugees''); 73 (XLIV), para. (b)(iii) (44th Sess. 1993) (calling on states to make ''arrangements facilitating prompt and unhindered access to all asylum-seekers, refugees and returnees for UNHCR and, as appropriate, other organizations approved by the Governments concerned''); 48 (XXXVIII), para. (d) (38th Sess. 1987) (asserting that ''States have a duty to cooperate with the High Commissioner in the performance of his humanitarian protection and assistance functions, which can only be effectively accomplished if he has access to camps and settlements of his concern'').

40 See CRC, above note 4, Article 22; African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. No. CAB/LEG/24.9/49 (1990), Article 23. The CRC limits this obligation somewhat by stating that states should co-operate ''as they consider appropriate'', however, it also refers expressly to both UN and non-governmental actors.

41 See Guiding Principles on Internal Displacement, UN Doc. No. E/CN.4/1998/53/Add.2 (1998).

42 See ibid., at Principles 3 and 25.

Recently, eleven states in the Great Lakes region of Africa adopted a "Protocol on the Protection and Assistance of Internally Displaced Persons", which requires member states to adhere to the Guiding Principles.[43] Discussions are also underway for a development of an African Union Treaty on IDPs.

Other international law applicable to disasters (IDRL)

In addition to the well-known canons of international law described above, there is another category of instruments and norms relevant to disaster assistance, known as IDRL.[44] In contrast to the centralization of international humanitarian law, IDRL is a rather scattered and heterogeneous collection of instruments.[45]

These include multilateral treaties on customs,[46] industrial accidents,[47] nuclear emergencies,[48] health emergencies,[49] civil defence,[50] food aid,[51] sea or air transport,[52] telecommunications,[53] satellite imaging[54] and telecommunications,[55]

43 See Protocol on the Protection and Assistance of Internally Displaced Persons (version of 30 November 2006), available at http://www3.brookings.edu/fp/projects/idp/GreatLakes_IDPprotocol_final.pdf (last visited 3 July 2007, Articles 3(6) and (7) and 4(1)(f)).

44 Many of these instruments define the term "disaster" so broadly as to also include situations of armed conflict, although it is relatively plain from their text and drafting history that non-conflict disasters are at least their primary focus. See, e.g., Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, December 4, 1998, United Nations depositary notification C.N.608.1998.TREATIES-8, available at http://www.ifrc.org/what/disasters/idrl/publication (last visited 3 July 2007) (hereinafter , Tampere Convention), Article 1(6) (defining "disaster" as "a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex long-term processes").

45 See generally Victoria Bannon, "Strengthening disaster response laws, rules and principles: overview of the current system and a new way forward", in C. Raj Kumar and D. K. Srivastava (eds.), *Tsunami and Disaster Management: Law and Governance*, 2006.

46 See International Convention on the Simplification and Harmonization of Customs Procedures, May 18, 1973, T.I.A.S. 6633 (1973), and its 1999 Protocol of Amendment, available at http://www.ifrc.org/what/disasters/idrl/publication.asp (last visited 3 July 2007), annex J.5.

47 See, e.g., Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, 2105 UNTS 460.

48 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, September 26, 1986, 1457 UNTS 134 (hereinafter Nuclear Assistance Convention).

49 See Revised International Health Regulations, 58th World Health Assembly, Doc. No. WHA58.3 (2005), Agenda Item 13.1.

50 See Framework Convention on Civil Defense Assistance, 22 May 2000, available at http://www.ifrc.org/what/disasters/idrl/publication.asp (last visited 3 July 2007).

51 See Food Aid Convention, 13 April 1999, available at http://untreaty.un.org/english/notpubl/notpubl.asp (last visited 3 July 2007).

52 See, e.g., Convention on Facilitation of International Maritime Traffic, April 9, 1965, 591 UNTS 265, annex 1, ss. 5.11–5.12; Annex 9 to the Convention on International Civil Aviation, December 7, 1944, s. 8.8, repr. in *International Civil Aviation Organization, International Standards and Recommended Practices: Facilitation – Annex 9 to the Convention on International Civil Aviation* (12th edn, 2005).

53 See Tampere Convention, above note 44.

54 See, e.g., Charter On Co-operation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters (2000), available at http://www.disasterscharter.org/charter_e.html (last visited 3 July 2007).

55 See Tampere Convention, above note 44.

several regional mutual assistance treaties in the Americas, Asia and Europe,[56] and a great many bilateral treaties and agreements, most of which are between European states.[57]

Many of these treaties are limited either in thematic scope or geographic reach and very few address themselves to any international actors other than states or UN agencies. Thus, in general, the instruments with the widest reach in this field are non-binding resolutions, guidelines and codes, such as UN General Assembly Resolutions 46/182 of 1991 and 57/150 of 2002, the Measures to Expedite Emergency Relief adopted by both the International Conference of the Red Cross and the UN General Assembly in 1977, and the Code of Conduct of the International Red Cross and Red Crescent Movement and Non-governmental Organizations in Disaster Relief.

While it is difficult to generalize across this eclectic collection of instruments, many set out procedures for requesting and accepting international assistance and specific types of legal and administrative facilitation at the national level with regard to the entry and operations of international actors. The emphasis of most of them is on providing assistance to the government of the affected state in its efforts to address a disaster, rather than on the rights and needs of affected persons. There is thus a corresponding emphasis on the primary role of the affected state and the importance of its consent to international assistance, as articulated, for example, by the ASEAN Agreement on Disaster Management and Emergency Response:

> The sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, in the implementation of this Agreement. In this context, each affected Party shall have the primary responsibility to respond to disasters occurring within its territory and external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party.[58]

The situation is thus something of the inverse of the human rights instruments discussed above. These instruments impose no duty on affected states to accept international assistance in the first instance, but once they have

56 See, e.g., Inter-American Convention to Facilitate Assistance in Cases of Disaster, 7 June 1991 (hereinafter Inter-American Convention), available at http://www.oas.org/legal/intro.htm (last visited 3 July 2007) (in force, but with only three state parties and never used); ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005 (not yet in force) (hereinafter ASEAN Agreement), available at http://www.aseansec.org (last visited 3 July 2007); Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters, 15 April 1998, available at http://www.bsec-organization.org/ (last visited 3 July 2007).

57 See Horst Fischer, ''International disaster response law treaties: trends, patters and lacunae'', in Victoria Bannon (ed.), *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges*, International Federation of Red Cross and Red Crescent Societies, 2003, p. 29. The International Federation of Red Cross and Red Crescent Societies has produced an online database of several hundred of these instruments, available at http://www.ifrc.org/idrl (last visited 3 July 2007).

58 See ASEAN Agreement, above note 55, Article 3(1).

consented, they are called upon to accord a specific set of legal facilities to the providers, such as expedited visas and customs clearance and exemptions from taxation among others. Another difference is that many of the instruments have very few state parties or apply only to a certain type of disaster or relief sector.

Summary

International law thus provides that, in certain situations, affected states are obligated to allow for international relief. The rules in this respect are strongest and clearest in situations of international armed conflict as laid out by international humanitarian law. States also have certain obligations to facilitate international relief operations, including through regulatory means. However, particularly outside the context of armed conflict, the applicable rules lack uniformity. Moreover, as discussed below, there is sometimes a lack of precision as to state obligations with regard to some of the most common regulatory issues.

Problems in the initiation and entry of international humanitarian relief

To some extent, the scope and intensity of common domestic regulatory problems for international relief in conflicts and non-conflict disasters mirror the divergences in the applicable international law. However, in the light of the fact that both share most of the same mechanical aspects (e.g. moving personnel, goods, equipment and operations across borders), there are inevitable similarities.

Initiation

In both disasters and armed conflicts, the relevant domestic authorities sometimes refuse to call for or allow international relief. In conflict settings, this is always a serious issue, at least as a matter of principle, and the general provisions of international humanitarian law described above go directly to this point.[59]

In contrast, for many disasters such refusal is not necessarily problematic. The vast majority of disasters are customarily handled entirely by domestic actors,[60] and in some cases where international actors offer to assist their help is

59 See generally, Stoffels and Dungel, above note 19.

60 For example, in 2005 there were 473 reported natural disasters but only 47 appeals reported by the United Nations and 29 by the International Federation of Red Cross and Red Crescent Societies. See EM-DAT Emergencies Disasters Database of the Centre for Research on the Epidemiology of Disasters (CRED), Université Catholique de Louvain, at http://www.em-dat.net/index.htm (last visited 3 July 2007). OCHA Financial Tracking Service, Natural Disasters in 2005, available at http://www.reliefweb.org (last visited 15 June 2007); International Federation of Red Cross and Red Crescent Societies, Statistics, http://www.ifrc.org/where/statisti.asp?navid=05_12 (last visited 3 July 2007).

not really required.[61] In cases of major disaster, outright refusal is relatively rare and the more common problem is delay in the issuance of a formal request for international assistance or in the response to international offers. This is frequently due to weaknesses in national procedures and regulations for needs assessment and decision-making.[62]

A number of existing instruments encourage affected states to speed the process of requesting and accepting offers of assistance from other states in disasters in addition to clarifying processes for offer and request.[63] However, very few of them address the mechanics of initiation of assistance by non-state actors.[64]

Personnel, goods and equipment

Even in the absence of explicit refusals to allow humanitarian relief, problems with visas and particularly internal travel regulations are common in conflict settings, due to heightened government sensibility to the presence of international actors. For example, in Sudan, notwithstanding several formal agreements between the United Nations and the government to streamline procedures regarding relief to Darfur, humanitarian officials have reported that the time, paperwork and expense required to obtain and renew visas as well as internal travel permits have become onerous.[65] In Israel entry visas have reportedly been denied to humanitarian personnel and their contractors of Arab origin or nationalities, posing a particular

61 See, e.g., Henri Astier, ''Can aid do more harm than good?'', *BBC News*, 1 February 2006, available at http://news.bbc.co.uk/2/hi/africa/4185550.stm (last visited 3 July 2007). On the other hand, there are many disasters where international assistance is greatly needed and urgently requested but little help has been forthcoming. See generally, International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2006: Focus on neglected crises*, 2006.

62 See, e.g. International Federation of Red Cross and Red Crescent Societies, *Fiji: Laws, Policies Planning and Practices on International Disaster Response*, 2005, p. 30 (''It was noted that foreign organizations providing disaster assistance in Fiji had experienced delays in obtaining entry permission and visas for relief personnel. The systems were considered to be ad hoc and inconsistent. The length of time taken to request external assistance by the Fiji Government also resulted in delays for sending relief personnel into the country and to the affected area''); Turkish Red Crescent Society, International Disaster Response Law: 1999 Marmara Earthquake Case Study, 2006, p. 38 (hereinafter Turkish Red Crescent Study) (''Turkey did not make any appeals during the acute stage (which should be made through the Ministry of Foreign Affairs with the Decree of the Cabinet) (the appeal was made 2–3 days later). During this period, international relief was unable to be provided'').

63 See, e.g., Framework Convention, above note 49, Article 3(e) (providing that ''[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time''); Oslo Guidelines on the Use of Civil and Military Assets in Disaster Relief (as revised in 2006), para. 38, available at http://www.ifrc.org/idrl (last visited 3 July 2007) (''If international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximize its effectiveness'').

64 One exception is the ASEAN Agreement, above note 55, Article 11.

65 See Lydia Polgreen, ''Red tape imperils humanitarian efforts in Darfur'', *International Herald Tribune*, 27 March 2007; Opheera McDoom, ''UN warns Darfur's aid operation may collapse'', *Reuters*, 17 January 2007. A 2006 ''fact sheet'' on this issue by the Office for the Co-ordination of Humanitarian Affairs (OCHA) found that ''[t]he visas regime for NGOs operating in Sudan is unclear, complicated and lengthy'', noting that the government had required multiple renewals of stay visas at a cost of US$240 per person. OCHA, Fact Sheet on Access Restrictions in Darfur and Other Areas of Sudan (20 April 2006), available at http://ochaonline.un.org/GetBin.asp?DocID=4494 (last visited 3 July 2007).

challenge to operations requiring staff fluent in Arabic.[66] Travel restrictions on humanitarian personnel are also imposed by insurgent groups, sometimes with a level of formality similar to governmental procedures.[67]

Likewise, in some disaster settings initial entry visas for international relief personnel are refused or substantially delayed. More often, however, disaster personnel are initially allowed to enter freely on tourist or other temporary visas, and problems only arise some time later with regard to renewing those documents and/or obtaining work permits. In both Indonesia and Thailand, for example, international relief personnel responding to the 2004 tsunami were required to exit and re-enter the country repeatedly in the midst of their operations in order to renew visas, at substantial loss of time and expense.[68]

Restrictions, delays and charges related to the importation of relief goods and equipment are another major impediment in disaster and conflict operations. For example, after the 2004 tsunami, customs clearance for relief consignments in both Sri Lanka and Indonesia was delayed for months, while food and medications perished.[69] One non-governmental organization (NGO) responding in Sri Lanka was required to pay $1 million in customs duties on the vehicles it imported for its operations.[70] In Eritrea, hundreds of tonnes of UN food aid for drought-affected persons were delayed for over a month in 2005 due to government demands for taxes,[71] and after the 1999 earthquake in Turkey a legal storage deadline was exceeded for some relief consignments awaiting customs clearance, and as a result they were nationalized rather than cleared for distribution.[72]

The story is similar in conflict settings. For example, during the war in the Balkans in the 1990s there were reports of significant customs delays on humanitarian relief in Yugoslavia[73] and in neighbouring countries hosting refugees.[74] In 2002, 8,500 metric tonnes of World Food Programme (WFP) emergency aid was blocked in Angolan ports over a dispute as to payment of customs and processing charges. Two years later the same dispute arose again,

66 See Mission Report of Catherine Bertini, Personal Humanitarian Envoy of the Secretary-General, 11–19 August 2002, para. 76, available at http://www.reliefweb.int/library/documents/2002/un-opt-19aug.pdf (last visited 3 July 2007).

67 During the north–south war in Sudan, the Sudan People's Liberation Army developed a formal system of travel permits which could be applied for at a "consular" office in Nairobi.

68 See International Federation of Red Cross and Red Crescent Societies, Legal Issues in the International Response to the Tsunami in Thailand, 2006, available at http://www.ifrc.org/idrl (last visited 3 July 2007) (hereinafter IFRC Thailand Report), pp. 15–16; International Federation of Red Cross and Red Crescent Societies, Legal Issues in the International Response to the Tsunami in Indonesia (publication pending) (hereinafter IFRC Indonesia Report), p. 15.

69 See International Federation of Red Cross and Red Crescent Societies, Legal issues in the international response to the tsunami in Sri Lanka, 2006 (hereinafter IFRC Sri Lanka Report), p. 17; IFRC Indonesia Report, above note 67, pp. 21–22.

70 See IFRC Sri Lanka Report, above note 68, p. 24.

71 See "Food aid held for taxes to be released, says gov't official", *IRIN* (16 August 2005).

72 See Turkish Red Crescent Study, above note 61, p. 34.

73 See Refugees International, "Kosovo: Shortfalls and difficulties in food aid delivery", 9 December 1998.

74 See Médecins sans Frontières press release, "Doctors without borders calls for immediate and unconditional access to Kosovar refugees in no man's land on Macedonian border", April 5 1999.

blocking food aid for three months.[75] In Sudan the United Nations has reported months-long delays in the clearance of food, telecommunications equipment and other items for use in Darfur.[76]

It should be recognized that some of the difficulties in entry are traceable to the rising number of international relief providers. Recent years have seen more governments, UN agencies, Red Cross and Red Crescent Societies, private entities and individuals becoming involved in international relief operations.[77] The numbers of international NGOs has risen most dramatically.[78] This has heightened risks of competitiveness among providers as well as of poor quality of work, as discussed below. These factors plainly complicate the task of affected states in facilitating speedy entry, as it is difficult for them to know whom to trust.

Existing international law addresses these issues at differing levels of precision. The Fourth Geneva Convention calls for the ''free passage''[79] and ''rapid distribution''[80] of relief consignments, which should also be ''exempt … from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory''.[81] The First Additional Protocol expands these requirements to the ''rapid and unimpeded passage of all relief consignments, equipment and personnel''.[82] As noted above, the ICRC customary law study found this same rule to be applicable as a matter of customary law to all types of armed conflict.[83]

Most of the treaties and soft-law instruments on disaster assistance make specific reference to facilitating the speedy entry of relief goods and personnel (mainly for assisting states).[84] Moreover, many of them call for the waiver of customs duties on relief items. Intergovernmental organizations are additionally entitled to such facilities as elements of their privileges and immunities.[85] There are several customs instruments that are applicable to all providers of relief and that call on member states to take a number of steps to speed customs clearance and

75 See ''Angolan food aid ''sits untouched'','' *BBC News*, 4 March 2004; ''Angola: government bureaucracy delays WFP food aid'', *IRIN*, 4 March 2004.

76 Report of the Secretary-General to the Security Council on the Sudan, UN Doc. S/2006/728 (2006), para 28.

77 See Arjun Katoch, ''The responders' cauldron: the uniqueness of international disaster response'', *Journal of International Affairs*, Vol. 59 (Spring/Summer 2006), pp. 157–8 (2006); John Telford and John Cosgrave, *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report*, Tsunami Evaluation Coalition, 2006 (hereinafter TEC Synthesis Report), pp. 55–60.

78 See Feinstein International Famine Center, ''Ambiguity and change: humanitarian NGOs prepare for the future'', 2004, pp. 70–1.

79 See Fourth Geneva Convention, Articles 23 and 59.

80 Ibid., Article 61.

81 Ibid., Article 61. The ICRC Commentary, argues for a restrictive reading of the limitation clause concerning the ''interests of the economy'', asserting that ''belligerents should endeavour to regard it as absolutely exceptional, since to grant absolute exemption from all charges is really the only way of acting in the true spirit of relief actions and, in the great majority of cases, is in the real interests of the countries to which relief is sent''. ICRC GC IV Commentary, above note 17, p. 327.

82 First Additional Protocol, Article 70(2).

83 See note 32 above.

84 See Fischer, above note 56, p. 36.

85 See, e.g., Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15.

recommend that restrictions and duties be lifted in disaster situations.[86] However, their coverage is either geographically or thematically limited.[87]

Relief operations

In order for humanitarian relief providers to carry out effective operations, more than mere permission to be present is required. There are many regulatory issues affecting these operations, only a few of which are summarized here.

Providing security

As noted above, security for relief personnel and/or their beneficiaries is one of the chief obstacles to humanitarian access in conflict settings, and this is equally true in mixed situations of conflict and disaster.[88] Security can be a domestic regulatory issue not only with regard to permission to enter affected areas, but also when authorities require armed escorts against the wishes of humanitarian actors seeking to ensure the acceptance of their neutrality. Issues also arise when on the contrary, interpose obstacles to providing requested security support. In Indonesia, for example, the army reportedly imposed military escorts on some humanitarian actors immediately after the 2004 tsunami.[89] Likewise, in Myanmar, among the numerous restrictions on humanitarian organizations are requirements that all their in-country travel be approved by several ministries and accompanied by a government official.[90] Conversely, in Uganda the government has required humanitarian actors requesting armed escort for humanitarian relief convoys to internally displaced persons camps to pay substantial fees, which some NGOs are unable to afford.[91]

86 See Revised Convention on the Harmonization and Simplification of Customs Procedures, 26 June 1999 (hereinafter Kyoto Convention), Specific Annex J.5; Convention on Temporary Admission, 26 June 1990, Annex B.9; Recommendation of the Customs Co-operation Council to expedite the forwarding of relief consignments in the event of disasters, Doc. No. T2–423 (1970) (hereinafter CCC Recommendation), all available at http://www.ifrc.org/what/disasters/idrl/publication.asp (last visited 3 July 2007).

87 For example, Specific J.5 of the Kyoto Convention currently has only seven parties, and annex B.9 of the Istanbul Convention refers only to equipment intended for re-exportation after use in disaster relief.

88 For example, in Somalia severe floods and droughts have coincided with renewed outbreaks of conflict over the last several years. See International Committee of the Red Cross, *Annual Report 2006*, May 2007, p. 128. In the ongoing environment of lawlessness, banditry and piracy have greatly hampered efforts to bring food and other relief to affected persons. See, e.g., World Food Programme press release, "New pirate attack on aid ship: WFP urges high-level international action against Somali piracy", 21 May 2007; "Food shortages worsen as piracy slows aid delivery", *IRIN*, 6 December 2005.

89 See Jim Gomez, "Indonesia requires aid escorts", *Deseret News*, 13 January 2005; Human Rights Watch, "Open letter to President Susilo Bambang Yudhoyono", 6 January 2005.

90 See International Crisis Group, "Myanmar: new threats to humanitarian aid", 8 December 2006, p. 9.

91 See Office for the Co-ordination of Humanitarian Affairs, "UN system response to the IDP situation in Uganda and recommendations for enhanced support to the national and local authorities, a mission report of the Internal Displacement Unit", August 2003, p. 3; Internal Displacement Monitoring Centre, "NGOs that access some of the camps without escort place themselves at considerable risk", August 2003, available at www.internal-displacement.org (last visited 3 July 2007).

In "pure" disaster relief settings, security is nowhere near as pressing a concern. However, it is also not entirely absent, as international relief goods and personnel are frequently targeted by criminals as sources of wealth. Thus, for example, after Tropical Storm Stan in Guatemala, relief workers reported armed assaults on trucks delivering food assistance.[92] A 2003 survey of relief and development workers in thirty-nine countries found that even among those working in overall environments of little or no violence, over 15 per cent reported obstacles to their operational access to beneficiaries due to concerns about small arms.[93]

In situations of international armed conflict, the Fourth Geneva Convention and First Additional Protocol require parties to "guarantee the[] protection" of relief consignments,[94] and "protect[] and respect[]" humanitarian personnel.[95] These rules have reportedly attained the status of customary law in both international and internal armed conflicts.[96] The Convention on the Safety of United Nations and Associated Personnel of 1994 (hereinafter UN Safety Convention) likewise requires parties to ensure the safety of personnel, prevent crimes against them and criminalize attacks against them in international peace and security missions; however, it is limited to personnel of the United Nations and NGOs acting under agreement with the UN.[97]

The Optional Protocol to the UN Safety Convention[98] broadened the reach of these protections to "emergency humanitarian assistance" missions more generally,[99] although parties are allowed to "opt out" of applying the convention to particular natural disaster operations.[100] However, it is not yet in force and currently has only ten parties.[101] A number of other treaties concerned with

92 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues from the International Response to Tropical Storm Stan in Guatemala*, 2007, p. 35.

93 Ryan Beasley et al., *In the Line of Fire: Surveying the Perceptions of Humanitarian and Development Personnel of the Impacts of Small Arms and Light Weapons*, Centre for Humanitarian Dialogue and Small Arms Survey, 2003, p. 52.

94 Fourth Geneva Convention, Article 59.

95 First Additional Protocol, Article 71.

96 See ICRC Customary Law Study, above note 20, pp. 105–11.

97 See Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Articles 7, 9 and 11, 2051 UNTS 363. Likewise, under the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Articles 8(2)(b)(iii) and 8(2)(e)(iii), attacks on humanitarian personnel and material are considered war crimes in both international and internal armed conflict. While state parties are not required by the treaty to criminalize these acts in their national law, many of them have done so in order to be able to comply with the rendition requirements.

98 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, November 8, 2005, UN Doc. No. A/C.6/60/L.11 (2005).

99 It also includes "peace building" missions. Ibid., Article 2(3).

100 Ibid.

101 As of the date of writing, the parties were Austria, Botswana, Kenya, Liechtenstein, Monaco, Netherlands, Norway, Slovakia, Spain and Sweden. Pursuant to Article 6, the Protocol can enter into force after it has received twenty-two ratifications.

disaster relief, at the global,[102] regional[103] and bilateral level[104] also impose obligations on affected states to protect relief personnel, goods and equipment; however, with a few notable exceptions[105] they apply only to the personnel of foreign governments or UN agencies.

There is less direct language in existing instruments concerning the right of humanitarian actors to refuse unwanted armed escorts. However, the concept of neutrality is plainly integrated into international humanitarian law, and states have often emphasized the importance of respecting it. For example, UN General Assembly Resolution 46/182 of 1991 states that "[h]umanitarian assistance must be provided in accordance with the principles of humanity, impartiality and neutrality".[106] Moreover, a mandatory escort requirement could easily be characterized as an impediment to the freedom of movement of humanitarian personnel, discussed above.

The international humanitarian community has adopted a number of its own guidelines in this area for conflict situations, uniformly calling for the most restricted and careful acceptance of armed escorts, and only as a last resort.[107] One of these, the 2003 Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies, also "encourages" "Member States and regional organizations engaged in relief or military operations in complex emergencies … to use the principles and procedures provided herein".[108]

102 See Nuclear Assistance Convention, above note 47, Article 3(b); Framework Convention, above note 49, Article 4(a)(5); Tampere Convention, above note 44, Article 5(3).

103 See, e.g., Inter-American Convention, above note 55, Article 4(c); ASEAN Agreement, above note 55, Article 12(2); see also Council of the European Communities Resolution, "Improving mutual aid between Member States in the event of a natural or technological disaster", OJ C 198, 27 July 1991, at 1, para. 4.

104 See, e.g., Abkommen zwischen der Republik Österreich und dem Fürstentum Liechtenstein über die Gegenseitige Hilfeleistung bei Katastrophen oder Schweren Unglücksfällen, 23 September 1994, Bundesgesetzblatt Nr. 758, 1995, at 254; Acuerdo entre el Gobierno del Reino de España y el Gobierno de la Federación de Rusia sobre Cooperación en el Ámbito de la Prevención de Catástrofes y Asistencia Mutua en la Mitigación de sus Consecuencias, 14 June 2000, Article 9(c), Boletín Oficial del Estado 153/2001, p. 22942.

105 See, e.g., Tampere Convention, above note 44; ASEAN Agreement, above note 55.

106 UN Doc. A/RES/46/182 (1991), annex, para. 2. The ICRC's arguments in this regard would be particularly supported by the recognition of its special status in the Geneva Conventions. See, e.g., Fourth Geneva Convention Article 142 (calling on parties to "respect" the "special position of the International Committee of the Red Cross in this field").

107 See, e.g., Inter-Agency Standing Committee, Use of Military or Armed Escorts for Humanitarian Convoys, 2001; Council of Delegates of the Red Cross and Red Crescent, Resolution 7, Guidance Document on Relations of Components of the Movement with Military Bodies, 2005.

108 Inter-Agency Standing Committee, Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies, 2003, para. 18. A set of guidelines for civil–military relations, known as the "Oslo Guidelines" has also been developed by states and humanitarian actors for disaster situations. See Guidelines on the Use of Military and Civil Defense Assets in Disaster Relief, as updated in 2004. However, the Oslo Guidelines are intended for regulating the direct use of international militaries in relief operations and do not address the issue of armed escorts. Ibid., para. 43.

Recognition of domestic legal status

The recognition of a domestic legal status is another common problem for foreign relief providers in both conflict and disaster settings, particularly for NGOs and foreign Red Cross or Red Crescent societies. All states require some type of registration process for ''legal persons'' before granting them legal personality. In emergency settings, these processes are frequently too slow or difficult for international actors to negotiate. For example, after the 2004 tsunami in Thailand, foreign NGOs were mystified by domestic registration processes and were unsuccessful in finding information from governmental sources even months after the disaster struck.[109] Similarly, in 1998, it was reported that many humanitarian agencies in Kosovo had given up on seeking domestic registration because of the complexity and delays.[110]

This lack of formal legal status can have a variety of consequences. Unregistered organizations are particularly vulnerable to sudden expulsion by authorities for non-programmatic reasons. Fear of such expulsion can lead relief providers to restrict their programming and advocacy on behalf of affected persons.[111] Unregistered organizations also sometimes have difficulty opening bank accounts,[112] operating radio communication systems,[113] hiring staff, entering into leases, purchasing vehicles and obtaining visas for their workers, and, as discussed further below, obtaining tax exemptions.[114]

To avoid such problems UN agencies and other international organizations can call upon the laws on privileges and immunities (such as the Convention on Privileges and Immunities of the United Nations of 1946[115] and the Convention on Privileges and Immunities of the Specialized Agencies of 1947[116]), which require member states to recognize their legal personality. Other relief providers, including states, the international components of the Red Cross and Red Crescent movement, and some of the large NGOs, have addressed this issue through bilateral agreements. However, where there are no such agreements in advance of an emergency, there is little guidance on this issue at the international level beyond the general obligations to facilitate aid discussed above.

109 See International Federation of Red Cross and Red Crescent Societies, Legal Issues in the International Response to the Tsunami in Thailand (2006) (hereinafter IFRC Thailand Report), at pp. 13–14.
110 See Refugees International, above note 72.
111 See IFRC Thailand Report, above note 108, at 14; Human Rights Watch press release, ''Sudan: continuing blockade of humanitarian aid'', 4 April 2006.
112 See IFRC Thailand Report, above note 108, at 19.
113 See Refugees International, above note 72.
114 See International Federation of Red Cross and Red Crescent Societies, Report of the European Forum on International Disaster Response Laws, Rules and Principles, Antalya, Turkey, 25–6 May 2006, p. 4.
115 Convention on the Privileges and Immunities of the United Nations, above note 84.
116 Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, 33 UNTS 261.

Medical qualifications

Another type of registration problem is related to medical services. Doctors and other medical professionals are commonly required to be domestically licensed or to have their foreign licences formally recognized by domestic authorities before they can legally practice medicine. Again, the procedures for obtaining such recognition are generally lengthy, complex and therefore functionally unavailable to medical relief personnel in emergency response situations. In Thailand, for example, recognition of foreign medical qualifications normally takes two years, and requires applicants, among other things, to pass a Thai language exam.[117]

Yet, medical professionals frequently intercede in both disaster and conflict situations and are mainly tolerated by domestic authorities. This occurred, for example, in Thailand after the 2004 tsunami, when thirty-two foreign medical teams intervened[118] and in the United States after Hurricane Katrina, when a Canadian urban search and rescue team was allowed to provide medical services in New Orleans.[119] However, tolerance has its limits. For example, in Nepal a prominent international medical NGO responding during the armed conflict between the government and the Maoist insurgents was required to cease operations because of the lack of recognized licences of its staff.[120] Foreign medical personnel are also left in a precarious position for liability for civil penalties.[121] Moreover, the absence of some interim method of monitoring foreign medical interventions exposes disaster-affected persons to the dangers of incompetent or inappropriate treatment. For instance, after the 2004 tsunami, teams of Scientologists responded in Sri Lanka, Indonesia and India to perform their modern version of faith healing on affected persons.[122]

The Geneva Conventions and First Additional Protocol, as well as some of the older humanitarian law conventions, have a number of specific provisions concerning the access, protection and respect for medical personnel. However, these provisions refer only to medical personnel acting under the specific direction of a party to the conflict and to certain other domestic medical actors, including recognized national Red Cross and Red Crescent societies.[123] On the other hand, Article 71 of the First Additional Protocol pertains to international relief personnel

117 See IFRC Thailand Report, above note 108, p. 16.
118 Ibid.
119 See Anne Richard, ''Role reversal: offers of help from other countries in response to Hurricane Katrina'', Center for Transatlantic Relations, 2006, p. 20.
120 See International Federation of Red Cross and Red Crescent Societies, *IDRL Asia-Pacific Study–Nepal Laws, Policies Planning and Practices on International Disaster Response*, 2005, p. 28.
121 See Richard, above note 118, p. 20.
122 See, e.g., Peter Goodman, ''For tsunami survivors, a touch of Scientology'', *Washington Post*, 28 January 2005; International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2005: Focus on information in disasters*, 2005, p. 93.
123 See, e.g., First Geneva Convention, Articles 24–26; Fourth Geneva Convention, Articles 17, 56; First Additional Protocol, Articles 8(c) (specifically defining the term ''medical personnel'' in these terms) and 15; ICRC Customary Law Study, above note 20, pp. 81–3 (concerning the definition of medical personnel), and Vol. II, pp. 453–6 (compiling citations to the Geneva Conventions of 1864, 1906 and 1929).

in general and requires parties receiving relief to admit them ''where necessary'', respect and protect them, and assist them in carrying out their missions. It further provides that ''[o]nly in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted''. The ICRC Commentary to this section notes that ''[p]articipation of medical or paramedical personnel is not explicitly mentioned, but it is not excluded, and it should certainly be viewed in a favourable light. Often experts in hygiene and nutrition, nurses, or even doctors, can provide useful – if not essential – additional aid depending on the relief facilities and personnel locally available''.[124] Inasmuch as a licensing requirement cannot be considered an ''imperative military necessity'', Article 71 would arguably forbid its use to block the activities of medical relief personnel.

Beyond this provision, however, this remains another area with little specific international guidance. For example, existing treaties on the recognition of foreign qualifications refer only obliquely to medical qualifications and have no provisions concerning emergencies.[125]

Taxation

There are similar gaps with regard to taxation of international humanitarian relief beyond the domain of customs duties. Value added taxes (VAT) are frequently imposed on relief providers in disaster settings (particularly, but not exclusively, on unregistered humanitarian organizations) and can sometimes amount to large sums, especially when relief goods and services are purchased locally rather than imported from abroad, an important means for supporting a recovering economy.[126]

Fees and taxes are also imposed on humanitarian relief in conflict settings, sometimes at exorbitant rates and with dubious legality, even under domestic law.[127] ''Taxes'' by insurgent groups are common both on relief providers and their beneficiaries.[128] Thus a 1999 survey of NGOs by the Union of International Associations found that delays and payment demands at militarized checkpoints

124 See ICRC AP Commentary, above note 19, p. 833.

125 See, e.g., Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States, 5 December 1981; Council of Europe/UNESCO Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11 April 1997, both available at http://www.unesco.org (last visited 3 July 2007).

126 See, e.g., Tom Wright, ''Tax snarls relief for Aceh'', *Wall Street Journal*, 19 January 2007.

127 See, e.g., Transparency International, ''Mapping the Risks of Corruption in Humanitarian Action'' (July 2006), pp. 22–3; ''Aid blocked as the Taliban demand ''tax''", *Daily Telegraph*, 12 October 2001.

128 During the war between the north and south of Sudan, the Sudan People's Liberation Army reportedly imposed a tax called ''tayeen'' on the beneficiaries of humanitarian aid to support its soldiers. See Human Rights Watch, *Famine in Sudan: The Human Rights Causes* (1998); Humanitarian Policy Group, ''The Agreement on Ground Rules in South Sudan'', Study 3 in *The Politics of Principle: The Principles of Humanitarian Action in Practice*, March 2000, p. 55.

(both ''public'' and ''private'') were among the most common obstacles to humanitarian access.[129]

For international organizations such as the United Nations, exemption from most taxation is included among their privileges and immunities, as discussed above.[130] For their part, most of the Geneva Conventions' provisions relevant to taxation seem primarily to be aimed at customs duties and other importation-related fees.[131] However, both the Fourth Geneva Convention and the First Additional Protocol provide that parties ''shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended'' except in ''urgent necessity'' in the interest of the concerned population.[132]

Several multilateral and a number of bilateral treaties[133] related to disaster response also address taxation beyond customs duties. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides that ''[t]he requesting State shall afford to personnel of the assisting party or personnel acting on its behalf exemption from taxation, duties or other charges, except those which are normally incorporated in the price of goods or paid for services rendered''[134] and the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations provides that relief organizations and personnel are to be provided ''exemption from taxation, duties or other charges, except for those which are normally incorporated in the price of goods or services, in respect of the performance of their assistance functions or on the equipment, materials and other property brought into or purchased in the territory of the request State Party for the purpose of providing telecommunication assistance''.[135] However, there is no general rule on this question in existing disaster law across all types of disasters and relief providers.

Regulation of co-ordination and quality

Co-ordination and quality are among the most cited problem areas in international disaster relief operations and are of concern in conflict situations

129 See Mario Bettati, ''Protection for non-governmental organizations on hazardous duties: reports of the results of a UIA survey'', *Transnational Associations/Associations transnationales*, Vol. 3 (1999), pp. 118–32.

130 See, e.g., Convention on the Privileges and Immunities of the United Nations, above note 84, s. 7.

131 As noted above, Article 61 of the Fourth Geneva Convention calls for ''all taxes, charges and duties'' to be waived for relief, but the use of the term ''consignments'', and the context of the clause would seem to indicate that relief being brought in from outside the affected country is primarily intended. Similarly, Article 23 of the Fourth Geneva Convention and Article 71 of the First Additional Protocol calls for the free passage of relief ''consignments''.

132 See, e.g., Fourth Geneva Convention, Article 60, and First Additional Protocol, Article 70(3).

133 See, e.g., Agreement between the Government of the United States of America and the Government of the Republic of Belarus Regarding Cooperation to Facilitate the Provision of Assistance, June 18, 1996, Article 1, available at http://www.ifrc.org/idrl (last visited 3 July 2007).

134 Nuclear Assistance Convention, above note 47, Article 8.

135 Tampere Convention, above note 44, Article 5.

as well. These issues are linked with the growth in the size and diversity of the international relief community.

For example, in 1996 a joint evaluation by donors and humanitarian organizations of emergency assistance provided in Rwanda in 1994–5 noted that at least 7 UN agencies, 8 militaries, several components of the Red Cross/Red Crescent Movement, 250 NGOs and 20 donor organizations intervened significant co-ordination problems.[136] While the report did not give a clear grade for all of these actors, it noted that, while most NGOs performed impressively, ''a number performed in an unprofessional and irresponsible manner that resulted not only in duplication and wasted resources but may also have contributed to an unnecessary loss of life''.[137] More recently, an even larger joint evaluation of the international response to the 2004 tsunami noted with alarm the proliferation of international actors, the resulting competition and duplication of efforts, and the enormous quantities of unwanted and inappropriate assistance sent to affected countries, including expired foods and medicines, used clothing and many other items which were a positive burden on local relief actors.[138]

In disaster settings it is expected that affected states will play a leading role with regard to international relief. As stated by UN General Assembly Resolution 46/182, ''the affected State has the primary role in the initiation, organization, co-ordination, and implementation of humanitarian assistance within its territory''. However, in some instances, affected states have adopted an ''open door'' and ''hands-off'' approach to international relief items and providers, which has allowed for uneven and unco-ordinated international efforts. For instance, after the 2003 earthquake in Bam, Iran, few government controls were exercised over the entry of the extremely large number of international NGOs that intervened, some of which imported poor quality goods, were unable to carry out promised activities and even required food and shelter themselves from the Iranian Red Crescent Society.[139]

In conflict settings the expectations are different. International humanitarian law recognizes and seeks to counterbalance the strong temptation of armed parties, in the tense atmosphere of an armed conflict, to exercise excessive control over humanitarian assistance. As noted above, parties may condition access on several restricted factors related to their own security and safeguards against military appropriation of relief. Ensuring an optimal co-ordination and high quality of humanitarian relief is not among these factors. Article 71 of the First Additional Protocol also notes that particular relief personnel ''shall be subject to the approval of the Party in whose territory they will carry out their duties'' and are prohibited from ''exceed[ing] the terms of their mission under this Protocol'', but no additional personal qualifications are specified. Both the

136 Overseas Development Institute, Joint Evaluation of Emergency Assistance to Rwanda: Study III – Principal Findings and Recommendations, June 1996, pp, 18–21.

137 Ibid., p. 23.

138 See TEC Synthesis Report, above note 76, pp. 52–7.

139 See International Federation of Red Cross and Red Crescent Societies, *Operations Review of the Red Cross Red Crescent Movement Response to the Earthquake in Bam, Iran*, 2004, p. 34.

Fourth Geneva Convention and First Additional Protocol provide non-exhaustive lists of potential types of relief items,[140] and assert that, in general, relief actions must be of an "exclusively humanitarian and impartial nature and … conducted without any adverse distinction",[141] but do not otherwise prescribe the quality of relief. While these provisions would likely not be interpreted to prohibit states from some very limited quality control (e.g. ensuring that imported medicines are not expired and thus dangerous to the public), they would be incompatible with any comprehensive efforts in this area.

In both disaster and conflict settings, the main international instruments relevant to the co-ordination and quality of assistance are non-binding guidelines.[142] These include UN General Assembly Resolutions 46/182 of 1991 and 57/150 of 2002, the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,[143] the Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response,[144] the International Search and Rescue Advisory Group (INSARAG) Guidelines[145] and the Principles and Practice of Good Humanitarian Donorship of 2003.[146] These guidelines are mainly aimed at international relief actors themselves, rather than affected states.

Mixed situations of conflict and disaster

The same heightened tensions that lead to particularly difficult regulatory problems in armed conflict tend to expand barriers in situations where natural disasters overlap with an armed conflict or a situation of high military tension. For example, in Sri Lanka, whereas access for relief providers was relatively open in the immediate aftermath of the 2004 tsunami,[147] ongoing assistance programmes have undergone much greater restrictions since the renewed outbreak of fighting with the Liberation Tigers of Tamil Eelam (LTTE).[148]

140 See, e.g., Fourth Geneva Convention, Article 23; First Additional Protocol, Article 69.
141 See Second Additional Protocol, Article 18(2); see also the similar language in First Additional Protocol, Article 70(1).
142 One exception is the Food Aid Convention of 1999, which places a number of binding obligations on food donating states as to the quality of both the food they provide and the way in which food aid programmes are carried out.
143 Available in the IDRL Database at http://www.ifrc.org/idrl (last visited 3 July 2007).
144 *Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response*, 2004 edn, available at http://www.sphereproject.org/ (last visited 3 July 2007).
145 The Guidelines are available at http://www.reliefweb.int (last visited 3 July 2007).
146 See Meeting Conclusions, International Meeting on Good Humanitarian Donorship, Stockholm 16–17 June 2003, available at http://www.reliefweb.int/ghd (last visited 3 July 2007).
147 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues in the International Response to the Tsunami in Sri Lanka*, 2006.
148 See Anuj Chopra, "Aid workers in Sri Lanka face escalating risk and red tape", *Christian Science Monitor*, 27 September 2006.

Admittedly, there are also counter-examples. For instance, after the October 2005 earthquake struck Pakistan, an historic agreement was reached between Pakistan and India to allow a limited flow of relief and movement of civilians across their heavily militarized border.[149] Even more dramatically, after the 2004 tsunami struck Aceh, Indonesia, a near total ban on humanitarian access was significantly relaxed.[150] Still, even in these cases, the effects of heightened conflict-related tension were plain. In Pakistan there were significant delays, angry protests and tight controls on the border crossing points that were ''opened''.[151] In the early days of the Aceh operation, humanitarian actors' travel and activities were tightly controlled by the military, notwithstanding a unilateral ceasefire by the Free Aceh Movement (GAM).[152]

In any event, it is fairly clear that these mixed situations are governed by international humanitarian law. This is because the trigger for the rules related to allowing and facilitating access to humanitarian relief in the setting of an armed conflict is the need of the civilian population due to a lack of ''necessary supplies''.[153] No particular cause for this need is singled out in the operative texts.[154] Thus an interpretation of the ordinary meaning of these texts[155] would lead to the conclusion that the fact that the need for relief might be attributable to natural forces rather than ongoing fighting does not change the parties' obligations concerning relief in a conflict setting. Similarly, Article 55 of the Fourth Geneva Convention concerning the occupying power's own duty to provide food and other needed supplies makes no reference to any particular cause for their need, and Article 56 of the Fourth Geneva Convention obliges occupying powers to ensure and maintain hospitals and medical services, including ''prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics'' without reference to any war-related causes

149 See Pakistan, ''India agrees to open disputed Kashmir border'', *International Herald Tribune*, 30 October 2005.

150 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues in the International Response to the Tsunami in Indonesia* (publication pending) (hereinafter IFRC Indonesia Report), pp. 7–8.

151 See, e.g., Zeeshan Haider, ''India delays border crossing as disease spreads'', Reuters, 10 November 2005; Nilofar Suhrawardy, ''Angry survivors slam delay in opening Kashmir border'', *Arab News*, 26 October 2005.

152 See IFRC Indonesia Report, above note 149, pp. 7–8; International Crisis Group, *Aceh: A New Chance for Peace*, Asia Briefing No. 40, 15 August 2005, p. 4.

153 See Fourth Geneva Convention Article 59; First Additional Protocol, Article70; Second Additional Protocol, Article 18; see also ICRC Customary Law Study, above note 20, p. 193. An examination of the *travaux préparatoires* for the above-cited provisions indicates that the issue of the causation of humanitarian need was not raised in negotiating the texts.

154 Note that Article 13 of the Geneva Convention states that the articles in Part II of that Convention are meant to ''alleviate the sufferings caused by war''. However, of the relief-related provisions in the Fourth Geneva Convention discussed here, only Article 23 falls within Part II, and that provision (in contrast to Article 59) does not refer to any condition precedent concerning a lack of supplies. Moreover, obstacles to obtaining relief from the effects of a disaster would very arguably qualify as ''suffering caused by war'' if they were imposed largely due to the dynamics of the armed conflict.

155 See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311, Article 31 (providing that ''a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'').

for such diseases.[156] There is a pattern here of primary concern for the underlying need of civilians, which is quite consistent with the overall object and purpose of these treaties.[157]

This plain-meaning reading also makes good sense as a matter of operability, inasmuch as it would often be very difficult to pinpoint when armed conflict could be said to be the proximate cause of a lack of supplies. For example, famine due to crop failure might be attributable in equal parts to drought and conflict-related insecurity interfering with work in the fields. Moreover, the temptations for armed parties to obstruct aid to civilians would not differ substantially according to the source of their distress; the same fears about potential advantage for the enemy would still be present.

Conclusion

Regulatory barriers often present themselves in the same form in disaster and conflict settings. Moreover, in both contexts they can amount to substantial obstacles to providing effective and speedy relief to people who need it the most.

International humanitarian law imposes rather strict and detailed rules on the access of humanitarian relief in international armed conflicts. There can be little doubt concerning domestic authorities' obligations concerning the initiation of relief, entry of personnel, customs clearance and duties, security and taxation of relief. Where there is no specific language, such as with regard to the registration of foreign relief organizations or certification of foreign medical personnel, the strong general duty to facilitate relief dictates that appropriate accommodation must be found.

There is not as much clarity on these questions in the context of internal armed conflict, in the light of the very sparse provisions of the Second Additional Protocol. However, it has been argued, both as a matter of interpretation of that text and an analysis of the development of customary law, that a similar overall duty to facilitate the access of international relief applies.

In contrast, other than a general duty that may be derived from human rights norms to ensure that the needs of affected persons are met (and some specific rules for access to refugees), the applicable international law for relief in

156 It is telling that the ICRC's background information to the 1947 Commission of Government Experts studying an early draft of the Geneva Conventions noted that wartime epidemics could arise for a variety of reasons. See Documentation Préliminaire Fournie par le Comité International de la Croix-Rouge, Commission d'Experts Gouvernementaux pour l'étude des Conventions protégeant les victimes de la guerre, Genève, du 14 au 26 avril 1947, p. 25 (''Au cours de la guerre de nombreux pays occupés ont souffert cruellement de la famine ou de la sous-alimentation. Des épidémies terribles ont ravagé des territoires entiers et cela en raison du manque de médicaments et d'hygiène, des conditions défavorables de vie, de la misère, du froid'').

157 As noted in the ICRC commentary to Article 55 of the Fourth Geneva Convention (concerning an occupying power's duty to provide food and supplies to civilians), the article ''represents a happy return to the traditional idea of the law of war, according to which belligerents sought to destroy the power of the enemy State, and not individuals''. ICRC GC IV Commentary , above note 17, pp. 309–10.

disasters is fragmented. While there are a number of useful provisions in the various IDRL treaties, their reach is frequently limited by a lack of ratification or an orientation towards a single sector (e.g. telecommunications) or type of disaster (e.g. nuclear accidents). The most important soft law instruments, such as UN General Assembly Resolution 46/182, tend to provide only very general guidance with regard to the regulatory problems described above.

There are also important differences in the operating environments. The extremely high tensions surrounding relief operations in conflict settings (and in mixed situations of conflict and disaster) have long been recognized, in particular in the light of the incentives for armed parties to weaken civilian populations perceived as potentially supportive of (or instrumental for) their enemies. Accordingly, regulatory barriers in conflict settings are often seen as deliberate attempts to impede or manipulate relief. In this context, any impediment to the access of international relief must be viewed with substantial suspicion.

On the other hand, in disaster settings, consent for international relief is usually forthcoming when it is needed, and the overall atmosphere between international and domestic actors is much more likely to be one of mutual support. While regulatory barriers are occasionally deliberate, more often they are the inadvertent effects of otherwise neutral domestic laws and regulations. In this context, one might expect that negotiation between the relevant parties would suffice to resolve most problems. However, with the increasing size of the international disaster relief community, there is a rising recognition that such an ad hoc approach is not providing satisfactory solutions. Certainly, this has been one of the major lessons from the 2004 tsunami,[158] and states as diverse as the United States[159] and Pakistan[160] have recently acknowledged that the lack of national legislation on these subjects hindered their capacity to address international relief.

What is the way forward? For conflict settings there is additional work to be done in dissemination, education and advocacy on the provisions of international humanitarian law relevant to domestic regulatory barriers. NGOs, in particular, should make themselves more aware of the provisions of the Geneva Conventions and customary law that could be helpful to them in negotiating access to persons in need, given that they cannot claim the same privileges and

158 See TEC Synthesis Report, above note 76, p. 115; see also United Nations Secretary-General's Special Envoy for Tsunami Recovery, William J. Clinton, Lessons Learned from Tsunami Recovery: Key Propositions for Building Back Better, 2006, p. 8 (''Preparedness is not just about relief response, but also requires predetermined ways of working together with a range of stakeholders in rebuilding houses and schools, restoring income streams, training workers to participate in reconstruction, and activating procedures to allow materiel to clear ports and customs quickly… The development of legal frameworks at the national and international levels to facilitate preparedness and response is fundamental'').

159 United States General Accountability Office, Hurricane Katrina: Comprehensive Policies and Procedures are Needed to Ensure Appropriate Use and Accountability for International Assistance, Doc. No. GAO-06-460 (2006).

160 See the remarks of Major-General Farooq Ahmed Khan, Chairman, Prime Minister's Inspection Commission in International Federation of Red Cross and Red Crescent Societies, Report of the Asia-Pacific IDRL Forum, December 12–14, 2006, Kuala Lumpur, Malaysia, p. 4.

immunities as international organizations. While the rules in internal armed conflict could be clearer, it is unlikely that putting the question to states to renegotiate would have any more expansive result today that it did in 1977 with Article 18 of the Second Additional Protocol.

With regard to issues of quality and co-ordination, states in conflict are generally not in a position to act as effective and impartial guarantors. As described above, this is due in part to their pre-existing duties to facilitate relief under international humanitarian law (which do not contemplate conditions on access beyond minimal controls) and in part to their interested position as parties to a conflict. The international community should therefore redouble its own efforts in this regard, including through dissemination and use of the RC/RC NGO Code of Conduct and the Sphere standards.

In contrast, disaster-affected states are neither legally constrained nor so potentially biased that they cannot play a constructive role in implementing international norms on the quality of international relief.[161] In fact, a few have started to do so.[162] Dissemination, education and advocacy about these norms, as well as existing international law pertinent to regulatory barriers, can thus also be of great use in the disaster setting. However, in the light of the dispersion of the relevant instruments, some means to bring together the relevant norms would be helpful. In the past, efforts have been made to achieve this through a comprehensive treaty on disaster relief, but they have not been successful and the political obstacles to such a path remain formidable.[163]

With this in mind, the International Federation of Red Cross and Red Crescent Societies is currently consulting with states and humanitarian stakeholders to develop a set of non-binding ''Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance'' with a focus on the content of domestic law for disasters only. The guidelines would compile currently dispersed international norms pertinent to the common regulatory problems, in order to provide a resource to states in developing their own laws before disasters strike. They would recommend that states (i) lower potential bureaucratic obstacles to international relief providers when their help is accepted, (ii) conditioned on minimal guarantees of quality, co-ordination and complementarity with domestic efforts, (iii) with due regard to the independence, neutrality and impartiality of humanitarian actors. While there is

161 The Sphere standards expressly ''invite other humanitarian actors, including states themselves, to adopt these standards as accepted norms''. See Sphere Project, above note 143, p. 19.

162 See, e.g., IFRC Sri Lanka Report, above note 68, pp. 32–3 (noting that Sri Lanka adopted Sphere standards for reconstruction after the tsunami).

163 See David Fidler, ''Disaster relief and governance after the Indian Ocean tsunami: what role for international law?'', *Melbourne Journal of International Law*, Vol. 6 (May 2005), p. 458. It should be noted, however, that the International Law Commission has decided to take this issue into its programme of work and it is possible that this could lead to further development at the global level. See Report of the International Law Commission, 58th Sess. (1 May–9 June and 3 July–11 August 2006), UN Doc. No. A/61/10 (2006), p. 464. See also International Law Commission Daily Bulletin, 59th Session, United Nations Office at Geneva, 1 June 2007 (noting that ''The Commission decided to appoint Mr Valencia Ospina as Special Rapporteur for the topic ''Protection of persons in the event of disasters''').

the potential for some tension between these goals, they should not be irreconcilable in the disaster context, and success in this area would go a long way to reconciling the legitimate needs of both sides in the interest of affected persons.

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Lessons for human rights and humanitarian law in the war on terror: comparing *Hamdan* and the Israeli *Targeted Killings* case

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Abstract

The article examines and compares two recent judgments which provide some of the most valuable examples of the difficulties surrounding the application of international humanitarian law to the phenomenon of terrorism: the Hamdan *judgment of the Supreme Court of the United States, and the* Targeted Killings *judgment of the Supreme Court of Israel. Both judgments deal with the thresholds of applicability of the law of armed conflict, as well as with the concept of unlawful combatancy and the relationship between human rights law and humanitarian law. Both judgments are at times inconsistent and lacking in analysis, with the* Hamdan *judgment in particular misinterpreting the relevant international authorities, including the Commentaries on the Geneva Conventions. Despite these flaws, or because of them, both of these judgments remain instructive. The purpose of this article is to present the lessons for the future that these two decisions might bring to ongoing debates on the impact of global terrorism on the law of armed conflict.*

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Many arguments have been made, both good and bad, regarding the impact on international humanitarian law of the "global war on terror" waged by the present US administration. Yet there always comes a time for these many different arguments to be tested, and at that in a court of law. In that regard, the past year has seen two very important judgments whose rulings can help us to assess the impact of global terrorism on humanitarian law.

First, in June 2006 the Supreme Court of the United States delivered its decision in *Hamdan* v. *Rumsfeld*.[1] Hamdan, a self-confessed one-time driver and bodyguard of Osama bin Laden, is now in custody at the US detention camp at Guantánamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (who then governed Afghanistan), Hamdan was captured by militia forces and turned over to the US military, and was later transported to Guantánamo Bay. Over a year later, the US president deemed him eligible for trial by military commission for then unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy to commit offences triable by military commission.[2] Hamdan then proceeded to challenge before a US federal court the validity of the military commissions set out to try him. After winning before the district court[3] and losing before the DC Circuit Court of Appeals,[4] Hamdan's case finally came before the Supreme Court of the United States.

The Court held that the military commissions as set up by the president violate common Article 3 of the four Geneva Conventions of 1949,[5] to which the United States is a party and whose requirements are incorporated into US statutes, since these commissions do not provide to those accused before them the minimal judicial guarantees recognized as indispensable by civilized peoples. A plurality of the Court also held that conspiracy, with which Hamdan could have been lawfully charged, is not an offence against the law of war.

Then, in December 2006, the Israeli Supreme Court rendered its long-awaited decision in the *Targeted Killings* case, in an opinion by its outgoing president, Judge Aharon Barak.[6] In this case the petitioners, two human rights NGOs, challenged the Israeli Army's use of the policy of targeted killings or assassinations – that is, limited military operations with the purpose of killing a specific person, usually a suspected terrorist.[7] The petitioners claimed that targeted

1 *Hamdan* v. *Rumsfeld*, US Supreme Court, 548 U.S. ___ (2006); 126 S. Ct. 2749; 2006 U.S. LEXIS 5185 (hereinafter *Hamdan*). All citations in this article will be to the slip opinion of the Court, available at http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf (last visited 29 January 2007).

2 *Hamdan*, above note 1, Opinion of the Court, at p. 1.

3 344 F. Supp. 2d 152 (DC 2004).

4 415 F. 3d 33 (2005).

5 *Hamdan*, above note 1, Opinion of the Court, at pp. 49–72.

6 *The Public Committee against Torture in Israel et al* v. *The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2006, HCJ 769/02, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM (last visited 29 January 2007) (hereinafter *Targeted Killings*).

7 The Israeli armed forces have resorted to targeted killings on several occasions, most notably in the 2004 assassinations of Hamas leaders Ahmed Yassin and Abdul Aziz Rantisi. Targeted killings have also been employed by the United States in the "war on terror", which launched a missile attack in

killings are always, without exception, a violation of human rights and humanitarian law. The assassinations have also drawn widespread condemnation in the international community, being labelled as "contrary to international law" by the UN Secretary-General Kofi Annan,[8] as "unlawful killings" by the UK Foreign Secretary Jack Straw[9] and as "summary execution[s] that violate human rights" by the late Anna Lindh, then the Foreign Minister of Sweden.[10]

The Israeli Supreme Court disagreed with the absolute position forwarded by the petitioners, finding that targeted killings may indeed be lawful under certain restrictive conditions, which it then proceeded to define, drawing heavily, as we shall see, on human rights law.[11]

These cases from two countries which are among the most concerned with international terrorism today are certainly instructive. Even more so is the comparison between the reasoning of the two high courts. This article will engage in precisely this type of analysis, dealing, in turn, with three specific issues: the thresholds of applicability of international humanitarian law, the concept of unlawful combatancy and the relationship between human rights law and humanitarian law.

Hamdan: an armed conflict with al Qaeda?

As is well known, the US administration has been arguing since 2001 that it is engaged in a "global war on terror", in which the rules of the law of armed conflict apply, and in which the usual, criminal-law enforcement model of dealing with terrorism plays a much more subdued role. This legal qualification of the ongoing fight against international terrorism as a war or an armed conflict has been vigorously resisted by many legal scholars, especially outside the United States. The International Committee of the Red Cross (ICRC) has, among others, remarked that the "war on terror" is legally no more a war than the "war on

Yemen in 2002 on the organizer of the terrorist bombing of the USS *Cole*, and which recently unsuccessfully attempted in Somalia to kill the mastermind of the 1996 bombings of the US embassies in Kenya and Tanzania. See http://edition.cnn.com/2007/WORLD/africa/01/11/somalia.ap/index.html (last visited 29 January 2007).

8 See transcript of remarks of 22 March 2004 at http://www.un.org/apps/sg/offthecuff.asp?nid=564 (last visited 29 January 2007).

9 Matthew Tempest, "UK condemns "unlawful" Yassin killing", *Guardian*, 22 March 2004, available at http://politics.guardian.co.uk/foreignaffairs/story/0,11538,1175312,00.html (last visited 29 January 2007).

10 Brian Whitaker and Oliver Burkeman, "Killing probes the frontiers of robotics and legality," *Guardian*, 6 November 2002, available at http://www.guardian.co.uk/usa/story/0,12271,834311,00.html (last visited 29 January 2007).

11 For a general overview of the Israeli policy of targeted assassinations, as well as for an exceptionally prescient analysis of the relevant legal questions, see David Kretzmer, "Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?", EJIL, Vol. 16 (2005), p. 171; Orna Ben-Naftali and Keren R. Michaeli, ""We must not make a scarecrow of the law": a legal analysis of the Israeli policy of targeted killings", *Cornell International Law Journal*, Vol. 36 (2003), p. 233.

drugs''.[12] One of the reasons for this rejection of the US position was that, historically, war was always considered only to be a conflict between two or more states, not between a state and a non-state actor.[13] It was also a subjective notion, since not even all interstate conflicts *de facto* were considered to be wars *de jure*.[14]

According to the ICRC and numerous authors, the ''global war on terror'' must be split into its components, such as the ongoing armed conflicts in Iraq and Afghanistan, and only to these specific armed conflicts, and not to the whole, can the laws of armed conflict apply.[15] That armed conflict, and not war, is now the threshold of applicability of humanitarian law, has also been recognized by the US administration, which argued in its legal memoranda[16] and its submissions to the Supreme Court[17] that the United States is engaged in an international armed conflict with the al Qaeda terrorist organization. Since international armed conflicts are defined by Common Article 2 of the four Geneva Conventions only as conflicts between states, the administration resorted to a rather innovative argument, claiming that there are some international armed conflicts which are beyond the material scope of the Geneva Conventions, and which are not regulated by it:

> Petitioner suggests that, if the Geneva Convention does not apply to al Qaeda, the law of war does not apply either. That suggestion is baseless. There is no field pre-emption under the Geneva Convention. The Convention seeks to *regulate* the conduct of warfare to which it applies with respect to nation-states that have entered the Convention and agreed to abide by its terms, but it does not purport to apply to every armed conflict that might arise or to crowd out the common law of war. Instead, as explained below, the Convention applies only to those conflicts identified in Articles 2 and 3. If an armed conflict, therefore, does not fall within the Convention, the Convention simply does not regulate it. Nothing in the Convention prohibits a belligerent

12 See Gabor Rona, ''Official statement on behalf of the ICRC'', 16 March 2004, available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XCMNJ (last visited 12 May 2007): ''There is no more logic to automatic application of the laws of armed conflict to the ''war on terror'' than there is to the ''war on drugs'', ''war on poverty'' or ''war on cancer''. Thus, blanket criticism of the law of armed conflict for its failure to cover terrorism, per se, is akin to assailing the specialized law of corporations for its failure to address all business disputes.''

13 For example, Oppenheim defines war as ''a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases''. Lassa Oppenheim, *International Law* (Hersch Lauterpacht ed., 7th ed., 1952) Vol. II, p. 202.

14 See generally Christopher Greenwood, ''The concept of war in modern international law'', ICLQ, Vol. 36 (1987), p. 283; for the opposite view see Yoram Dinstein, *War, Aggression and Self-Defence*, 4th edn, Cambridge University Press, Cambridge, 2005, pp. 14–15.

15 See, e.g., the Official Statement by ICRC President Kellenberger, 14 September 2004, available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/66EMA9 (last visited 12 May 2007).

16 Memorandum for the Vice President, signed by President Bush on February 7, 2002. Summaries and texts of all relevant memoranda are available at http://lawofwar.org/Torture_Memos_analysis.htm (last visited 12 May 2007).

17 See *Hamdan* v. *Rumsfeld*, Government Brief on the Merits, available at http://www.hamdanvrumsfeld.com/HamdanSGmeritsbrief.pdf (last visited 12 May 2007), at pp. 23–6.

> party from applying the law of war to a conflict to which the Convention does not apply.[18]

The government cites only one authority for this rather remarkable proposition that there are, under customary law, other types of armed conflict than those regulated by the Geneva Conventions: Article 142(3) of the Third Geneva Convention, which contains the Martens Clause. It must be noted that it certainly takes some audacity to cite the Martens Clause, of all things, which embodies the humanitarian spirit of the laws of armed conflict, as support for the thesis that there are armed conflicts which are governed by the law of war but are not regulated by it, and all for the purpose of torturing suspected terrorists for information. It is certainly true that the Martens Clause is frequently invoked when there is no state practice or *opinio juris* to support the existence of a customary rule, but this has always been done for humanitarian purposes. Here we have the first example of the Martens Clause being cited by a government for purposes which are everything but humanitarian.

The US Supreme Court dealt with the government's position that the "war on terror" is an international armed conflict by saying that it

> need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by … detention."[19]

Yet, unfortunately, the Supreme Court does not specify how and why Common Article 3 applies. Does it apply as a matter of customary law, regardless of the legal qualification of the armed conflict between the United States and al Qaeda? This conclusion, which is certainly correct as a matter of law, is suspect because the Court does not once mention the word "custom." Or does it apply as treaty law even if the conflict is regarded as an international one, a reading which would clearly be contrary to the text of Common Article 3? Or is the Court saying that Common Article 3 applies because the conflict between the United States and al Qaeda is legally a non-international armed conflict, and if so, which one? Is the United States fighting al Qaeda in Afghanistan, as an ally of the Afghan government, or is this non-international armed conflict with al Qaeda somehow global in scope?[20]

18 Ibid., p. 26.
19 *Hamdan*, above note 1, Opinion of the Court, p. 67 (citations omitted).
20 This is basically the position taken in Derek Jinks, "September 11 and the law of war", *Yale Journal of International Law*, Vol. 28 (2003), p. 20.

It is impossible to know exactly which of these readings of *Hamdan* was the one that the Court had intended. It is even possible that this ambiguity, which is the judgment's greatest weakness, was actually quite intentional on the Court's part. The reading adopted as a matter of course by many commentators is that the Court has ruled that the United States' ''war'' with al Qaeda is a global non-international armed conflict.[21] Indeed, this reading has seemingly also been adopted by the US Department of Defence in its memorandum regarding the implementation of *Hamdan*,[22] and most recently by John Bellinger, the Legal Adviser in the Department of State.[23] This is in fact the textually most plausible interpretation of *Hamdan*, as is indicated, for example, by the Court's discussion of Common Article 3, which

> affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory ''Power'' who are involved in a conflict ''in the territory of'' a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ''not of an international character'' bears its literal meaning. Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ''conflict not of an international character,'' i.e., a civil war, the commentaries also make clear ''that the scope of the Article must be as wide as possible.'' In fact, limiting language that would have rendered Common Article 3 applicable ''especially [to] cases of civil war, colonial conflicts, or wars of religion,'' was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.[24]

Clearly, this passage would be pointless if the Court was not distinguishing between Common Article 2 and Common Article 3 conflicts precisely in order to rule that there is indeed a Common Article 3, non-international armed conflict

21 See, e.g., the discussion by Marty Lederman at the Georgetown Law Faculty Blog, ''Top ten myths about *Hamdan*, Geneva, and interrogations'', 5 July 2006, available at http://gulcfac.typepad.com/georgetown_university_law/2006/07/top_ten_myths_a_1.html (last visited 12 May 2007); George P. Fletcher, ''The *Hamdan* case and conspiracy as a war crime'', *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 442, 444; Harold Hongju Koh, ''Setting the world right'', *Yale Law Journal*, Vol. 115 (2006), p. 2350, at pp. 2365–6.

22 Memorandum on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, signed on 7 July 2006 by the Deputy Secretary of Defense, Gordon England, available at http://balkin.blogspot.com/CA3.DOD.memo.pdf (last visited 12 May 2007), which states that ''[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law *to the conflict with Al Qaeda*'' (emphasis added).

23 ''[T]he Administration reads the *Hamdan* decision to accept that the US is in an armed conflict – and therefore that the laws of war are appropriate to apply – but that the armed conflict is not of an international character''. Discussion at the *Opinio Juris* weblog, ''Armed conflict with al Qaida: a response'', 16 January 2007, available at http://www.opiniojuris.org/posts/1169001063.shtml (last visited 12 May 2007).

24 *Hamdan*, above note 1, Opinion of the Court, p. 68 (citations and quotations omitted).

between the United States and al Qaeda. Yet this conclusion is contradicted by the Court's discussion in footnote 61 of its opinion, where it says that "the question whether [Hamdan's] potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved".[25] This statement would make sense *only* if Hamdan was still possibly a combatant in an international armed conflict, as prisoner-of-war status exists only in such conflicts.

The judgment is therefore quite remarkable in its conceptual confusion. The Court could simply have said that Common Article 3 applies in all armed conflicts as a matter of customary law and therefore have been able to avoid the difficult question of qualifying the legal nature of any conflict with al Qaeda. This still remains a possible reading of the judgment,[26] however unlikely, as the Court instead seems to have applied Common Article 3 as treaty law to a non-international armed conflict. As that appears to be the case, it is even more remarkable how little support the Court actually invokes for such an ahistorical position. Non-international armed conflicts have always been regarded not just as conflicts between a state and a non-state actor, but as conflicts which are by their scope internal, occurring within a single state, as mandated by the text of Common Article 3 itself.[27]

The Court, on the other hand, has apparently adopted the view that only the former element matters, and has done so in a way which misinterprets the relevant international authorities. So, for example, the Court cites the Pictet Commentary on the 1949 Geneva Conventions[28] for the point that references to civil war were omitted from the text of Common Article 3, and for the proposition that "the scope of the Article must be as wide as possible".[29] Both of these points are indeed correct, but neither of them have the implications that the Court assigns to them.

References to "civil war" were omitted from the text of Common Article 3 not because the drafters had any misgivings about the internal nature of these conflicts, but because the term "civil war" denotes an internal conflict of particularly grave intensity, such as the American Civil War or the Spanish Civil War, while the drafters wanted Common Article 3 to apply to all situations of internal armed conflict which surpass the level of mere disturbances.[30] "Civil war"

25 Ibid., note 61.

26 This option seems to be entertained by John Cerone, "Status of detainees in non-international armed conflict, and their protection in the course of criminal proceedings: the case of *Hamdan* v. *Rumsfeld*" , *ASIL Insight*, 14 July 2006, available at http://www.asil.org/insights/2006/insights060714.html, at Part II (last visited 12 May 2007).

27 Which speaks of a "conflict not of an international character *occurring in the territory of one of the High Contracting Parties*" (emphasis added). See also Lindsay Moir, *The Law of Internal Armed Conflict*, 2002, pp. 1–2.

28 Jean Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols., ICRC, Geneva, 1952–9 (hereinafter ICRC Commentary). The full text of the Commentary is available at www.icrc.org (last visited 12 May 2007).

29 *Hamdan*, above note 1, Opinion of the Court, p. 68, quotation provided in full above, at note 24.

30 See, e.g., David A. Elder, "The historical background of Common Article 3 of the Geneva Conventions of 1949", *Case Western Reserve Journal of International Law*, Vol. 11 (1979), p. 37, at pp. 53, 68–9.

would today denote the much stricter conditions of application of Additional Protocol II, with parties to the conflict controlling distinct portions of territory and carrying out sustained and concerted military operations. Moreover, the Commentary does say that the scope of application of Common Article 3 should be as wide as possible, but it is clearly referring to the many situations in which states have refused to acknowledge that the internal strife they are experiencing has reached the level of non-international armed conflict and engaged the protections of Common Article 3,[31] as, for example, France did in respect of the Algerian conflict[32] and the United Kingdom did in respect of the conflict in Northern Ireland, or as Russia continues to do in respect of the conflict in Chechnya.[33] This wide scope of application of Common Article 3 has nothing to do with whether the conflict is or is not internal in scope. In reality, on the exact same page that the Court cites, the Commentary explicitly says that ''[s]peaking generally, it must be recognized that the conflicts referred to in [Common] Article 3 are armed conflicts, with ''armed forces'' on either side engaged in ''hostilities'' – conflicts, in short, which are in many respects similar to an international war, *but take place within the confines of a single country*.''[34]

At one point the Court even mis-cites and misquotes the Commentary on the Additional Protocols,[35] quoting it as saying that ''a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other, and citing it to page 1351 of the Commentary.[36] In fact, the quoted text is located not on the cited page, but on page 1319, and the sentence quoted is not given in full, as the Commentary continues to say that ''the parties to the conflict are not sovereign States, *but the government of a single State in conflict with one or more armed factions within its territory*''.[37] The full quote is therefore contrary to the argument that non-international armed conflict can somehow be transnational, and not internal, as are all other ICRC authorities. The citation error in question fully reproduces the exact same error in citation in an *amicus* brief submitted to the Court in *Hamdan*,[38] which indicates beyond any doubt not only that the Court cited the

31 See, e.g., Yves Sandoz, ''International humanitarian law in the twenty-first century'', *Yearbook of International Humanitarian Law*, Vol. 6 (2003), pp. 3, 13–15; Robert Kolb, *Ius in bello: Le droit international des conflits armés*, 2003, p. 83.

32 See, e.g, Eldon van Cleef Greenberg, ''Law and the conduct of the Algerian Revolution'', *Harvard Journal of International Law*, Vol. 11 (1970), p. 37, esp. pp. 47–52.

33 See William Abresch, ''A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya'', EJIL, Vol. 16 (2005), p. 741, at p. 754, n. 44.

34 ICRC Commentary on GC III, above note 28, p. 36 (emphasis added).

35 Yves Sandoz et al., eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987.

36 *Hamdan*, above note 1, Opinion of the Court, p. 68.

37 *Commentary on the Additional Protocols*, above note 35, p. 1319, para. 4339, also available at http://www.icrc.org/ihl.nsf/COM/475-750999?OpenDocument.

38 *Hamdan* v. *Rumsfeld*, Brief of Professors Ryan Goodman, Derek Jinks, and Anne-Marie Slaughter as Amicus Curiae Supporting Reversal (Geneva – Applicability), available at http://hamdanvrumsfeld.com/GoodmanJinksSlaughter-FINALHamdamAmicusBrief-Jan52006.pdf (last visited 12 May 2007), at p. 19.

commentaries for propositions that they do not support, but that it did so without even bothering to look at them itself.

Now, it is true that international law does recognize certain anomalous types of non-international armed conflicts, particularly those of the ''internationalized'' variety.[39] It is quite possible to argue *de lege ferenda* that new forms of armed conflict should evolve under customary law, or that international law should adapt in some other way in order to describe better the new realities of the modern world under threat of transnational terrorism.[40] There certainly are difficulties in applying the traditional binary paradigm of international and internal armed conflicts in situations which involve, for example, armed groups which operate simultaneously in two or more states, with hostilities transcending porous state borders. The 2006 Israeli–Hezbollah conflict is but one instance in which the legal qualification of the conflict is problematic. Consequently, there are some indications that the ICRC has, at least in its internal practice, dispensed with the geographical limitation of non-international armed conflict built into Common Article 3, although no official statement or public memorandum exists in that regard.[41]

It is, however, disingenuous to argue that the laws of armed conflict have somehow always recognized that non-international armed conflicts are not synonymous with internal conflicts, and can somehow be transnational in scope, when the opposite is true. This is particularly so when all the Supreme Court in *Hamdan* needed to do in order to avoid these issues was to apply Common Article 3 as customary law applicable in all kinds of armed conflicts, as did the International Court of Justice (ICJ) in the *Nicaragua* case,[42] regardless of the precise legal qualification of the conflict during which Hamdan was captured.

Targeted Killings: an abnormal occupation

The petitioners in *Hamdan* did not argue that the ''global war on terror'' is not an armed conflict at all, since they actually wanted Common Article 3 to apply in order to provide some minimum humanitarian protection, such as the prohibition on torture and basic fair trial rights. The petitioners in the Israeli *Targeted Killings* case, however, did directly challenge the government's position that Israel is engaged in an armed conflict with Palestinian terrorist groups, as the direct basis

39 See generally Kolb, above note 31, pp. 85–93; Eric David, *Principes de droit des conflits armés*, 3rd edn, 2002, pp. 137–85; Dietrich Schindler, ''The different types of armed conflicts according to the Geneva Conventions and Protocols'', *Recueil des cours*, Vol. 163 (1979-II), p. 124; Hans-Peter Gasser, ''Internationalized non-international armed conflicts: case studies of Afghanistan, Kampuchea, and Lebanon'', *American University Law Review*, Vol. 33 (1983), p. 145.

40 See, e.g, Roy S. Schöndorf, ''Extra-state armed conflicts: is there a need for a new legal regime'', *New York University Journal of International Law and Politics*, Vol. 37 (2005), p. 1.

41 See Jelena Pejic, ''Terrorist acts and groups: a role for international law?'' *British Year Book of International Law*, Vol. 75 (2004), p. 71, at p. 86, n. 74.

42 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, paras. 218, 219 (hereinafter *Nicaragua*).

for the targeted killings policy was the qualification of the alleged terrorists as combatants in this conflict, and therefore as legitimate targets.

The Israeli Supreme Court disagreed with the petitioners, saying that "[t]he general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada*."[43] The conclusion that an armed conflict is occurring is not by itself controversial, bearing in mind the intensity of the violence and its protracted character.[44] Yet even more interesting is the qualification that the Court gave to the conflict:

> The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its centre stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:
>
> An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict (A. CASSESE, INTERNATIONAL LAW 420 (2nd ed. 2005), hereinafter CASSESE).
>
> This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *ius in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law.[45]

There are two fundamental problems with the Court's reasoning.

First, it asserts that a continuous state of armed conflict has existed between Israel and the various terrorist organisations since the first *intifada*. Does this mean that an armed conflict existed even after the signing of the Oslo Accords in 1993, which ended the first *intifada*, and before the beginning of the second

43 *Targeted Killings*, above note 6, para. 16.

44 *Per* the well-known definition of armed conflict in the *Tadić* case: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". ICTY, *Prosecutor* v. *Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.

45 *Targeted Killings*, above note 6, para. 18.

intifada in September 2000? If so, why? There were some sporadic terrorist attacks during that period, but they could hardly amount to protracted armed violence. The UN Inquiry Commission has expressed doubts even as to the protracted nature of the violence during the second *intifada*, though it (rightly) acknowledged the possibility of a non-international armed conflict taking place.[46] It just seems inconceivable, however, to classify the relatively peaceful inter-*intifada* period as a non-international armed conflict.

This brings us to the second problematic point – the Court finds that the armed conflict in the occupied territories is international in character. At first glance that does not seem to be a troublesome proposition, as international armed conflicts and belligerent occupation go hand in hand. Unfortunately, the issue is rather more complex.

Naturally, a condition of international armed conflict is indispensable for the imposition of a belligerent occupation on a foreign territory.[47] Indeed, Yoram Dinstein has argued that belligerent occupation can exist only insofar as the conflict in which it has been created continues to exist.[48] Such a position has direct bearing on Israel's occupation of the West Bank and Gaza, as Israel has concluded peace treaties with both Jordan and Egypt, thereby ending beyond any doubt the international armed conflicts during which these territories were occupied. The majority view, however, is that Israel continues to be the belligerent occupier of the Palestinian territories, and that it is additionally bound by the Fourth Geneva Convention in its administration of these territories.[49] Both of these questions have now been authoritatively settled by the ICJ in its *Wall* Advisory Opinion.[50]

What makes Israel's occupation of the Palestinian territories so abnormal, though, is not just that the armed conflict in which the occupation was effected has ended, but also that the occupation has lasted for so much time, now approaching 40 years, and that there is no displaced sovereign whose interests are to be considered, since both Jordan and Egypt have renounced any claims to the territories in favour of the Palestinian people's right to self-determination.[51] Both

46 UN Commission on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission, UN Doc. E/CN.4/2001/121, paras. 39–40, available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2260 (last visited 12 May 2007).

47 It is axiomatic that a state can never occupy its own territory as a belligerent. See, e.g., Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 2nd edn, 2000, p. 257.

48 Yoram Dinstein, "The international law of belligerent occupation and human rights", *Israel Year Book of Human Rights*, Vol. 8 (1978), p. 105. Professor Dinstein apparently still holds this view – see Dinstein, above note 14, p. 169: "Belligerent occupation posits the existence of the enemy as a State and the continuation of the war."

49 The Israeli government has not disputed that it is the belligerent occupier of the Palestinian territories, but it has disputed the applicability of the Fourth Geneva Convention. See, e.g., Dinstein, above note 14, pp. 106–8. See more Eyal Benvenisti, *The International Law of Occupation*, 2nd edn, Princeton University Press, Princeton, 2004, pp. 109–12.

50 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, paras. 90–101 (hereinafter *Wall*).

51 See Benvenisti, above note 49, p. 112.

of these abnormalities have, of course, been noted in the literature.[52] Their relevance to the matter before us is simply in the fact that international law never needed to provide an answer as to what happens when protracted violence and armed hostilities emerge in an occupied territory which are not directly related to the initial armed conflict during which the territory was occupied.[53]

The original armed conflict can be distinguished from any subsequent, new armed conflicts occurring in an occupied territory. The two Palestinian *intifadas* are not legally a part of the international armed conflict in which the Palestinian territories were occupied, namely the 1967 Six Day War, which is now long over. It therefore does not seem at all obvious that the Israeli–Palestinian conflict should be regarded as an international, rather than as a non-international one, just because it is taking place, at least in part, in a territory which is under belligerent occupation. This is especially so since, as already stated, only states have traditionally been regarded as possible parties to an international armed conflict,[54] and Palestine is not a state. What is even more remarkable is that the Court seems to be defining international armed conflict as ''one that crosses the borders of the state'',[55] when the single defining characteristic of international armed conflicts has not been their cross-border, but their interstate, nature.

Furthermore, the Israeli Supreme Court has never before qualified this conflict as one which is international in character. In many of its previous cases, most of them cited in the *Targeted Killings* judgment, it has applied the law of belligerent occupation and other rules of humanitarian law, but it has never said whether it considers the ongoing Palestinian–Israeli conflict to be international or non-international.[56] Indeed, the Court's *dicta* had actually led some commentators to believe that the Court had characterized the ongoing conflict as a non-international one.[57]

The Court does not invoke any of the exceptions recognized under positive law which allow for the ''internationalisation'' of the conflict – that is, the application of the law of international armed conflicts to an internal conflict. It is not saying, for instance, that the Palestinians are under the overall control of a third state, or that belligerency has been recognized. Nor is the Court saying, quite understandably, that the Palestinians are engaged in a fight of national liberation against the Israeli occupiers, even if one were to consider the rule in Article 1(4) of Protocol I to be reflective of customary law.

The Court's position therefore appears to be that whenever an armed conflict occurs within an occupied territory that conflict must be classified as

52 See, e.g., Adam Roberts, ''Prolonged military occupation: the Israeli-occupied territories since 1967'', AJIL, Vol. 84 (1990), p. 44; Benvenisti, above note 49, pp. 144–8.

53 Such a scenario is, for example, not at all contemplated in the ICRC Commentary to the Conventions. ICRC Commentary, above note 28, pp. 18–25.

54 See, e.g, Green, above note 47, pp. 54–5.

55 *Targeted Killings*, above note 6, para. 18, quoted in full at note 45.

56 See, e.g, *Mara'abe* v. *The Prime Minister of Israel*, Supreme Court of Israel, HCJ 7957/04, available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm (last visited 12 May 2007).

57 See David Kretzmer, ''The Advisory Opinion: the light treatment of international humanitarian law'', AJIL, Vol. 99 (2005), p. 88, at p. 95, note 56.

international. The road it took to this position is, however, methodologically a very dubious one. Furthermore, the only authority that the Court cites for this proposition is that of Professor Cassese, who in his textbook on international law does say that "[a]n armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict."[58] One can only marvel at how positively clever the Court was in citing the authority of Professor Cassese, not only because of his indisputable eminence as a legal scholar, but also because of his position in the *Targeted Killings* case as an expert for the petitioners. At a single stroke the Court rejected the petitioners' argument that no armed conflict was taking place by relying on their own expert, and, by seemingly handing a victory to the government, made it harder for it to complain at any restrictions on its actions it might impose later on, which are, as we shall see, quite substantial.

It is, of course, from a purely humanitarian standpoint desirable for the law of international conflicts to apply, since it provides significantly more protections than the law of internal armed conflicts. Yet it is hard to escape the impression that the Court was somewhat insincere, since the conclusion it has reached is in no way clear or obvious. Citing Professor Cassese does not make it any more so, and citation of an authority is not a substitute for a legal argument. Cassese himself actually does not rely on any other authority, but argues that new armed conflicts in occupied territories should be treated as international ones because (i) internal conflicts are those between a central government and a group of insurgents belonging to the same state, which is not the case with occupied territories; (ii) the protections guaranteed by humanitarian law must be as wide as possible, and the law of international armed conflicts provides for much greater protections; and (iii) since the belligerent occupation is governed by the Fourth Geneva Convention, a part of the law of international armed conflict, it would be contradictory to subject armed hostilities between the occupant state and insurgent groups to the law of internal armed conflict.[59]

Although this is certainly a well-argued, common-sense position, with which the present author agrees as a matter of desirability, it is hard to say that it is in any way established in state practice, as there is indeed very little state practice to go on.[60] The major humanitarian treaties are also of little help, since they relate only to the original armed conflict during which the territory was occupied, but not to a new armed conflict occurring long after the end of the initial one. Likewise, the new armed conflict could be regarded as an internal one, since (i) the occupying power is the only state for decades to exercise exclusive effective control over the territory; (ii) no other state is laying claim to the territory; and (iii) the

58 Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, p. 420, as cited in *Targeted Killings*, above note 6, para. 18.

59 Ibid.

60 Lubell has also argued, albeit briefly, that the Israeli–Palestinian conflict should be classified as international – see Noam Lubell, "The ICJ Advisory Opinion and the separation barrier: a troublesome route", *Israel Year Book of Human Rights*, Vol. 35 (2005), p. 283, at pp. 296–7, note 68.

insurgents themselves are not purporting to fight on behalf of any other state, nor is their struggle directly related to the initial international armed conflict.[61] It is also not entirely contradictory for both the Fourth Geneva Convention to regulate the belligerent occupation and for a non-international armed conflict to be occurring at the same time, as both the ICJ in *Nicaragua*[62] and the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*[63] recognized that an international and a non-international armed conflict can take place at the same time, running in parallel. There is no logical reason why this rule cannot also apply by analogy during an occupation, and the Court, unlike Professor Cassese, just does not provide any reasoning for the conclusion it has ultimately reached.

Unlawful combatants

However fascinating the discussion of the thresholds of applicability of humanitarian law, or the lack thereof, in both the *Hamdan* and the *Targeted Killings* judgments, there is also the matter of the application of the substantive rules of humanitarian law by both high courts. Here, again, the parallels between the two cases are very instructive.

The US legal argument regarding the ''global war on terror'' is a story of three lacunae. The first one, as we have seen, is the alleged gap in the application criteria of the 1949 Geneva Conventions, since the United States was arguing that its conflict with al Qaeda is legally an armed conflict, but that it is neither a Common Article 2 nor a Common Article 3 conflict. The second gap comes in even if it is assumed that the conflict falls within the material scope of application of the Conventions, since the US government has claimed that al Qaeda terrorists are ''unlawful enemy combatants'', who are, in this strange new type of international armed conflict, entitled neither to the protection of the Third Geneva Convention, since they do not fulfil the requirements set out by its Article 4, nor under the Fourth Geneva Convention, since they are combatants, not civilians. For its part, Israel has in 2002 rather opportunistically enacted its own law on the imprisonment of unlawful combatants, also claiming that unlawful combatants are not protected under either the Third or the Fourth Geneva Convention.[64] Finally, the US government has not claimed only that humanitarian

61 See also Kretzmer, above note 11, pp. 208–211.

62 *Nicaragua*, above note 42, para. 219.

63 *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, at para. 84.

64 Incarceration of Unlawful Combatants Law, 5762–2002, available in English at http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf (last visited 12 May 2007). The law has been heavily criticized, although it must be acknowledged that it is much more moderate when compared with the extremely broad powers of detention claimed by the US executive. See also Human Rights Watch, ''Israel: Opportunistic Law Condemned'', 7 March 2002, at http://hrw.org/english/docs/2002/03/07/isrlpa3787.htm (last visited 12 May 2007); Hilly Moodrick–Even Khen, ''Unlawful combatants or unlawful legislation? An analysis of the Imprisonment of Unlawful Combatants Law'', Israel Democracy Institute, Jerusalem, 2005, available at SSRN: http://ssrn.com/abstract=902934 (last visited 12 May 2007).

law applies but provides no protections to those detained in the "war on terror". It has also claimed that human rights law does not apply, since (i) it is inapplicable in times of war; and since (ii) human rights treaties do not apply extraterritorially, as in Iraq, Afghanistan or Guantánamo Bay.[65] Both these claims have been rejected by UN treaty bodies.[66]

It is hard to dispute the historical existence of the category of unlawful (unprivileged) combatants or belligerents.[67] That just begs the question, however, of how this historical category fits into the Geneva framework, the most basic issue being the fundamental humanitarian guarantees owed to all participants in a conflict, regardless of their exact legal status. In international armed conflicts the starting point has usually been Article 75 of Protocol I, which has long been regarded as reflective of customary law.[68] Even more importantly in this case, the customary status of Article 75 has been confirmed by at least two Legal Advisers of the US State Department.[69] Yet the current US administration has regrettably cast even this point into doubt, and its present Legal Adviser has stated that the administration is "looking at" whether Article 75 guarantees are applicable in the "war on terror".[70]

For all its ambiguities, the *Hamdan* judgment is at least clear on one point: that the minimal guarantees of Common Article 3, including the protection of personal dignity and basic fair trial rights, are applicable to all terrorism detainees. The Court was unfortunately unable to reach the same conclusion with respect to Article 75 of Protocol I, with a plurality of four justices finding that some of the provisions of Article 75 are indisputably a part of customary law[71] and thereby informing the Court's interpretation of Common Article 3, but with

65 See, e.g, the Opening Remarks by John Bellinger, Legal Adviser, US Department of State, before the UN Committee against Torture, May 5, 2006, available at http://www.us-mission.ch/Press2006/0505BellingerOpenCAT.html and the Opening Statement of Mathew Waxman, Head of US Delegation before the UN Human Rights Committee, 17 July 2006, available at http://geneva.usmission.gov/0717Waxman.html (last visited 12 May 2007).

66 See the Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2, 25 July 2006, paras. 14 and 15 and the Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3, 15 September 2006, para. 10, available at http://www.unhchr.ch/tbs/doc.nsf (last visited 12 May 2007).

67 For the classical treatment of the subject see Richard R. Baxter, "So-called "Unprivileged belligerency": spies, guerrillas and saboteurs", *British Year Book of International Law*, Vol. 28 (1951), p. 323. See also Green, above note 47, pp. 102–5, 107–8.

68 See, e.g, Jean-Philippe Lavoyer, "Should international humanitarian law be reaffirmed, clarified or developed?", *Israel Year Book on Human Rights*, Vol. 34 (2004), p. 35, 42; Fausto Pocar, "Protocol I Additional to the 1949 Geneva Conventions and customary international law", *Israel Year Book on Human Rights*, Vol. 31 (2001), p. 145; Kolb, above note 31, p. 158; David, above note 39, pp. 483–4.

69 See Michael J. Matheson, "The United States' position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University Journal of International Law & Policy*, Vol. 2 (1987), p. 419; William H. Taft IV, "The law of armed conflict after 9/11: some salient features", *Yale Journal of International Law*, Vol. 28 (2003), pp. 319, 322.

70 Remarks by John Bellinger, Legal Adviser, US Department of State, at the Royal Institute of International Affairs (Chatham House), London, 9 February 2006. See Anthony Dworkin, "United States is "looking at" the place of fundamental guarantees in the war on terror", *Crimes of War Project*, 1 March 2006, available at http://www.crimesofwar.org/onnews/news-guarantees.html (last visited 12 May 2007).

71 *Hamdan*, above note 1, Opinion of the Court, pp. 70–2.

Justice Kennedy, who provided the swing vote for the judgment as a whole, not joining that part of the opinion of the Court.

In contrast, the Israeli Supreme Court was much more forceful in relation to fundamental humanitarian guarantees. It unequivocally affirms the customary status of Article 75,[72] and adds some substantial rhetorical flourish:

> Needless to say, unlawful combatants are not beyond the law. They are not ''outlaws''. God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law.[73]

One can only express agreement with such sentiment.

When it comes to the precise legal status of unlawful combatants, the ICRC and numerous authors have asserted that persons not entitled to protection under the Third Convention must consequently be entitled to protection under Articles 4(1) and 5 of the Fourth Geneva Convention.[74] Other authors have just as ably argued that unlawful combatants do indeed slip through the cracks, as it were, between the two conventions, and that they are entitled to protection only under customary humanitarian law.[75]

The US Supreme Court does not address this issue in *Hamdan*, although its judgment is again unclear and contradictory. As already mentioned, it ''reserves'' the issue of whether Hamdan is entitled to prisoner-of-war status, even though it apparently characterizes the underlying conflict as a non-international one.[76] The Court does not seem to realize that the concepts of combatants' privilege and lawful or unlawful combatancy simply have no place in non-international armed conflicts. In Common Article 3 conflicts nobody has the right to take up arms against the state, and prisoner-of-war status as such does not exist at all, unless stipulated to the contrary by a special agreement between the parties to the conflict.[77]

72 *Targeted Killings*, above note 6, para. 25.

73 Ibid.

74 See ICRC Commentary on GC IV, above note 28, at p. 52, which states that ''[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.'' See also Luisa Vierucci, ''Prisoners of war or protected persons *qua* unlawful combatants? The judicial safeguards to which the Guantánamo detainees are entitled'', *Journal of International Criminal Justice*, Vol. 1 (2003), p. 284; Hans-Peter Gasser, ''Acts of terror, ''terrorism'' and international humanitarian law'', *International Review of the Red Cross*, Vol. 84 (847) (2002), p. 547; Knut Dörmann, ''The legal situation of ''unlawful/unprivileged combatants''", *International Review of the Red Cross*, Vol. 85 (849) (2003), p. 45; Kolb, above note 31, pp. 158–9; Cassese, above note 58, pp. 409–10.

75 See Adam Roberts, ''The law of war in the war on terror'', in Wybo P. Heere, ed., *Terrorism and the Military*, 2002, p. 82; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, p. 29; Sean D. Murphy, ''Evolving Geneva Convention paradigms in the ''war on terrorism'': applying the core rules to the release of persons deemed ''unprivileged combatants''", forthcoming, *George Washington Law Review*, Vol. 75 (2007), available at SSRN: http://ssrn.com/abstract=958380 (last visited 12 May 2007).

76 *Hamdan*, above note 1, Opinion of the Court, note 61.

77 Common Article 3(3).

The Israeli Supreme Court, on the other hand, squarely deals with the issue: it finds that the separate category of unlawful combatants does not exist under positive law, and that in international armed conflicts either the Third or the Fourth Convention must apply. Unlawful combatants are, according to the Court, civilians who are taking a direct part in hostilities, and who are not protected while doing so. In so ruling, the Court has explicitly affirmed in its entirety the customary nature of the rule enshrined in Article 51(3) of Additional Protocol I, which it discussed in great detail.[78]

Human rights and humanitarian law

But by far the most interesting part of the *Targeted Killings* judgment is the Court's application of international human rights law, and contrasting this decision to *Hamdan* then becomes like comparing night and day. On the one hand, the US Supreme Court's treatment of international human rights law is reduced to a single footnote in a 100-page opinion, with the Court invoking Article 14 of the International Covenant on Civil and Political Rights (ICCPR), just like Article 75 of Protocol I, only in order to elaborate on the more general fair trial provisions of Common Article 3.[79] On the other hand, the Israeli Supreme Court extensively uses human rights law in order to complement the applicable rules of humanitarian law. The Court indeed finds that civilians who are taking a direct part in hostilities may be lawfully targeted, but only if four conditions are met.

1. The state must possess well-based, thoroughly verified information regarding the identity and activity of the civilian who is allegedly taking part in the hostilities; the burden of proof on the state is heavy.[80]
2. 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 taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed. In the words of the Court, ''Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force.''[81]
3. If a civilian is indeed attacked, a thorough and independent investigation must be conducted regarding the precision of the identification of the target and the circumstances of the attack, and in appropriate cases compensation must be paid for harm done to innocent civilians.[82]
4. Finally, combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the

78 The Court extensively analyses both the element of directness and the temporal element in applying Article 51(3). See *Targeted Killings*, above note 6, paras. 33–40.
79 *Hamdan*, above note 1, Opinion of the Court, p. 70, note 66.
80 *Targeted Killings*, above note 6, para. 40.
81 Ibid.
82 Ibid.

military advantage directly anticipated from harming the combatants and terrorists.[83]

What is so interesting here is that only the last of these conditions – that is, the principle of proportionality – is a rule of international humanitarian law. There is no rule of humanitarian law obliging states not to kill combatants if they can be arrested or detained – as long as the combatant is not *hors de combat*, he can be lawfully killed. There is likewise no rule of humanitarian law mandating an effective investigation into the circumstances of every attack, as such an obligation exists only in respect of possible grave breaches of the Geneva Conventions.[84] The first three conditions set by the Court for the lawfulness of targeted killings are therefore drawn solely from human rights law. The Court indeed cites to that effect three judgments of the European Court of Human Rights, including the well-known *McCann* case.[85]

The most remarkable thing about this judgment is precisely this use of human rights law to further humanize humanitarian law. The relationship between human rights law and humanitarian law is usually thought of in terms of *lex specialis*, *per* the ICJ's *Nuclear Weapons* Advisory Opinion.[86] To illustrate this relationship the ICJ itself gave the example of the rules of humanitarian law defining what an arbitrary deprivation of life is during an armed conflict, in the context of Article 6 of the ICCPR.[87] This decision of the ICJ has sometimes been interpreted as warranting a strict approach: if a specific provision of humanitarian law contradicts a more general provision of human rights law, the provision of humanitarian law must apply. In other words, it is humanitarian law which has a direct impact on human rights law, not the other way around.[88]

The situation in the *Targeted Killings* case is exactly the opposite, since the state's duties under human rights law are now reducing the freedom of action the state actually enjoys under humanitarian law. This is indeed precisely the type of

83 *Targeted Killings*, above note 6, paras. 40–46.

84 See, e.g., Art. 146(2) of GC IV.

85 *Targeted Killings*, above note 6, para. 40, citing *Ergi* v. *Turkey*, 32 EHRR 388 (2001), *McCann* v. *United Kingdom*, 21 EHRR 97 (1995) and *McKerr* v. *United Kingdom*, 34 EHRR 553 (2001).

86 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 25.

87 Ibid.

88 See, e.g., Louise Doswald-Beck, ''International humanitarian law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons'', *International Review of the Red Cross*, No. 316 (1997), p. 35: ''This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule. Conversely, it also means that, at least in the context of the conduct of hostilities, *human rights law cannot be interpreted differently from humanitarian law*. Although this makes complete sense in the context of the arbitrary deprivation of life (a vague formulation in human rights law, whereas humanitarian law is full of purpose-built rules to protect life as far as possible in armed conflict), it is less clear whether this is also appropriate for human rights rules that protect persons in the power of an authority. This is particularly so when it is a human rights treaty body that is applying the text of the treaty. Practice thus far, in particular of the European Commission and Court of Human Rights, seems to show that such bodies apply the human rights text within its own terms'' (text around footnotes 50–2, emphasis added). See also William Abresch, ''A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya'', EJIL, Vol. 16 (2005), p. 741, at pp. 743–5.

situation that the ICJ contemplated in its *Wall* Advisory Opinion, where it expanded on its own thinking in *Nuclear Weapons*:

> As regards the relationship between international humanitarian law and human rights law, 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.[89]

What flows both from the ICJ's opinion in the *Wall* case and the *Targeted Killings* judgment is that the relationship between human rights law and humanitarian law cannot be explained by the simple comparison of the general to the special, even if this relationship operates in both directions. For instance, Common Article 3(1)(d) refers, in a very general way, to ''judicial guarantees recognized as indispensable by civilized peoples''. It is then only natural to look at human rights law, among other sources, in order to provide more specific content to this general formula of humanitarian law. This is actually what was suggested by the experts gathered at the 2003 ICRC Round Table in San Remo[90] and, indeed, this is exactly what the US Supreme Court has done in *Hamdan*, even if it is referring to human rights law in a rather superficial way.

In *Targeted Killings* the Israeli Supreme Court is doing much more than that. It is not using a more specific rule of human rights law to interpret a general rule of humanitarian law. No, the rule of humanitarian law is very clear; states have quite deliberately left themselves the freedom to kill combatants, or civilians engaging in hostilities, and are under no obligation to capture them and put them on trial instead. The Israeli Supreme Court is therefore using a human rights norm not to interpret, but to restrict the application of the humanitarian one.

Anthony Dworkin has rightly criticized the Israeli Supreme Court for not providing more reasoning on the exact mechanics of this interface between human rights and humanitarian law.[91] The Court certainly could have been more explicit, but it is in the end for legal scholars to provide an appropriate theoretical

89 *Wall*, above note 50, para. 106.

90 ICRC, ''International humanitarian law and other legal regimes: interplay in situations of violence'', XXVIIth Round Table on Current Problems of International Humanitarian Law, held in San Remo, Italy, in September 2003, summary report available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf (last visited 12 May 2007). See especially p. 9: ''as human rights law is more precise than IHL [international humanitarian law] in certain domains, the relation of interpretation must also be able to operate in the other direction. For example, Article 3(1)(d) common to the Geneva Conventions explicitly refers to the ''judicial guarantees recognized as indispensable by civilized peoples'' but without further specifying the meaning of this expression. It was suggested that, in such a hypothesis, apart from the complementary elements contained in Additional Protocol II and in customary law, the interplay between these two bodies of law permits reference to be made to human rights law in order to deduce the substantive guarantees resulting from this general formula.''

91 Anthony Dworkin, ''Israel's High Court on targeted killing: a model for the war on terror?'', *Crimes of War Project*, 15 December 2006, available at http://www.crimesofwar.org/onnews/news-highcourt.html (last visited 12 May 2007).

framework.[92] What the Court clearly did focus on as the primary basis for its expansive application of human rights law is Israel's continuing belligerent occupation of the Palestinian territories. For example, the Court says that targeted killings may not be used against terrorists if they can be arrested and tried, since this is ''particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities''.[93] This approach of the Court is commendable, and it is entirely consistent with the ICJ's position in the *Wall* case,[94] as further elaborated in *Congo* v. *Uganda*.[95]

The amount of control over the Palestinian territories and people that Israel has, as their belligerent occupier, gives it a wide variety of options it can use in order to deal with terrorists, and this in turn augments the obligations it has under human rights law. In a ''normal'' international armed conflict, without the presence of a prolonged occupation, human rights law would presumably not impose such additional obligations, and the state's relative freedom of action under humanitarian law would remain unrestricted.

Conclusion

At the level of rhetoric and the affirmation of the rule of law the importance of both of the two judgments presented in this article cannot be denied. Both of them clearly stand against the proposition that law has no place in times of war. And, as we have seen, both of them are far from perfect, although not equally so, yet they provide valuable lessons for the future.

This applies foremost to both courts' examination of what qualifies as an armed conflict in international law. The US Supreme Court rightly rejected the US government's position that it is involved in an international armed conflict with the al Qaeda terrorist organization, as international armed conflicts can only be interstate ones. Yet, it did so only to find that this conflict is actually a non-international one, disregarding evidence that non-international armed conflicts have always been regarded as synonymous with internal conflict, and misinterpreting the relevant authorities while doing so. The Israeli Supreme Court, on the other hand, ruled that Israel is indeed involved in an international armed conflict with Palestinian terrorist organizations, in an apparent reflection of the US government's position. Yet it did so only in reference to belligerent occupation, basically holding that the occupation will transform even

92 See, e.g., Orna Ben-Naftali and Yuval Shany, ''Living in denial: the application of human rights in the occupied territories'', *Israel Law Review*, Vol. 37 (2003), p. 17; Adam Roberts, ''Transformative military occupation: applying the laws of war and human rights'', AJIL, Vol. 100 (2006), p. 580; Kretzmer, above note 11.

93 *Targeted Killings*, above note 6, para. 40.

94 *Wall*, above note 50, paras. 107–113.

95 *Armed Activities in the Territory of the Congo* (*Congo* v. *Uganda*), ICJ, Judgment, 19 December 2005, paras. 216 and 220.

a non-international conflict into an international one. Even if this conclusion is perfectly defensible, the Court was still somewhat disingenuous in making it seem as if this conclusion was obvious, which it is not, and in stating that this was always its position, when it had actually refrained in the past from qualifying the ongoing armed conflict either as an international or as a non-international one.

Both *Hamdan* and, to a somewhat lesser extent, the *Targeted Killings* case, clearly show us the remarkable amount of conceptual confusion brought into the traditional framework of international humanitarian law by the ever-increasing impact of non-state actors which are able to operate across state borders with little restraint. This does not change the fact, however, that we are, as a matter of positive law and for historical reasons, still trapped in a binary conceptual mould of international and internal armed conflict. Whether this is a good thing or bad, and whether states will through their practice create new types of armed conflict, is beyond the scope of this article. Yet, if any change to the existing law is to be made, that change must be made clearly and openly, and it must be supported by adequate analysis and reasoning.

Of course, no matter how academically interesting this debate on the concept of armed conflict is, it also has significant practical consequences. Qualifying the ''global war on terror'' as a single, global non-international armed conflict, instead of splitting it up into its constitutive components, such as Iraq or Afghanistan, has repercussions on the issue of indefinite detention of those persons whom the US government designates as unlawful combatants in this war, and it also exposes them to potential targeted assassinations. The fact that the US government will not be trying to assassinate suspected terrorists living in London, or at least it says that it will not, does not mean that it is not claiming that it has legal authority to do so.[96] It also, of course, does not mean that it will not try to exercise this supposed authority in places like Yemen or Somalia, as it has indeed done so in the past.

The paradox that therefore emerges from comparing these two decisions is that *Hamdan*, the one which is on its face more favourable to the petitioners, might actually be less so in the long term. The Israeli Supreme Court is clearly superior to its US counterpart in applying humanitarian law to the phenomenon of terrorism, and it is even more so in its application of human rights law. This might actually prove to be the most enduring quality of the *Targeted Killings* judgment: that it shows so clearly how the relationship between human rights law and humanitarian law can be a two-way street, and how that relationship can be far more complex than is usually thought.

96 See, e.g., Charles Garraway, ''Armed conflict with al Qaeda: a riposte'', *Opinio Juris* weblog, 15 January 2006, available at http://www.opiniojuris.org/posts/1168895161.shtml (last visited 12 May 2007).

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The judicial arm of the occupation: the Israeli military courts in the occupied territories

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Abstract

Since the beginning of the Israeli occupation more than 200,000 cases have been brought before military courts, where Palestinian civilians have been prosecuted and judged by the military authorities. However, despite the large number of judicial decisions, this jurisprudence has not received the attention it merits. Academic researchers and NGOs have usually examined the procedural rights of the accused and have only rarely dealt with other legal matters. This article aims to examine the preliminary issue of territorial jurisdiction. Through the analysis a process of judicial domination is revealed. It is a domination that facilitates extensive control of the military authorities over the Palestinian civilian population through their judicial powers.

The principle of equality of arms, inherent to any fair trial process, acquires a physical dimension in the Israeli military courtroom in the occupied territories. Arms are present all around – with the numerous soldiers on guard, military prosecutors and judges in uniform. They are almost everywhere, apart from the place reserved for the defence. Here the only arm is a lawyer, who for the most part

* The author is grateful to Professor Marco Sassoli, Advocate Lea Tsemel, Advocate Labib G. Habib and Colonel Shaul Gordon – President of the Military Court of Appeals – without whose contributions this article would not have been possible.

hardly speaks Hebrew, has limited knowledge of Israeli law and has even less trust in Israeli military justice.

Since the military legal system was put in force by Israeli occupying forces in the Palestinian occupied territories it has judged hundreds of thousands of Palestinian civilians. Between 1993 and 2000 alone, the period of the Oslo peace process, more than 124,000 people were prosecuted in military courts.[1]

The first five military courts were established in 1967, in Hebron, Nablus, Jenin, Jericho and Ramallah.[2] Since then the number of courts has been reduced or enlarged according to security and political considerations.[3] However, despite the flood of cases since the second intifada, only two courts of first instance and one court of appeals function today. They are responsible for administering justice in matters under their jurisdiction for the entire West Bank. Whether they alone can handle this task remains highly questionable.[4]

1 Netanel Benisho, ''Criminal law in the West Bank and Gaza'', *IDF Law Review*, Vol. 18 (2005), p. 299, at p. 300 (in Hebrew). According to Adalah, the Legal Centre for Arab Minority Rights in Israel, ''since 1967, Israel has arrested close to 700,000 Palestinians … With the outbreak of the second intifada and in its wake, the number of prisoners rose dramatically. Data from the Israel Prison Service indicates that at the end of October 2006 the total number of Arab prisoners classified as ''security prisoners'' was about 9,140, including 289 Palestinian citizens of Israel. Over 98% of them have been tried in military courts.'' Available at http://www.adalah.org/newsletter/eng/apr07/ar3.php (last visited 1 May 2007). According to Lisa Hajjar, ''since 1967, hundreds of thousands of Palestinians have been arrested … of those who are charged, approximately 90 to 95 percent are convicted. Of the convictions, approximately 97 percent are the result of plea bargains.'' Lisa Hajjar, *Courting Conflict: The Military Court System in the West Bank and Gaza*, University of California Press, Berkeley, 2005, at p. 3.

Although numerous and complex legal questions having a vital impact on the liberty of thousands of people arise through the military judiciary process, only a few academic studies on it have been conducted. Several reports which dealt with procedural rights of suspects and accused persons have been published, but they have not been updated. See *Israël et Territoires Occupés: Justice Militaire*, Amnesty International, London, 1991; *The Military Court System in the West Bank*, B'tselem, Jerusalem, 1989 (in Hebrew); *Routine Torture: Interrogation Methods of the GSS*, B'tselem, Jerusalem,1998; Jordan J. Paust, Gerhard von Glahn and Gunter Woratsch, *Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, International Commission of Jurists, Geneva, 1989; Raja Shehadeh, *The West Bank and the Rule of Law*, International Commission of Jurists, Geneva, 1980. For other publications see Moshe Drori, ''Double criminal jurisdiction in the Administered Territories'', *Hapraklit*, Vol. 3 (1979), p. 386 (in Hebrew); Moshe Drori, ''The legal system in Judea and Samaria: A review of the previous decade with a glance at the future'', *Israel Yearbook of Human Rights*, Vol. 8 (1978), p. 144; Uzi Amit-Kohn et al., *Israel, the Intifada and the Rule of Law*, Israel Ministry of Defence Publication, Tel Aviv, 1993; Amnon Rubinstein, ''The changing status of the ''Territories'' (West Bank and Gaza): from escrow to legal mongrel'', *Israel Law Review*, Vol. 8 (1988), p. 59; Amnon Rubinstein, ''Israel and the Territories: jurisdiction'', *Iyounei Mishpat*, Vol. 14 (3) (1989), p. 415 (in Hebrew); Meir Shamgar, ''Legal concepts and problems of the Israeli military government: The Initial Stage'', in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1982, p. 13; Uri Shoam, ''The principle of legality and the Israeli military government in the Territories'', *Military Law Review*, Vol. 153 (1996), p. 245; Raja Shehadeh, *Occupier's Law: Israel and the West Bank*, Institute for Palestinian Studies, Washington DC, 1985; Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, Kluwer Law International, London, 1997.

2 Order Concerning Establishment of Military Courts (No. 3), 7 June 1967, published in *Collection of Proclamations, Orders and Appointments of the Military Commander in the West Bank Region* (hereinafter CPOA), Israeli Defense Forces No. 1, p. 25.

3 Benisho, above note 1, p. 302.

4 See e.g. a report of 5 October 2005: ''Ofer Israeli military court transferred 200 out of 500 Palestinian detainees to administrative detention without trial; the court said it does not have the time to prosecute them''. Available at http://www.kibush.co.il/show_file.asp?num=8897 (last visited 20 March 2006). I

This article aims to examine the preliminary issue of jurisdiction of the military courts that allow application of the Israeli military legal system to the Palestinian civilian population. Although rules of jurisdiction may be viewed as a technical matter, this is seemingly one of the most fundamental questions. All further procedures, which may end with persons being deprived of their liberty, depend on the preliminary decision whether a legal dispute is under the authority of that particular law and judicial system. Therefore, even when a legal process functions strictly according to international rules of fair trial, it can still profoundly violate individual rights simply by deciding to enforce a law when it is beyond its authority. Without respecting the limits of jurisdiction, a legal system may thus become a tool for legitimating domination and punishment under the hegemony of the rule of law instead of regulating justice.

Regulation of military courts in occupied territories

International humanitarian law

International humanitarian law regulates the legal environment of occupied territories, based on the general concept that the local legal system, including the law and the judicial authority, continue to be in force as they were prior to the occupation.[5] This reflects a fundamental concept of international humanitarian law, namely that occupation is a temporary situation and the occupying power is not the new sovereign of the territory. Consequently, civilian life should continue as much as possible to be conducted as it was prior to the occupation, and the occupying power is forbidden to extend its own legal system to the territories it is occupying.[6]

The maintenance of local law and courts

Article 43 of the Hague Regulations imposes a general obligation on the occupying power to ensure public order and safety while respecting, unless it is absolutely necessary to do otherwise, the law in force prior to the occupation. This rule prevents the occupying power from extending its own legal system over the occupied territories and from ''acting as a sovereign legislator''.[7] Article 64(1) of

happened to be present that day in the court; because of the lack of time (eve of the Jewish New Year) and the large number of arrests, the court decided to place those people in administrative detention on a collective basis. There was no individual procedure.

5 Article 43 of the Hague Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land (No. II of 1899 and No. IV of 1907) (hereinafter Hague Regulations) and Article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Fourth Geneva Convention).

6 *Final Records of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, Federal Political Department, Berne, repr. in 2005, p. 640.

7 Marco Sassoli, ''Legislation and maintenance of public order and civil life by occupying powers'', *European Journal of International Law*, Vol. 16 (4) (2005), p. 661, at p. 668; Jean S. Pictet (ed.), *IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958, pp. 335–7.

the Fourth Geneva Convention reaffirms this fundamental principle by stating that local penal law remains in force. As an exception to the general rule Article 64(1) provides for two specific conditions under which the occupying power may suspend or repeal the local penal legislation: if local law constitutes a threat to security, or if it is an obstacle to the application of the Convention. Article 64(1) thereby spells out more precisely the term ''unless absolutely prevented'', which appears in Article 43 of the Hague Regulations regarding penal legislation.[8]

Local courts continue to function and to apply local criminal law in offences committed by the inhabitants that do not involve the occupying forces.[9] This reflects the principle that protected persons will be judged by their own regular judges and legal system, without being subjected to alien doctrines of law. Intervention by the occupying power in the local administration of justice is authorized only for reasons of security, for the application of the Convention, and for ''the necessity for ensuring the effective administration of justice''.[10] The ICRC *Commentary* points out that even if the occupying power has interfered in the composition of local courts, it is the local penal law that should be enforced.[11]

The authority of the occupying power to legislate

Article 64(2) of the Fourth Geneva Convention gives a more detailed provision on the authority of the occupying power to legislate, which is generally authorized in the said Article 43. It sets three conditions under which such legislation is authorized: for the application of the Convention, to maintain order and for the occupying power's own safety. However, this authority may be exercised only when it is essential to achieve any of these conditions. The ICRC C*ommentary* indicates that the legislative capacities of the occupying power are very extensive and complex, but that these varied measures must not under any circumstances serve as a means of oppressing the population.[12]

The authority of the occupying power to establish its own military courts

Article 66 of the Fourth Geneva Convention lists three requirements for the function of military courts: they must be properly constituted, non-political, and located in the occupied territories (while the court of appeal should only preferably be located there). The authority to establish them is granted for the

8 According to Sassoli, ''Article 64 certainly provides a *lex specialis* regarding the situation in which an occupying power is absolutely prevented from respecting penal law'' (ibid., p. 670). For the relation between Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention see also Gerhard von Glahn, *The Occupation of Enemy Territories: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p. 115; Raymond T. Yingling and Robert W. Ginnane, ''The Geneva Conventions of 1949'', *American Journal of International Law*, Vol. 46 (1952), p. 393, at p. 422.

9 Von Glahn, above note 8, p.108.

10 Fourth Geneva Convention, Article 64(1).

11 Pictet, above note 7, p. 336.

12 Ibid., p. 337.

enforcement of penal laws promulgated by the occupying power in accordance with Article 64(2).

> Article 66 recognizes the right of the Occupying Power to bring offenders before its own military courts for the purpose of punishing offences against such measures [according to Art. 64(2)] … the legislative powers of the occupying forces are thus reinforced by judicial powers designed to make good the deficiencies of the local courts, should this be necessary.[13]

Here Pictet seems to have added a requirement for the jurisdiction of military courts, namely that the local tribunals be inadequate to enforce the law enacted by the occupying power. This requirement, however, is not laid down in Article 66. Although it appears in Article 64(1) for empowering the occupying power to intervene in the functioning of local courts, it seems to apply to local courts with regard to their jurisdiction over the enforcement of local laws. So when the local legal procedure is inadequate to enforce local laws, the occupying power can intervene in the local legal system – that is, can make changes in the courts' structure, replace judges and so on. But as Article 66 deals with the enforcement of new penal laws enacted by the occupying power, the condition laid down in Article 64(1) does not necessarily have to apply here too. In my view military courts are competent to try violations of penal law enacted by the occupying power without additional conditions concerning the local jurisdiction. In contrast, the jurisdiction of local courts over offences enacted by the occupying power is not evident. Although it may be interpreted that local courts are also competent to enforce the occupying power's legislation, under Article 66 the occupying power, not the local courts, seems to have first say in choosing the place of jurisdiction.

International human rights law[14]

Only few provisions deal specifically with trials under military jurisdiction. As they mostly concern enforced disappearances, they have a limited scope of application.[15] More relevant are the general rules of fair trial, which are regulated by Articles 14 and 15 of the 1966 International Covenant of Civil and Political Rights (ICCPR) and other

13 Ibid., pp. 339–40.

14 For the applicability of human rights law to occupied territories see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Reports 2004, para. 112 (hereinafter *Wall* case). For theoretical approaches see Al Haq, *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories*, Ramallah, 2003. Of interest is that although the official position of the state of Israel is the non-applicability of human rights law in the occupied territories, the Israeli High Court nevertheless applied it. See for example HCJ 3239/02, *Marab et al.* v. *The IDF Commander in the West Bank*, 57(2) PD (Reports of the Israeli High Court of Justice), p. 349 (2003), excerpted in the *Israel Yearbook on Human Rights*, Vol. 34 (2004), p. 307; the entire English version is available on the Internet site of the Israeli High Court of Justice: www.eylon1.court.gov.il/eng/verdict/framesetsrch/html (last visited 29 April 2007).

15 UN Declaration on the Protection of All Persons from Enforced Disappearance; Article XI of the Inter-American Convention on Forced Disappearance of Persons, Article 16(2).

human rights instruments.[16] According to these rules, military jurisdiction should be compatible with the obligations for the administration of justice and with the requirement of being independent and impartial. As a common feature of almost every military legal system is that the judges are members of the armed forces, and as they furthermore remain subject to military discipline, under which they are evaluated for their future promotion, and are more generally under the authority of the executive power, it is highly questionable whether military courts can reach the level of independence and impartiality required by human rights law and the legal doctrine of the separation of powers.[17] Indeed, all treaty bodies took the approach of deeming the trial of civilians in military courts unlawful, because in most cases these do not comply with the obligation of independence and impartiality:[18]

> [Military courts] could present serious problems as far as the equitable, independent and impartial administration of justice is concerned … While the Covenant does not prohibit such categories of courts nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional …[19]
>
> Military courts are often used to try civilians. On that subject, the United Nations Special Rapporteur on the independence of judges and lawyers concluded that ''international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice''.[20]

The relations between human rights law and international humanitarian law

International humanitarian law constitutes *lex specialis*, which prevails over any other general law.[21] Therefore the provisions of Articles 64 and 66 of the Fourth Geneva Convention concerning the judgment of civilians in military courts in occupied territories will be applicable, and will prevail over other rules of human rights law. Nonetheless, human rights law remains relevant. The authorization

16 For a complete list of these instruments, see Louise Doswald-Beck and Robert Kolb, *Judicial Process and Human Rights: Texts and Summaries of International Case-law*, International Commission of Jurists, N.P. Engel, 2004, p. 119.

17 See for example ECHR, *Sahiner* v. *Turkey*, Case No. 29279/95, ECHR 552, 25 September 2001, para. 40. Article 66 of the Fourth Geneva Convention also requires military courts to be non-political. However, the independence requirement seems to be greater under human rights law, as in international humanitarian law it was foreseen that the judges would belong to the armed forces and therefore would not be entirely independent in the sense of human rights law and the separation of powers doctrine.

18 Doswald-Beck and Kolb, above note 16, p. 66.

19 General Comment No. 13 on Article 14 ICCPR, UN Human Rights Committee (12 April 1984), UN Doc.HRI/GEN/1/Rev.1.

20 United Nations Special Rapporteur, UN Doc. E/CN.4/1998/39/Add.1, para. 78, cited in Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, Vol. 1, International Commission of Jurists/Colombian Commission of Jurists, Geneva, 2004, p. 10.

21 *Wall* case, above note 14, para. 106. See also *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25; Louise Doswald-Beck and Silvain Vité, ''International humanitarian law and human rights law'', *International Review of the Red Cross*, No. 293 (March–April 1993), p. 94.

granted by international humanitarian law is strictly limited to the explicit regulations of the Fourth Geneva Convention; in all other situations not covered by them the general rule of human rights law should apply, namely that civilians should in principle be tried not in military courts but in civil courts.

The Israeli military courts in the Palestinian occupied territories

On 7 June 1967, the day the occupation started, Military Proclamation No. 2 was issued, endowing the area commander with full legislative, executive, and judicial authorities over the West Bank and declaring that the law in force prior to the occupation remained in force as long as it did not contradict new military orders.[22] Exercising this authority, the military commander enacted the criminal legislation. This was done almost entirely under the Security Provisions Order (No. 378) of 1970[23] (hereinafter SPO), which still serves today as the criminal code of the West Bank. It has been elaborated over the years, and amended more than ninety times. Through its ninety-seven provisions the SPO establishes military courts, outlines their area of jurisdiction and lays down procedural provisions; regulates the arrest of, search for and detention of suspects and accused persons; and establishes a list of crimes and punishment. Other orders, such as the Rules of Criminal Responsibility Order[24] and the Order Concerning Punishment,[25] are complementary criminal regulations absent from the SPO.

Two types of first-instance courts were established: presided over by a panel of three judges or a single judge.[26] The two have the same competence in jurisdiction but differ in the level of punishment they may impose: a single judge is competent to impose a limited punishment of up to ten years imprisonment,[27] while a three-judge panel may impose any punishment.[28] A recent amendment of 2004, which is perceived by the military authority as a reform in the structure of military courts, provides that all judges of a first-instance court must have legal training.[29] Before this amendment it was required that of the three-judge panel

22 Military Proclamation No. 2 Concerning Regulation of Authority and the Judiciary (West Bank) (1967), published in CPOA, No. 1, p. 3 (hereinafter Proclamation No. 2), Article 3.
23 Security Provisions Order (Consolidated Version) (West Bank) (No. 378) (1970), published in CPOA, No. 21, p. 733.
24 The Rules of Criminal Responsibility Order (No. 225) (1968), published in CPOA, No. 12, p. 467 (hereinafter Rules of Criminal Responsibility). One of the most astonishing articles in this order is Article 13, which states that a married woman is criminally responsible for her acts also if her husband was present during the commission of the offence.
25 Order Concerning Punishment (No. 322) (1969), published in CPOA, No. 18, p. 645.
26 SPO, Article 3A.
27 SPO, Article 4A(d). Before the 1995 amendment No. 65 of the SPO, a single judge could impose a punishment of only up to five years' imprisonment.
28 The only restriction is for capital punishment, imposition of which demands a minimum rank of the officer-judges (SPO, Article 47(a)(8)). However, capital punishment has never been executed by a military court.
29 Amendment No. 89 to Article 4 of the SPO (Order No.1550) (2004), as yet unpublished. See Benisho, above note 1, pp. 311–12; Haim Shibi, ''The military general attorney: the Israeli review of military acts is better than the American'', *Halishka*, Vol. 69 (2004), p. 3, at p. 6 (in Hebrew).

only the presiding judge must be a lawyer, while the two other judges could be ordinary officers.

Today only two military courts of first instance are functioning: the Salem court, situated in area B near Jenin, and the military court in Ofer camp, situated in area B near Ramallah.[30] These two courts have to deal with thousands of files each year. In April 1989, following the recommendation of the Israeli High Court of Justice,[31] a court of appeals was established. The Military Court of Appeals is also situated in Ofer camp, and its rulings guide the lower courts.[32]

The territorial definition of the occupied territories

In September 1995 the interim agreement between the state of Israel and the Palestine Liberation Organization was signed. It was the continuation of a peace process which had started with the Declaration of Principles in 1993, in which the Palestinian Authority (PA) was established. The interim agreement transferred several powers to the PA, according to three areas of control that were established:

- *Area A* (the autonomous territories) was placed wholly under the control of the PA except for foreign affairs;
- *Area B* (the occupied territories) was placed under mixed control of the Israeli army, which remained responsible for security matters, and of the PA, which assumed responsibility for internal public order;
- *Area C* consisted of Israeli settlements, military bases and the areas connecting them with the Green Line (the dividing line between Israel and the occupied and autonomous territories) and to each other, which were kept under complete control of the Israeli army.[33]

As a number of leading scholars have recognized, it is assumed that the interim agreement has put an end to the Israeli military occupation in area A, that came wholly under the control of the PA.[34]

The transfer of responsibilities to the PA according to the interim agreement was endorsed by the military commander through military Proclamation No. 7.[35] This endorsement rendered the interim agreement binding

30 For the definition of area B see text below.

31 HCJ 87/85, *Arjub* v. *The Military Commander in the West Bank*, 42(1) PD, p. 353 (1988).

32 Article 4B of the SPO regulates the structure of the Military Court of Appeals. Although no regulation defines the relations between the Military Court of Appeals and the military courts of first instance, since the Israeli legal tradition is based on the common law system it seems that the precedents of the Court of Appeals are binding for lower courts.

33 Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington DC, 28 September 1995 (hereinafter the interim agreement), Article XIII, Section 1.

34 Yoram Dinstein, "The international legal status of the West Bank and the Gaza Strip – 1998", *Israel Yearbook on Human Rights*, Vol. 28 (1998), p. 37, at p. 45; Eyal Benvenisti, "Responsibility for the protection of human rights under the interim Israeli-Palestinian agreements", *Israel Law Review*, Vol. 28 (1994), p. 297, at p. 313.

35 Military Proclamation No. 7 Concerning the Application of the Interim Agreement (West Bank)(1995), published in CPOA, No. 164, p. 1923 (hereinafter Proclamation No. 7).

in the occupied territories.[36] However, the proclamation was not identical to the interim agreement. Among other gaps,[37] Proclamation No. 7 did not amend the definition of the "Region". Under domestic military law the term "Region" therefore remains defined as the entire West Bank, just as it was first defined by Proclamation No. 2 in 1967.[38] This retention of the meaning it had prior to the Oslo peace process has the legal implication that every provision that uses the term "Region" is still in force over the whole Region, including area A, which is supposed to be under the sole authority of the PA.

The jurisdiction of the Israeli military courts

The rules of jurisdiction of the Israeli military legal system allow its application to the Palestinian civilian population in criminal and security matters. Because the occupation is a special situation in which civilians may be tried by a military legal system, these rules of jurisdiction must strictly respect their limits of authorization as defined by international humanitarian law; any trespass of these limits must be avoided, as is required also by human rights law. The following section analyses the rules of territorial and extraterritorial jurisdiction and their implementation by the Israeli military legal system, in order to examine whether the involvement of military justice is legitimate.

Territorial jurisdiction

The most fundamental principle of criminal jurisdiction prescribed by public international law is the principle of territorial jurisdiction. It defines the right of a state to regulate behaviour and enact criminal legislation within its territories. According to Bowett, this basic principle should be regarded as axiomatic.[39] Two kinds of jurisdiction are identified – legislative jurisdiction that defines whether

36 In the Israeli legal system (military and civil), according to the dual approach international agreements bind the courts only if they are endorsed by domestic legislation. (For more details on the dual approach see Lassa Oppenheim, *International Law*, 8th edn, Longmans, London, 1955, p. 53.) Accordingly, in the Waffa case the High Court of Justice ruled that it is the proclamation and not the interim agreement that is legally binding in the Region (HCJ 2717/96, *Waffa* v. *Ministry of Defence*, 50(2) PD p. 848 [1996], at p. 853).

37 Article 4a of Proclamation No. 7, above note 35, transfers all legislative, administrative and judicial powers to the PA "as prescribed in the interim agreement". Thus the new responsibilities *of the PA* were fully endorsed by Proclamation No. 7. However, the powers *of the military commander* were defined more widely than agreed in the interim agreement (above note 33). Article 6a(5) of Proclamation No. 7 declares that the military commander retains responsibility for internal security and public order wherever Israel has security control (i.e. area B). The military commander thereby created a situation of parallel jurisdiction over ordinary criminal issues in area B, exceeding the power granted by the interim agreement to which the Israeli government had agreed. Does a bilateral international agreement, such as the interim agreement, bind the military commander? It would seem to do so, for in democracies the army is subordinate to the government and therefore is bound by its decisions.

38 Article 1 of Proclamation No. 2 defines the "Region" as the West Bank region.

39 Derek W. Bowett, "Jurisdiction: changing patterns of authorities over activities and resources", *British Yearbook of International Law*, Vol. 53 (1982), p. 1, at p. 4.

and in what circumstances a state has the right of regulation and enforcement jurisdiction that relates to the capacity of a state to act in order to enforce its jurisdiction. Legislative jurisdiction and enforcement jurisdiction are two distinct competences; a state that may be entitled to exercise its prescriptive jurisdiction is not necessarily entitled to enforce it.[40] Since states are entitled to territorial sovereignty, a state is not entitled to enforce its jurisdiction over the territory of another state without the express consent of the host state.[41] Thus the principle of territoriality makes jurisdiction possible, but also contains it within states' territorial boundaries.

The territorial jurisdiction of the occupying power is regulated by Article 42 of the 1907 Hague Regulations:

> The occupation extends only to the territory where such authority has been established and can be exercised.

In the context of the Israeli military occupation, the general principle of territorial jurisdiction was not explicitly prescribed by the military commander. However, with the introduction of the general principles of criminal law by the Rule of Criminal Responsibility Order (1968) it was presumed. Article 2 granted the military court jurisdiction over offences committed in the Region.[42]

The Rule of Criminal Responsibility Order provides two additional rules with regard to territorial jurisdiction:

> Rule (a): There is no requirement that the offence be entirely committed in the Region; it is sufficient that it be partly committed there in order to establish territorial jurisdiction over the offence (Art. 2).
>
> Rule (b): The liability of each perpetrator and accomplice is prescribed in detail. For territorial jurisdiction over an offence and all its participants, it is enough that one of them was present in the Region during the commission of the offence. As according to Arts. 15 and 16 they are all equally responsible for its commission, the military court may establish its territorial jurisdiction over all perpetrators, through only one person, even if the others were never present in the territories of the Region.

These two rules, which expand territorial jurisdiction beyond the borders of the Region, should not be regarded as unique.[43] Most criminal codes recognize

40 F. A. Mann, "The doctrine of jurisdiction in international law", *Recueil des Cours* 111 (1964-I), p. 9, at p. 13; Malcom N. Shaw, *International Law*, 5th edn, Cambridge University Press, Cambridge, 2003, p. 576; Vaughan Lowe, "Jurisdiction", in Malcolm D. Evans (ed.), *International Law*, Oxford University Press, Oxford, 2003, p. 332; Michael Akehurst, "Jurisdiction in international law", *British Yearbook of International Law*, Vol. 46 (1972), p. 145.

41 Thus under public international law it is illegal to apprehend persons in third states in order to bring them to trial in a domestic court. However, although such apprehension breaches international law and violates the human rights of the person abducted, it does not necessarily impede the possibility of holding a judicial procedure against that person, once brought to the state. This doctrine, named *male captus, bene detentus*, is practised in Israel. See the *Eichmann* case: HCJ 336/61, *Eichmann* v. *State of Israel*, 16(3) PD, p. 2033 (1961), at p. 2067; and the *Bargouti* case: S.C.C 1158/02, *The State of Israel* v. *Marwan Ibn Hatib Bargouti* (2002), para. 37.

42 Zvi Hadar, "The military courts", in Shamgar, above note 1, p. 191.

43 Arnold H. Loewy, *Criminal Law*, 4th edn, West Publishing Company Minnesota, Nutshell series, 2003, p. 246.

them. However, although the territorial rules described above may be perceived as neutral definitions well accepted in criminal doctrine, their de facto enforcement by military courts in the unique territorial situation of the Region resulted in a far-reaching extension of territorial jurisdiction, which normally could not have been exercised on such a scale.

Unlike a situation between two states, where the borders are well defined and defended, the situation in the Region is much less clear. In the eyes of the Israeli authorities the territorial boundaries between Israel and the occupied territories – the 'Green Line – are not strictly binding, and definite borders have never been officially declared. This vagueness was internationally recognized by the interim agreement, which places area C wholly under Israeli control. This de facto annexation of a part of the land, the fact that the PA is not an independent state, the ongoing control of the army over the whole Region with regard to foreign relations and the major security concerns – especially since the second intifada, which gave rise to vast army operations inside the PA territories – all these aspects, in addition to strong ideological and political views on ''Greater Israel'' of an important segment of the Israeli population and governments,[44] have obscured the conception of Israel's territorial boundaries. This perception is reflected in the military legal procedure, where the legal territorial borders, have become as vague and extended as the physical ones.

The enforcement of the rules (a) and (b) above well demonstrate this argument. When a person crosses a border he or she enters the territory of another state. But in the case of the state of Israel, the ''Region'' and the PA territories, it is not so simple. The interim agreement created a complex territorial reality by establishing three areas of control. As a result of this new situation, virtually no territories of the state of Israel (within the ''Green Line'') border directly on the PA territories without having area B or C in between. Any criminal leaving the PA territories to commit an offence in Israel must cross area B or area C, both of which are under the territorial jurisdiction of the military courts. In cases when these areas, are only ''transit territories'' owing to the complex territorial patchwork, which otherwise would not be involved, the territorial definition enables military courts to establish their territorial jurisdiction over the offence by the legal fiction that part of the offence was committed there. Although the real territories in which the offence was committed are Israel and the PA territories, because the offenders have committed continuous offences by crossing area B as transit territories, military courts assume jurisdiction over the commission of the whole offence. As the PA is surrounded by areas under Israeli military control, all offences committed in Israel and initiated in the PA territories automatically establish the authority of the military legal system through the rule of territorial jurisdiction. These territorial constructions in accordance with the interim agreement are therefore a convenient tool for enlarging territorial jurisdiction of military courts over ''regular'' (non-security)

44 Ilan Pappe, *History of Modern Palestine*, Cambridge University Press, Cambridge, 2004, p. 196.

criminal offences. In this way the military court has assumed jurisdiction over car thieves and drug dealers,[45] and also over their accomplices who never left area A.

Rule (b), according to which military courts assume jurisdiction on the basis of the territorial principles over all perpetrators of an offence, is routinely enforced, even when a distinct violation of the self-controlled territorial boundaries of the PA is thereby incurred. Entering area A of the PA in order to arrest a person is a matter of routine.[46] As the territorial borders are not perceived as strictly binding, and as Israel holds much more power than the PA, Israel encounters virtually no obstacles to the arrest or abduction of Palestinians in area A; the entire army is available to assist in this mission. During the legal procedure, complaints of abductions are not considered seriously and do not in any case have any impact on the legal process, as the doctrine *male captus, bene detentus* has been recognized and applied by Israeli civil and military legal systems.[47]

Respecting strict borders of jurisdiction does not imply that suspects should not be prosecuted. If there is sufficient evidence for prosecution, they certainly should be tried. But this legal procedure has to be conducted by the appropriate forum: the civil judicial system. This distinction is not merely technical. Huge differences exist between the regulation and the practice of the legal procedure in Israeli military and civil courts.[48] Nevertheless, as demonstrated, the military courts have enlarged their jurisdiction to include even simple criminal offences committed by Palestinians. This wide enforcement would have been impossible if instead of an occupied territory there were a state with definite and binding borders. Thus the enforcement of legitimate rules of territorial jurisdiction in the specific circumstances of the ''Region'' allowed expansion of the area of application of the military legal system, which took over the civilian sphere: this is the ''*judicial domination*'' of Israeli military justice over Palestinians.

This phenomenon of expanding judicial control is practised not only by the enforcement of territorial rules but also through the extension of extraterritorial jurisdiction rules, as shown in the following section.

45 Military Court of Appeals (MCA)/111/00, *Al Matzri* v. *The Military Prosecutor*, *Selected Judgment of Military Courts* (hereinafter SJMC), No. 11, p. 140.

46 For daily reports of those arrests look at www.kibush.co.il, under the section ''Life under occupation - flashes from the occupied territories''.

47 Above note 41.

48 Under military justice the rights of the suspect/accused are less safeguarded, as the legislation, which is enacted by the military commander, is almost exclusively concerned with upholding security interests. Therefore important legal differences appear at all stages of the legal process, starting with the provisions for arrest and investigation and continuing through the rules of evidence right up to the degree of punishment that can be imposed.

It is beyond the scope of this article to deal with the law applied by military courts (jurisdiction *ratione materiae*). In general, they apply criminal orders enacted by the military commander (in most cases for security offences, but not only) and local Jordanian law.

Extraterritorial jurisdiction

In addition to the principle of territoriality, international law prescribes four other principles of jurisdiction: the principle of universality, the principle of active personality, the principle of passive personality and the protective principle. These principles are in effect exceptions to the general rule of territoriality, as they allow for extraterritorial jurisdiction under their specific circumstances. As the protective principle is the main basis for extraterritorial jurisdiction in the occupied territories, the following part deals with this principle in detail.

The protective principle[49]

The protective principle entitles sovereign states to exercise jurisdiction over persons who have committed acts against their security or vital interests abroad.[50] Whereas there is no doubt about the validity of the principle under public international law, its scope is less definite. No explicit limits have been defined by public international law.

> The doubts relating to the scope of the [protective] principle are two. The first is that states may claim such jurisdiction in relation to conduct which is not generally regarded as criminal at all. The second is that offences may be so vaguely and broadly defined … [that] an accused person may not realize he is committing [one].[51]

Because of the lack of explicit limits to its definition, the protective principle may easily be open to abuse in its prescription and enforcement. However, as its enforcement in third states may lead to conflict of jurisdiction and also clash with other fundamental principles such as territorial sovereignty and equality of states, as well as individual rights, all authors suggest that states must not expand it to objectives other than protecting truly vital interests.[52] Abuses in legislation must be strictly avoided. Moreover, even when a state may have a legitimate protective interest, its enforcement in third states does not go without saying. It should be greatly circumscribed by the delicate balance of international relations and other fundamental considerations with which the enforcement of the protective principle clashes.[53]

Most extraterritorial provisions enacted by the military commander derive from the protective principle. The most important rules are the following:

49 For a complete examination of the protective principle, see Akehurst, above note 40, p. 158; Mann, above note 40, p. 94; Bowett, above note 39, p. 10.
50 Bowett, ibid., Mann, ibid.; Shaw, above note 40, p. 592
51 Bowett, above note 39, p. 11.
52 Ibid., pp. 10–11; Shaw, above note 40, p. 591; Akehurst, above note 40, p. 158.
53 "Even where there is a basis in international law for exercising jurisdiction, principles of comity often suggest that forbearance is appropriate … States are obliged to consider and weigh the legitimate interests of other states when taking action that could affect those interests." Comment by the US State's department in the context of civil jurisprudence. However, it seems relevant also for criminal affairs. Cited in Bowett, ibid., p. 21.

Article 7(c) of the SPO. At the beginning of the occupation, cases that lacked any territorial link with the Region were rejected.[54] The military court ruled that in order to establish jurisdiction over extraterritorial offences an explicit law was needed.[55] In 1973 an extraterritorial provision was therefore introduced by the military commander, who conceived his legislative authority as including competence to enact extraterritorial laws:

> A Military Court shall also be competent to try … anyone who committed an act outside the Region which would constitute an offence had it been committed within the Region and the act harmed or was designed to harm the security of the Region or public order therein.[56]

This extraterritorial legislation, reflecting the protective principle, protects security concerns as well as public order interests of the Region, and allows the criminal law of the occupied territories to be applied to a person in a third state. The offender may be "anyone" who committed the offence outside the West Bank. Thus, through this new provision a considerable range of offences concerned with assisting in the commission of offences, attempting, inciting or conspiring to commit an offence, membership of unlawful organizations and others became triable by the military courts, even when no part of the offence was committed within the Region.[57]

Article 7(d) of the SPO. According to the interim agreement, as adopted by the military commander in Proclamation No. 7, area A became the responsibility solely of the PA, including security matters. As this matter was not regulated in the Proclamation, and as extraterritorial jurisdiction requires explicit legislation,[58] it remained questionable whether military courts had extraterritorial jurisdiction over area A. On the one hand, it was impossible to apply Article 7(c) to offences committed in area A, as this area remained by definition in the Region and they therefore did not constitute an offence committed "outside the Region" as required by Article 7(c). On the other hand, judges found it hard to accept that the protective principle could be implemented vis-à-vis any third state, but not vis-à-vis area A, where security offences were more likely to be perpetrated:

> Is it seriously imaginable that an offence which was committed in the territories of the PA, and which harmed and was designed to harm the territories under the responsibility of the military commander in the Region, will not be under the jurisdiction of military court in the Region?[59]

54 Ramallah (RAM)/160/68, *The Military Prosecutor* v. *Wildman*, SJMC, No. 1, p. 377; RAM/78/69, *The Military Prosecutor* v. *Bakir*, SJMC, No. 1, p. 450.
55 RAM/78/69, *The Military Prosecutor* v. *Akrash*, SJMC, No. 1, p. 450.
56 Order No. 517 (Amendment No. 7 to the SPO) (1973), published in CPOA, No. 33, p. 1272.
57 Hadar, above note 42, p. 193.
58 *Military Prosecutor* v. *Akrash*, above note 55.
59 MCA/375/03, *Eit* v. *The Military Prosecutor* (2003) (unpublished), at p. 4. The same idea was expressed in MCA/29, 28/98, *Raduan* v. *The Military Prosecutor*, SJMC, No. 11, p. 1 (1998), at p. 13.

Therefore, on 28 September 1997, two years after the interim agreement was signed, Article 7(d) of the SPO was introduced in order to extend jurisdiction over security offences committed in area A:[60]

> A Military Court shall also be competent to try, as provided in section (a), anyone who committed an offence in area A, which harmed or was designed to harm the security of the Region.

Specific orders. In addition to Articles 7(c) and (d) of the SPO, which are more general in scope, other extraterritorial provisions were enacted by the military commander. These are provisions which deal with specific offences, such as the Order Concerning the Prohibition of Training and Contact with Hostile Organization outside the Region (Order No. 284)-1968[61] and the Order Concerning Dangerous Drugs (No. 558).[62]

The military commander's competence to enact extraterritorial provisions

The Israeli military system has taken it for granted that the military commander has the same authority as a sovereign state to enact extraterritorial provisions in light of the protective principle.

> Through extraterritorial provisions the military commander sought to protect his authority from hostile acts planned or carried out against him outside the bounds of his rule. The protective principle is well recognized by international law … and by the Israeli High Court of Justice. Therefore the military commander, who is the legislator in the Region, was competent to enact extraterritorial orders if guided by considerations of security and public order.[63] (1974)
>
> When a serious harm is caused to its civilians, a state can not stay indifferent. There can be no dispute over this issue. The state has to react, even in an extraterritorial way, in order to protect its interests … This principle enables the Military Commander in the Region to enlarge its jurisdiction even outside the territories of the Region.[64]

However, it is not so obvious that an occupying power can impose criminal provisions affecting individuals beyond its territorial jurisdiction, as states may do. The occupying power is not the sovereign of the territories.[65] It exercises only temporary rights as empowered by international humanitarian law, and lacks the entitlements of sovereign states. The following argument, which is set

60 Order No. 1455 (Amendment No. 80 to the SPO) (1997), CPOA, No. 177, p. 2354.
61 Order Concerning the Prohibition of Training and Contact with Hostile Organization outside the Region (No. 284) (1968), published in CPOA, No. 16, p. 582 (hereinafter Order Concerning Hostile Organization).
62 Order Concerning Dangerous Drugs (No. 558) (1975), published in CPOA, No. 34, p. 1335.
63 Gaza (G)/1410/74, *The Military Prosecutor* v. *Jayi et al.*, SJMC, No. 4, p. 25, at p. 30. Excerpted in *Israel Yearbook on Human Rights*, Vol. 7 (1977), p. 259.
64 *Eit* case, above note 59, p.3.
65 Sassoli, above note 7, p. 664.

forth in three stages, seeks to address this issue and to propose a possible approach.

1. Does the regulation of jurisdiction require an explicit authorization or a non-prohibiting rule?

To verify whether the military commander is competent to enact extraterritorial legislation this preliminary question has to be answered. In the *Salem* case,[66] which is a recent and very detailed decision of over thirty pages, the military court raised this question. It clearly rejected the approach holding that an explicit authority for regulating jurisdiction is required. According to the military court, it is the limitation on the commander's authority that requires an explicit provision. As no limit is introduced with regard to extraterritorial legislation, the military court ruled that the commander is authorized to enact extraterritorial provisions even if he is not the sovereign of the area. The military court emphasized that this authorization is deduced from the general authority of Article 43 of the Hague Regulations, which sets no limits to such legislation.

The military court's ruling seems to follow the line taken by the Permanent Court of Justice in the *Lotus* case (1927) regarding states' jurisdiction:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and jurisdiction … [to] acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.[67]

However, this decision, rendered in 1927, has been criticized by a considerable number of scholars in the light of states' practice.[68] According to Lowe, objecting states never indicated a prohibiting rule, but claimed that they had "no right" to exercise such jurisdiction: "States' practice is consistently based upon the premise that it is for the state asserting some novel extraterritorial jurisdiction to prove that it is entitled to do so."[69] Indeed, as indicated by Akehurst, almost all scholars list specific heads of jurisdiction, thereby implying that all other types are illegal (and they do not state the general presumption that all jurisdictions are legal, listing the illegal ones that are prohibited).[70]

Thus it appears that modern international law has developed differently since the *Lotus* case of 1927, and it has become accepted that international law regulates claims of jurisdiction, as categorically stated by Mann:

> The existence of the State's right to exercise jurisdiction is exclusively determined by *public international law* … Joseph Beale made this very clear,

66 Ofer/3887/02, *The Military Prosecutor* v. *Salem* (2003) (unpublished). Available in Hebrew at the military court's internet site: http://elyon1.court.gov.il/idf_yesha/verdict/search_idf_yesha/verdict_by_misc.html (last visited 27 May 2007).

67 PCIJ, Series A, No. 10, 1927, p. 19.

68 Mann, above note 40, p. 33; Lowe, above note 40, p. 335.

69 Lowe, ibid., p. 336.

70 Akehurst, above note 40, p. 167.

when he stated that "the sovereign can not confer jurisdiction on his court or his legislature when he has no such jurisdiction according to the principles of international law".[71]

If we follow this modern approach in the case of the legislative authority of states, which are sovereign in their territories, it can be easily inferred that it also applies to an occupying power's authority to regulate questions of jurisdiction; it can hardly be assumed that an occupying power's legislative competence is wider than a state's authority. Thus it appears that an explicit authorization to regulate issues of jurisdiction is also required in occupied territories.

2. Does international humanitarian law provide an explicit authorization for extraterritorial jurisdiction?

If extraterritorial jurisdiction requires explicit authorization, it is necessary to examine whether the law of belligerent occupation provides it.

Arie Pach, a former Israeli military prosecutor, proposed to interpret Article 64(2) as including extraterritorial prescriptive jurisdiction.[72] This proposal seems doubtful. As Article 64 remains silent on this issue, it is appropriate to interpret it according to the general rule of criminal jurisdiction – that is, the principle of territoriality – and not according to its exception. In addition, Article 154 of the Fourth Geneva Convention explicitly states that the provisions of the Convention are supplementary to the Hague Regulations. Article 64 should consequently be read as not contradicting Article 42 of the 1907 Hague Regulations, which asserts that "The occupation extends only to the territory where such authority has been established and can be exercised." Thus no explicit (or implicit) rule of international humanitarian law allows extraterritorial jurisdiction, rather the contrary.

3. Analogy from the right of sovereign states?

As the law of belligerent occupation does not empower the occupying power to exercise extraterritorial legislative jurisdiction to justify the military commander's competence to enact such legislation, the military courts referred to public international law. They certainly did borrow a rule – the protective principle, which is normally applicable by sovereign states – for their legal system in the occupied territories. This reasoning should be questioned. It is not obvious that extraterritorial jurisdiction competence based on the protective principle can be imported from the sphere of international law to the law applying in occupied

71 Mann, above note 40, p. 11. "The application of international law to regulate claims to criminal jurisdiction is generally conceded". Bowett, above note 39, p. 5.

72 "Article 64 seems to include explicitly and clearly extraterritorial jurisdiction for security reasons." Arie Pach, "Human rights in West Bank military courts", *Israel Yearbook on Human Rights*, Vol. 7 (1977), p. 222, at p. 238. This interpretation was also suggested by the military court. See e.g. the *Akrash* case, above note 55.

territories. Public international law regulates legal matters between states, and international humanitarian law regulates the temporary control of an occupying power over an occupied area of land and people. These two distinct sources of laws differ in their subjects of application and in their substance.

The jurisdiction rules of public international law were undoubtedly designed to apply to states. Moreover, it seems that states were a founding concept in the formation of these rules. Fundamental principles of international law such as state sovereignty, equality, reciprocity and non-violent interstate relations were necessarily taken into account in elaborating the rules of jurisdiction. However, these principles do not regulate the relations between an occupying power and an occupied territory: sovereignty, equality and reciprocity simply do not exist. It seems hard, therefore, to apply to occupied territories, which constitute a completely different subject of application, rules specifically formed to regulate states' jurisdiction in a given legal environment.

The protective principle can serve as a good example illustrating why a rule which was formed to apply to states, and whose formation was affected by other principles of international law that bind states, is not properly applicable in an occupied territory, where the occupying power is not bound by the same governing principles.

As stated above, the enforcement in third states of extraterritorial legislation based on the protective principle depends on a balancing test which takes, besides protective interests, other principles of international law into account. The state's protective interest is not an absolute right; through the balancing test the danger of abuses is thus limited. In addition, in my view, not only enforcement jurisdiction but also the initial competence to enact extraterritorial provisions according to the protective principle took this balance into account when it was promulgated by public international law without definite limits. It seems that this formation was possible only because that balance provided a guarantee against abuses of legislative competence and not only against abuses in enforcement. In domestic legal systems, and more specifically in the branch of criminal law, the two competences (legislative and enforcement) are equal. All provisions against criminal acts have to be enforceable, as this is the *raison d'être* of criminal law. It could then be reasonably expected that a state will enact only extraterritorial criminal provisions that it can enforce. The fact that according to public international law not all extraterritorial provisions can automatically be enforced is not a coincidence: it has substantial implications for the essence of legislative competence, and is not merely a matter of implementation.[73] It aims to set limits to abuses in the legislation: if states have enacted provisions that are too abusive on the basis of the protective principle, their enforcement will be impossible.

73 See Bowett, above note 39, p. 24. In order to resolve the problem of concurrent jurisdictions (which may contain abuses) he suggested the balance test, because "agreeing on the principles of jurisdiction and their limits" seems not to be achievable. Those limits may be understood as limits to the initial legislative jurisdiction, and not necessarily to the enforcement.

In the occupied territories the limiting balance does not function in the same way as it does between states, as legal relations are different. Principles such as sovereignty, equality and reciprocity do not exist and therefore will not set limits to the enforcement of a provision, as will the balance test for states. Thus the usual guarantees against abuses in legislation (which is the main concern of the protective principle) do not operate. Consequently, if the enforcement of extraterritorial jurisdiction is not limited by the balancing test, which no longer applies, the legislative authority itself should be questioned because of the great danger of abuse. Otherwise, applying only the legislative jurisdiction without limits on the enforcement may turn extraterritorial jurisdiction into a tool for domination and not necessarily for protection. And this seemingly is exactly what happens in the case of extraterritorial jurisdiction of the Israeli occupying power. It applies a rule from another branch of law without taking into account all the complexity thereof that brought about the formation of the rule itself, which could now be used almost without limits, especially when in Israeli military courts illegal abductions do not void the legal procedure.

In addition to international balances, during occupation domestic limits which normally restrict abuses are missing, too; all legislative powers are in the hands of the military commander, who is also the executive. There is no separation of powers, and this constitutes another danger of abuse.

> The normal result of an excess of jurisdiction is a protest by the national State of the accused. No example is known of protests being made by any other State, so it would seem that a State could claim jurisdiction over a stateless person with impunity.[74]

The limits of extraterritorial legislation

As argued above, it appears that the occupying power has no competence to enact extraterritorial legislation. However, important considerations, mainly concerning security interests, may support the opposite view. Nevertheless, even when assuming that the military commander is granted extraterritorial legislative authority based on the protective principle, this authority is not absolute. It must protect strictly vital interests. The following section aims to examine whether the limits imposed by international law and the interim agreement were respected by the Israeli military commander when enacting extraterritorial rules.

Public international law

> It seems to us, that … extraterritorial jurisdiction is possible only with regard to ''classical'' and obvious security offences, i.e., offences whose prevention is

74 Akehurst, above note 40, p. 169.
75 Above note 55, p. 464.

> necessary to protect the physical security of the occupying power and its forces, as well as that of the administration (the *Akrash* case, 1969).[75]

Security of the region

The *Abu Higla* case[76] dealt with a member of the Fatah organization from Syria who infiltrated into Israel in 1979 by crossing the Jordanian border. His intention was to capture hostages or to carry out a terrorist attack. Examining its jurisdiction according to Article 7(c) of the SPO, the military court ruled that

> The expression ''security of the Region'' is not identical to the security of the State of Israel, so that there is no automatic jurisdiction of the court in the Region to try acts committed abroad against the State of Israel or the Jewish people … The Region is a territorial unit possessing its own legal system, quite separate from that of the State of Israel.[77]

If the military commander is entitled to enact extraterritorial provisions, it seems necessary to respect at least this fundamental distinction, which should serve as an obligatory limit. But this was not always the case, as demonstrated by the Order Concerning Hostile Organizations. This Order applies only to residents of the Region; it prohibits arms training outside the Region[78] and any contact with a hostile organization.[79] A hostile organization is defined as ''a person or a group of persons whose aim is to harm the public security, the IDF [Israeli Defence Forces] or the public order, in Israel or in an area controlled by the IDF''.[80] Thus this order also protects the interests of the state of Israel. Nevertheless, as cited above, the military court itself found that ''the Region is a territorial unit possessing its own legal system, quite separate from that of the State of Israel''. Security interests of the state of Israel are protected by Israeli domestic extraterritorial jurisdiction, and should not be covered by military jurisdiction. The commander is responsible only for the security of the Region, and cannot expand his authority over Israeli domestic concerns. It therefore seems that by defending the direct security interests of the state of Israel, the military commander exceeds the authority granted to him to protect the security interests of the Region. Moreover, as observed by the military court in the case of *Dir Bazia*, this order does not require the extraterritorial offence to harm the security of the Region. It means that all military training or contacts with a ''hostile organization'', for whatever reason, are criminally chargeable in the Region's military courts. This appears to be an abuse of extraterritorial jurisdiction based on the protective principle. And indeed the military court ruled that

76 Nablus (NB)/5193/81, *The Military Prosecutor* v. *Abu Higla*, SJMC, No. 6, p. 581. Excerpted in English in *Israel Yearbook on Human Rights*, Vol. 19 (1989), p. 384.
77 Ibid., p. 385.
78 Order Concerning Hostile Organization, above note 61, Article 2.
79 Ibid., Article 3. The definition of ''contact'' includes contact with a person who is reasonably suspected of acting on behalf of a hostile organization.
80 Ibid., Article 1.

> The only logical and reasonable interpretation of the Order Prohibiting Armed Training outside the Region is that the training should be accompanied by a criminal intent to use it against the security of the Region.[81]

Even so, this limit should be incorporated in the order itself and not left open to the interpretation of the military court, as the interpretation may be modified.

Public order – a vital interest?

Article 7(c) of the SPO provides for extraterritorial protection against acts designed to harm the security of the Region or public order there.[82] The main difficulty of this enactment is that the scope of the term "public order", without any restriction, is very broad. It may encompass almost the entire criminal code. The danger of laws enacted in a wide manner is that they are open to abuse.[83] In addition, when the offence is defined too broadly or vaguely, it is a violation of the general principle *nullum crimen sine lege*, as individuals may not be aware they are committing a crime.[84] To respect the limit imposed by public international law, the military commander apparently should have limited the scope of this term within the definition of the provision, preventing it from being open to abuse and from providing the military courts with an opportunity to interpret it too broadly.

The Order Concerning Dangerous Drugs, which is a specific provision criminalizing drug offences, may illustrate how using this term in order to justify extraterritorial legislation may lead to serious abuses of the protective principle. The order imposes criminal responsibility for violations of its provisions even if committed outside the Region (Article 38). Persons not resident in the Region could be prosecuted only if the offence was also illegal in a third state where it was committed. This provision does not exist for Palestinians. If a truly vital public interest of the occupied territories is protected by this order, then its discriminatory implementation by a law distinguishing between residents and non-residents is not possible. It is hard to see what vital interest is protected when the order criminalizes even minor drug offences abroad. However, as drug offences harm public order (to varying degrees), the legislator, on the basis of the indefinite scope of the term "public order", was nevertheless able to enact this order. It definitely seems to exceed the scope of a "vital interest", which according to the protective principle is the only interest that legitimates the enactment of extraterritorial legislation.

81 RAM/4252/82, *The Military Prosecutor* v. *Dir Bazia*, SJMC, No. 6(2), p. 421. Excerpted in English in *Israel Yearbook on Human Rights*, Vol. 19 (1989), p. 389. In this case the accused, who was a resident of Ramallah, underwent military training in Amman in 1979 in order to qualify for service as a guard in the Muslim Brotherhood organization's headquarters in Amman. He claimed in his defence that he had no intention of harming the Region, and was acquitted.

82 Unlike Article 7(d) of the SPO, which protects only security concerns.

83 Akehurst, above note 40, p. 158.

84 Bowett, above note 39, p. 11.

The interim agreement

Besides the general limits provided by public international law, specific limits were set by the interim agreement.

Article 7(c) of the SPO. In the *G'abri* case (1999)[85] the accused was charged with offences contrary to the SPO-1970 that were committed in Iran. The military court ruled that the interim agreement had not modified jurisdiction over offences committed "outside the Region," and that the meaning of the term "Region" remained as it was before. Thus, with regard to Article7(c) of the SPO, the military court was competent to try any offence which harmed or was designed to harm the security or the public order of the entire West Bank, including the security and public order of area A. This result contradicts the interim agreement, and seemingly even the intention of Israel and of the military commander as expressed by the president of the Military Court of Appeals in the *Raduan* case.[86]

Article 7(d) of the SPO. Article 7(a) of Annex IV to the interim agreement recognizes Israeli extraterritorial jurisdiction:

> Without prejudice to the criminal jurisdiction of the Council … Israel has in addition … criminal jurisdiction in accordance with its domestic laws over offences committed in the [PA territories] against Israel or an Israeli.[87]

Although the interim agreement recognizes extraterritorial jurisdiction, it is the extraterritorial jurisdiction of the state of Israel that was recognized, and not that of the military commander. However, this distinction between Israeli domestic and military extraterritorial jurisdiction was not made by military courts. The said article from the interim agreement was cited in the *Raduan* case as confirmation that "the clear intention of the sides to the agreement was keeping the principle of extraterritorial jurisdiction over offences committed in the PA", in order to justify the legislation of Article 7(d) of the SPO. Nevertheless, a more accurate understanding of this provision is that the authority to exercise extraterritorial jurisdiction belongs to Israeli civil courts through implementation of parliamentary legislation, and not to military legislation and courts.

As shown above, even assuming that the Israeli military commander is entitled to enact extraterritorial provisions based on the protective principle, it seems that he has exercised the authority it confers upon him by exceeding the limits set by public international law and by the interim agreement. These enactments, which actually reflect concern about abuse of the protective principle, gave the military courts jurisdictional powers going beyond the legitimate bounds of the law and of the occupied territories, in order to facilitate *judicial domination* over the Palestinian population.

85 G/235/99, *The Military Prosecutor* v. *G'abri*, SJMC, No. 12, p. 255.
86 Above note 59, p. 15.
87 Article 7(a) of Annex IV to the interim agreement.

The enforcement of extraterritorial jurisdiction exercised by the military courts

At first, the judicial domination was initiated by expanding legislation; however, its sophisticated development, which slowly emerged and led to vast and deep-rooted implementation, was possible only because of the even wider exercise of that law by military courts, which by their interpretation law made a major contribution to *borderless judicial domination.*

Interpretation

As the military courts' jurisdiction depends on the interpretation of the term ''security of the Region'', it is given a meaning so broad that even the Military Court of Appeals queried it. This occurred, for instance, in a case concerning a drug offence committed in area A; the Military Court of Appeals stated that the classification, by the court of first instance, of a drug offence as a security offence ''is not that evident''.[88]

Another example of extension of the term ''security'' is the *Raduan* case. The appellant was convicted of illegal possession of weapons, an offence committed entirely in the PA territories. He claimed that he was doing an arms deal for economic interests, that the weapon was in his possession for only a few hours, and that as he did not intend to harm in any way the security of the Region and although he might be a criminal, the military court was not competent to judge him because he did not commit a security offence. The military court rejected his claim and ruled that regardless of the motives (which may be economic or criminal) for their possession: ''any illegal possession or illegal use of arms counts as harm to security''.[89] This ruling was cited in the *Shaleh* case[90] and the *Eit* case,[91] and apparently constitutes the guideline: any illegal possession of arms is an extraterritorial security matter.

This interpretation seems to go far beyond the scope of a legitimate extraterritorial jurisdiction – that is, protection of vital interests. It transforms all ''regular'' criminals who use weapons during their criminal activities (e.g., a robbery) into terrorists who harm the security of territories beyond those of the PA.

88 MCA/10/11/02, *Zu'hrub* v. *The Military Prosecutor* (2002) (unpublished). However, it was not explicitly ruled that it is not a security offence! In this particular case the Military Court of Appeals convicted the accused on another basis, so it did not have to decide on this issue. It should be stressed that not all convicted persons can reach the Court of Appeal, and in the routine work of the courts it is very probable that other cases are still decided in the same way.

89 Ibid., p. 16.

90 G/376/00, *The Military Prosecutor* v. *Shaleh*, SJMC, No. 12, p. 332, at p. 339.

91 Above note 59.

Limits?

Military courts regularly reject attempts to limit their jurisdiction, basing their decisions on the broad military legislation that enables them to disregard the limits imposed by public international law or by the interim agreement.

In the *Eit* case the defence tried to set a limit to the jurisdiction of the military court. It was claimed that if an act is legal in area A, the military court could not establish its jurisdiction by defining that act as dangerous for the Region; the argument states that if an act is legal in the PA territories, its prosecution in military courts contradicts the principle of *nullum crimen sine lege*. This claim is relevant, especially since the accused had never left the PA territories but was arrested there by soldiers and brought to trial after an investigation, as often happens.

The military court ignored this claim, but it seems to be an interesting one, especially with regard to the offence of membership of an illegal organization. Akehurst noted that jurisdiction in relation to conduct which is not generally regarded as criminal is problematic. However, as the protective principle aims to protect states from acts which are often not illegal in other states, the practice of states did not support that approach (taken by the defence).[92] A suggested solution for this situation is the doctrine of the *primary effect*.[93] According to that doctrine, a state can claim jurisdiction only if the *primary* effect of the accused person's act was to harm a vital interest of the state. Applying this doctrine, the charge of membership of an illegal organization could be prosecuted only if the primary effect of this membership was to harm the security of the Region. Therefore it seems that this offence, which is prosecuted on a wide scale, could be questioned in many cases. One example is the case of *A'lian*, a female member of Islamic Jihad, who was accused of being the head of the women's organization at Bethlehem University. She claimed that as her activity was authorized by the PA the military commander was prevented from deciding otherwise, as her activities had never gone beyond the territorial borders of the PA. In addition, she claimed that her activities had nothing to do with the violent branch of the organization and that all her activities were social work. The military court rejected the latter claim and the relevance of the PA's authorization, and referred strictly to Article 7(d) of the SPO.[94]

Conclusion

This article has attempted to show how the military legal system expands its jurisdiction according to territoriality doctrines, and how this expansion has led to

92 Akehurst, above note 40, p. 168.
93 Ibid., p. 159.
94 MCA /16/03, *A'lian* v. *The Military Prosecutor* (2003) (unpublished). Available in Hebrew at http://elyon1.court.gov.il/files_idf_yesha/03/160/000/a47/03000160.a47.HTM (last visited 27 May 2007).

extensive control by the military legal authorities and facilitated a judicial domination of the army over the Palestinian civilian population.

There is in fact an invasion of the military legal system over civilian domains. Due to this expansion of jurisdiction, matters which should be under the jurisdiction of a civil court (Palestinian or Israeli) are in many cases dealt with under the Israeli military system – a system that enjoys less independence and impartiality and does not effectively safeguard the individual rights of accused persons and suspects.[95] This interference by the military legal system, taking broader territorial control than is authorized by international humanitarian law, is no more legitimate than any other kind of military domination merely because it is affected by a legal system. Once this legal system is not restricted by the rules of international humanitarian law and international human rights law, its legitimacy in administering justice no longer exists, and the illegitimate domination it imposes is as violent as any other aggressive act that an army may perpetuate. This domination by the army seems to be even more dangerous because it appears to be under the guise of the rule of law.

However, the expansion of territorial jurisdiction is merely one phase of this method. The issue of jurisdiction needs to be placed in its wider judicial context: before appearing before the military court, suspects are often arrested and abducted from the PA territories, and then interrogated without access to a lawyer or a judge for a longer time than is allowed in a civil procedure. In many cases the defendants do not have access to all the evidence and are prosecuted according to military orders, in which the definition of the offences and degree of punishment are broader than in the civilian criminal code. After their conviction they are deported from the occupied territories to serve their sentences in prisons situated in Israel, which makes it almost impossible for their families to visit them.

In this article the examination of territorial jurisdiction reveals the process of *judicial domination* in its first stage; it is clearly apparent, however, in the exercise of other kinds of jurisdiction.[96] It will be of interest to pursue this research through other stages of the judicial procedures in order to reinforce this observation and illustrate how *judicial domination* functions in all phases of the judicial process.

95 Regarding the impartiality of the Israeli military judges, Hajjar's observation (which seems to characterize more broadly any other military system that judges its enemy) is that "law enforcement in the occupied territories is not disinterested; it is provided primarily by soldiers, most of whom, by all accounts, are deeply hostile to and suspicious of Palestinians". Hajjar, above note 1, p. 112. Before 2004 it was not necessary for all the judges to have a legal background, and they were just regular officers, usually also very young.

96 This article is a part of wider research that I pursued for my master's thesis. There I examined three types of jurisdiction exercised by the Israeli military authorities in the occupied West Bank: territorial jurisdiction, jurisdiction *ratione materiae*, and jurisdiction *ratione personae*.

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Managing the dead in catastrophes: guiding principles and practical recommendations for first responders

Morris Tidball-Binz*

Abstract

The proper management of the dead from catastrophes is an essential component of humanitarian response, together with the rescue and care of survivors and the provision and rehabilitation of essential services. Sadly, insufficient recognition of the importance of ensuring proper management of the dead and of caring for the needs of the bereaved, coupled with the frequent collapse of forensic services in the aftermath of catastrophes, contribute to perpetuating the tragedy and trauma suffered by survivors forever unable properly to bury and mourn their dead. In 2006 the Pan American Health Organisation (PAHO) and the International Committee of the Red Cross (ICRC), together with the World Health Organisation (WHO) and the International Federation of Red Cross and Red Crescent Societies (IFRC), published guidelines for the management of the dead, to help improve the management of the dead after catastrophes. The publication, Management of Dead Bodies after Disasters: A Field Manual for First Responders, *offers practical and simple recommendations to non-specialists for the proper and dignified management of the dead in catastrophes and for the care of bereaved relatives. It also helps to dispel the principal myth which often complicates this difficult task: the unfounded association of cadavers with epidemics. The manual has proven to be a valuable tool for first responders, including humanitarian workers, for disaster response and preparedness in various operational contexts.*

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In May 2006 the Pan American Health Organisation (PAHO)[1] and the International Committee of the Red Cross (ICRC), with the participation of the World Health Organisation (WHO) and the International Federation of Red Cross and Red Crescent Societies (IFRC), published *Management of Dead Bodies after Disasters: A Field Manual for First Responders*,[2] offering practical guidelines for non-specialists dealing with the dead in catastrophes.

The manual is the result of a meeting held in Lima, Peru, in May 2005 and organized by PAHO and the ICRC, on lessons learnt on managing the dead in armed conflicts, disasters and catastrophes, including the 2004 tsunami in south-east Asia.[3]

Catastrophes are understood as disasters of unexpected proportions, which often produce massive fatalities and totally overwhelm local and even regional emergency response services, thus forcing local residents and communities, volunteers and humanitarian workers to deal with the first response to the tragedy, including rescuing and caring for survivors and recovering and managing the dead.

It is increasingly acknowledged worldwide that the proper management of the dead is a core component of any humanitarian response to catastrophes, together with the recovery and care of survivors and the supply of basic services. The trauma suffered by bereaved families and affected communities as a result of the neglect and mismanagement of their dead, including lack of news of missing relatives, often lasts much longer than the more conspicuous physical effects of catastrophes. The tragedy of the missing in situations of armed conflict and internal violence, including of those whose bodies await recovery, identification and return to bereaved families, is well acknowledged by the international community, including the Red Cross and Red Crescent Movement.

During the 2005 meeting in Lima, forensic and humanitarian experts and practitioners from the Americas and other regions, including south-east Asia, warned about the lack of simple and practical guidelines for first responders on managing the dead and caring for bereaved families during the immediate aftermath of catastrophes, when forensic services are often collapsed and/or simply unavailable for lack of access to affected areas.

1 The Pan American Health Organisation (PAHO) is an international public health agency, established in 1902, which also serves as the regional office for the Americas of the World Health Organisation (WHO).

2 Permission to reproduce parts of the manual in this article was granted by the publisher.

3 The following participants at the Conference contributed to the drafting of the manual: Stephen Cordner, Director, Victoria Institute of Forensic Medicine, Australia; Boyd Dent, Lecturer, University of Technology, Sydney, Australia; Eric Dykes, Consultant in DVI; Yves Etienne, Head of Assistance Division, ICRC, Geneva, Switzerland; Claude de Ville de Goyet, Consultant in Emergency Response; Ute Hofmeister, Forensic Advisor, Assistance Division, ICRC, Geneva, Switzerland; Oliver Morgan, Honorary Research Fellow, London School of Hygiene and Tropical Medicine, UK; Ricardo Perez, Regional Advisor (Publications), PAHO/WHO; Pongruk Sribanditmongkol, Associate Professor, Department of Forensic Medicine, Chiang Mai University, Thailand; Boonchai Somboonsook, Deputy Director, Department of Health Service Support, Ministry of Public Health, Thailand; Morris Tidball-Binz, Forensic Coordinator, Assistance Division, ICRC, Geneva, Switzerland; and Dana Van Alphen, Regional Advisor, PAHO/WHO.

As illustrated by many examples analysed during that meeting, including from countries affected by the tsunami, existing guidelines and manuals for forensic practitioners on disaster victim identification (DVI), including the guide prepared by the International Police Organisation (Interpol), are of little or no practical use for non-specialists. On the other hand, specialists are often not at hand during the immediate aftermath of catastrophes – for days and sometimes weeks after events – to help in the recovery and identification of the dead.

During this critical period local residents and volunteers are the only people available to handle the dead. Worldwide, they require simple, practical and easy-to-follow guidelines for helping to ensure the proper and dignified management of their dead, including taking all necessary steps to aid future efforts by forensic specialists and investigators to identify them and clarify the fate of the missing. For this purpose, the simple procedures outlined in *Management of Dead Bodies after Disasters: A Field Manual for First Responders* for proper handling and storage of bodies and collection of basic information are complementary to professional requirements for disaster victim identification, including Interpol's DVI guide and forms.

Although the manual was drafted and designed for contexts with limited or unavailable forensic services, it has also been well received in countries with well-resourced and highly developed forensic services and disaster-response agencies as a useful tool for disaster preparedness.

The manual has proven so far to be a useful tool for humanitarian workers and first responders managing the dead in contexts of armed conflict and situations of internal violence,[4] where the ICRC is promoting its use in combination with its other guidelines aimed at such contexts, including its *Operational Best Practices Regarding the Management of Human Remains and Information on the Dead by Non-specialists for All Armed Forces, for All Humanitarian Organizations*.

Contents of the manual

The 47-page manual is divided into eleven short chapters covering the main aspects of management of the dead in catastrophes, including the needs of bereaved families. Each chapter summarizes principal recommendations and practical advice for their implementation. It also includes a chapter with questions and answers for first responders, and annexes with forms for the collection and management of information on the missing and the dead.

4 After its publication in early 2006, in English and Spanish, a second edition was published at the end of that year in order to meet growing demands from the field worldwide. Limited editions of the manual, in Urdu, Sinhalese, Tamil, Bahasa Indonesian and French, were prepared by the ICRC during 2006 to meet specific needs in Pakistan, Sri Lanka and the Democratic Republic of Congo. Similarly, editions in Arabic, Japanese and other languages are under consideration at the time of writing.

The manual has two main purposes: first, to promote the proper and dignified management of the dead and ensure respect for the bereaved, and, second, to enable the identification of human remains.

Following catastrophes, implementing simple measures early on can significantly improve the opportunity for their successful identification. However, after the majority of catastrophes the immediate management of human remains is done by local organizations and communities and not by specialist teams of national and international experts. Consequently the manual focuses on practical recommendations for non-specialists.

In the immediate aftermath of a catastrophe there is little time to read guidelines, so the manual dedicates one chapter to each key task and uses bullet-points for brevity and clarity. Local co-ordinators can photocopy and distribute the relevant chapters to individuals responsible for specific tasks, such as body recovery.

The term ''dead bodies'' is used instead of the more respectful and technically correct term ''human remains'' because the term ''dead bodies'' is less ambiguous for readers whose first language is not English.

The manual does not provide a comprehensive framework for forensic investigation. However, following the recommendations will aid the work of forensic specialists when they arrive at the scene. Its recommendations will also help communities for whom forensic expertise is unavailable to collect basic information that may aid identification of the deceased. Nevertheless, the manual does not replace the need for specialist forensic identification of victims, including the need to collect thorough ante-mortem data (AMD) of the missing and to carry out thorough post-mortem examinations whenever possible. The use of the manual is expected to contribute towards and facilitate the later task of forensic investigators, including Interpol DVI teams, once they gain access to the areas affected by a catastrophe and become operational.

Co-ordination

The coordination of activities related to the management of the dead after catastrophes is a core component of disaster response and it is required at several levels: local, regional/provincial and national. Early coordination is vital for the following tasks:

- to manage information and co-ordinate assessment activities;
- to identify required resources (e.g. forensic teams, morgues, body bags, etc.);
- to put into practice and manage a plan of action for the management of dead bodies and corresponding information;
- to disseminate accurate information to families and communities about identification of the missing and management of dead bodies.

The recommendations outlined below help to guide early coordination efforts.

Effective local coordination

- As soon as possible, and in accordance with existing disaster preparedness plans, identify an agency and name a person to serve as a local coordinator with full authority and responsibility for the management of dead bodies (e.g. coroner, local governor, police chief, military commander, mayor, community leader).
- The choice of medical or hospital directors as co-ordinators for the management of the dead in catastrophes should be discouraged, as their primary responsibility is the care of the living and injured.
- Within the emergency operations center establish a team to coordinate management of the dead. Include key operational partners such as the military, civil defense, fire service, local emergency or rescue organizations, National Red Cross/Red Crescent Society, and local funeral homes, morticians, and coroners, etc.
- Appoint persons to be in charge of one or more of the following tasks and provide them with a copy of the relevant chapter in this manual:
  - body recovery
  - storage
  - identification
  - information and communication
  - disposal
  - support for families
  - logistics

Effective regional and national coordination

- As soon as possible, someone with the required level of responsibility should be appointed as the national or regional coordinator, and provided with the necessary authority to oversee the management of dead bodies (e.g. Minister, Governor, coroner, Police Chief, Military Commander, Mayor).
- Refer to the mass fatality section of your disaster response plan or major incident procedures manual, if available.
- Establish a coordination group including key individuals to advise on:
  - Communications with the public and the media.
  - Legal issues about identification and death certification.
  - Technical support for identification and documentation.
  - Logistical support (e.g. military or police).
  - Liaison with diplomatic missions, intergovernmental and international organizations (e.g. United Nations, World Health Organization, International Committee of the Red Cross, International Federation of Red Cross and Red Crescent Societies; in particular and with regard to the management of the dead, Interpol should be contacted as soon as possible for DVI advice and assistance).

Infectious disease risks

The fear that the dead will cause epidemics after catastrophes is often deeply ingrained, despite growing evidence to the contrary. Research has shown that the dead, including decomposing bodies, do not spread diseases after catastrophes unless they are in direct contact with drinking water. Instead, the surviving population is the most likely source of epidemics. The unfounded belief that the dead spread diseases is swiftly disseminated by the weary public after catastrophes and is often promoted by the media and on occasions even by misled sanitary authorities. The political pressure brought about by this belief too often causes authorities to call for hasty mass burials and cremations of unidentified bodies and for the use of ineffective ''sanitary'' measures, such as the use of masks and spraying the dead with so-called ''disinfectants'', which may truly pollute water sources.

The mismanagement of dead bodies resulting from such hasty procedures may cause serious and long-lasting mental distress to bereaved families and communities exposed to the undignified handling of their dead and left unable to mourn their loved ones.

Infections and dead bodies

- Victims of catastrophes are normally killed by trauma (injuries), blasts, drowning, or heat – not by disease.
- At the time of death, victims are not likely to be sick with epidemic-causing infections (i.e. plague, cholera, typhoid and anthrax).
- A few victims will have chronic blood infections (hepatitis or HIV), tuberculosis or diarrheal disease.
- Most infectious organisms do not survive beyond 48 hours in a dead body. An exception is HIV which has been found six days post-mortem.

Risk to the public

- The risk to the public is negligible because they do not touch dead bodies.
- There is the potential risk of contamination of drinking water supplies by fecal material released from dead bodies.

Risk to body handlers

- Individuals handling human remains have a small risk through contact with blood, body fluids and feces (bodies often leak feces after death) from the following:
  HIV
  tuberculosis
  diarrheal disease

- Body recovery teams work in hazardous environments (e.g. collapsed buildings and debris) and may also be at risk of injury and tetanus (transmitted via soil).

Safety precautions for body handlers

- Basic hygiene protects workers from exposure to diseases spread by blood and certain body fluids. Workers should use the following precautions.
  - The use of gloves and boots, when available, is highly recommended.****
  - Wash hands with soap and water after handling bodies and before eating;
  - Avoid wiping face or mouth with hands.
  - Wash and disinfect all equipment, clothes and vehicles used for transportation of bodies.
  - Face masks are unnecessary, but should be provided if requested to avoid anxiety.
- The recovery of bodies from confined, unventilated spaces should be approached with caution. After several days of decomposition, potentially hazardous toxic gases can build up. Time should be allowed for fresh air to ventilate confined spaces.
- See body recovery for recommendations on the use of body bags.

Body recovery

Body recovery by first responders is the first and arguably the most important step in managing the dead after catastrophes. If properly done it will greatly help in the identification of the dead and will also help reduce the anguish of bereaved families and communities.

The aim of body recovery

- Rapid retrieval is a priority because it aids identification and reduces the psychological burden on survivors.
- Recovery of bodies should not interrupt other interventions aimed at helping survivors.

The workforce

- Body recovery is often done spontaneously by a large number of individuals, including:
  - surviving community members
  - volunteers (e.g., National Red Cross/Red Crescent Societies)
  - search and rescue teams

military, police or civil-defence personnel
- Coordination of these groups is needed to encourage the use of procedures and health and safety precautions recommended in this manual.

Methods and procedures

- Bodies should be placed in body bags. If these are unavailable, use plastic sheets, shrouds, bed sheets, or other locally available material.
- Body parts (e.g., limbs) should be treated as individual bodies. Recovery teams should not attempt to match the body parts at the disaster scene.
- Body recovery teams work most effectively in two groups: one to take bodies to a nearby collection point and a second to take them to identification or storage areas.
- Noting the place and date where the body was found helps future identification.
- Personal belongings, jewellery and documents should not be separated from the corresponding remains during recovery, but only during the identification phase (see ''Identification of dead bodies'').
- Stretchers, body bags and flatbed trucks or tractor-trailers can be used to transport bodies. Ambulances should not be used for this purpose as they are best used to help the living. Whenever possible, bodies should be concealed during transportation, to protect their dignity.

Health and safety

- Body recovery teams should wear basic protective equipment (heavy duty gloves and boots) and wash their hands with soap and water after handling dead bodies (see ''Infectious disease risks'').
- Recovery teams often work among debris or collapsed buildings. First aid and medical treatment should be available in case of injury.
- Tetanus is a serious risk for unvaccinated workers. Local medical teams should be on the alert for tetanus-prone injuries.
- Many different people or groups are involved in body recovery. Communication and coordination with them is often difficult.
- This part of the process can be essential for identification and should be read in conjunction with the section ''Identification of dead bodies''.
- Body recovery only lasts a few days or weeks, but may be prolonged following catastrophes.

Storage of dead bodies

Once recovered, bodies awaiting identification should be stored in a proper and dignified way. Dead bodies decompose rapidly in warm weather. For example, in hot climates the decomposition of a body may be too advanced within just 12–48

hours to allow for facial recognition. Conversely, cold storage slows the rate of decomposition and preserves the bodies for easier examination.

Storage options

- Whichever storage option is used, each body or body part should be kept in a body bag or wrapped in a sheet before storage.
- Waterproof labels (e.g. paper in sealed plastic) with a unique identification number should be used (see ''Unique reference numbering for dead bodies'' in ''Identification of dead bodies''). Do not write identification numbers on bodies or body bags or sheets, as they are erased easily during transportation and storage.

Refrigeration

- Refrigeration between 2℃ and 4℃ is the best option.
- Refrigerated transport containers used by commercial shipping companies can usually be used to accommodate properly up to 50 bodies in racks.
- Enough containers are seldom available at the disaster site, and alternative storage options should be used until refrigeration becomes available.

Temporary burial

- Temporary burial provides a good option for immediate storage where no other method is available, or where longer-term temporary storage is needed.
- Temperature underground tends to be lower than at the surface, thereby providing natural cooling.
- Temporary burial sites should be constructed in the following way to help ensure future location and recovery of bodies:
  - Use individual burials for a small number of bodies and trench burial for larger numbers.
  - Burial should be around 1.5m deep and at least 200m from drinking water sources (see ''Long-term storage and disposal of dead bodies'').
  - Leave approximately 0.4m between bodies.
  - Lay bodies in one layer only (not on top of each other).
  - Clearly mark each body (see ''Identification of dead bodies'') and mark their positions at ground level.

Dry ice

- Dry ice (carbon dioxide (CO_2) frozen at –78.5℃) may be suitable for short-term storage.
  - Dry ice should not be placed in direct contact with bodies, even when wrapped, because it damages them.Build a low wall of dry ice (i.e. 0.5m high) around groups of about 20 bodies and cover with a plastic

sheet, tarpaulin, or tent. About 10kg of dry ice per body, per day is needed, depending on outside temperature.Dry ice must be handled carefully as it causes ''cold burns'' if touched without proper gloves.When dry ice melts it produces carbon dioxide gas, which is toxic. *Warning*: closed rooms or buildings should be avoided when using dry ice in preference to areas with good natural ventilation.

Ice

- The use of ice (frozen water) should be avoided where possible because:
  In hot climates ice melts quickly and large quantities are needed.
  Melting ice produces large quantities of dirty waste water that may cause concern about diarrheal disease.
  Disposal of this waste water creates additional management issues.
  The water may damage bodies and personal belongings (e.g. identity cards).

Identification of dead bodies

Identification of dead bodies is based upon the comparison and matching of information from missing persons (physical features, personal belongings, place and circumstances of death, etc.) with corresponding information from the deceased.

Forensic experts are qualified and often the only ones authorized to do this job. But mobilizing forensic experts and resources after catastrophes may demand several days. This means that early opportunities to help identify bodies may be lost as the bodies decompose. Visual recognition of cadavers or their photographs by acquaintances is the simplest method of identification, but this is prone to frequent errors. Therefore, whenever possible, it should be complemented with other means of forensic human identification, albeit at a later stage. Forensic procedures (autopsies, fingerprinting, dental examinations, X-rays, forensic anthropology, DNA analysis) can be used after visual recognition of bodies or photographs becomes impossible.

The early work of non-specialists in managing the dead (especially proper recovery, recording, documentation and storage) will determine much of the success of future identifications by forensic specialists. The forms included in *Management of Dead Bodies after Disasters: A Field Manual for First Responders* for collecting information on the dead and on missing persons (''Human Remains Information Form'' and ''Missing Persons Data Form'' Annex I and II respectively in the manual) should be used by non-specialists to collect basic albeit essential information that will aid later forensic identification procedures.

The collection and management of samples from dead bodies and relatives of the missing, for possible DNA analysis and identification at a later date,

is too complicated for first responders to deal with in catastrophes, unless the necessary resources and forensic advice are available.

General principles

- Sooner is better for victim identification. Decomposed bodies are much more difficult to identify and require forensic expertise.
- The key steps to documenting dead bodies as described below are: unique reference number, label, photograph, record and secure.
- It should be appreciated that visual recognition and photographs, while simple, can result in mistaken identification.
- Injuries to the deceased or the presence of blood, fluids or dirt, especially around the head, greatly increase the errors in visual recognition.
- Any separate body part which proves that a person is dead can aid in identification and should therefore be managed as though it is a whole body (i.e. using a unique reference number).

Processes

Unique referencing (mandatory)

Assign unique and sequential reference numbers to each body or body part (Figure 1). Reference numbers must not be duplicated.

Labeling (mandatory)

- Write the unique reference number on a waterproof label (e.g., paper sealed in plastic) then securely attach it to the body or body part.
- A waterproof label with the same unique reference number must also be attached to the container for the body or body part (e.g. body bag, cover sheet or bag for the body part).

Photography (mandatory – if photographic equipment is available)

- The unique reference number must be visible in all photographs.
- If available, digital cameras allow for easier storage and distribution of photographs.
- Clean the body sufficiently to allow facial features and clothing to be properly represented in the photographs.
- In addition to the unique reference number, the photographs should include at least:
  - a full-length of the body, front view
  - whole face
  - any obvious distinguishing features
  - a scale (i.e. a ruler or measuring tape)

Unique reference numbering for dead bodies:

Each body or body part ***must*** have a unique reference number. The following is recommended.

PLACE + RECOVERY TEAM/PERSON + BODY COUNT

For example:

Colonia San Juan - Team A–001

OR

Chaing Mai Hospital - P. Sribanditmongkol–001

PLACE: Where possible, all bodies should be assigned a unique reference number indicating place of recovery. If recovery place is unknown, use instead the place where the body was taken for identification/storage.

RECOVERY TEAM/PERSON: Person or team numbering the body.

BODY COUNT: A sequential count of bodies at each site (e.g., 001 = body number one).

Note: Details about where and when the body was found and the person/organization who found it should also be recorded

Figure 1

- If circumstances permit, or at a later time, additional photographs can be included with the unique reference number of the following:
  - upper and lower part of the body
  - all clothing, personal effects and distinguishing features
- When taking photographs the following should be considered:
  - Blurred photographs will not be useful.
  - Photographs must be taken close to the dead body; when photographing the face, it should fill the entire picture.
  - The photographer should stand at the middle of the body when taking the picture, not at the head or feet.
  - The photograph must include the visible unique reference number to ensure that identification made using the photograph matches the correct body.
  - Minimum photograph set required for visual identification:
  - (a) whole face (b) whole body
  - (c) upper body (d) lower body

Record (mandatory)

- Whenever possible and regardless of whether photographs have been taken of the dead body or body part, use the Human Remains Information Form to record the necessary information, including:
  - sex
  - approximate age range (infant, child, adolescent, adult or elderly)
  - personal belongings (jewellery, clothes, identity card, driver's license, etc.)
  - obvious specific marks on the skin (e.g. tattoos, scars, birthmarks), or any obvious individualizing trait

- If no photographs have been taken, if possible also record:
  - apparent race
  - estimated stature (from heels to top of head)
  - color and length of hair
  - color of eyes (*only in very fresh cadavers*)
- The Human Remains Information Form should include the same unique referencing number used for the body or body part.

Secure

- Personal belongings should be securely packaged, labeled with the same unique reference number, and stored with the body or body part. This is mandatory.
- Clothing should be left on the body.

Release of bodies

- A dead body should only be released to the next of kin when identification is certain and the corresponding death certificate is signed. The release should be duly recorded.
- A body should only be released by the responsible authority, which must also provide documentation of the release (a letter or death certificate).
- Whenever possible visual recognition should be complemented, albeit at a later date, with other methods of forensic human identification, including fingerprints, dental traits and genetics, and information such as identification of clothing or personal effects.
- To increase reliability of visual recognition (see warning above), viewing conditions should minimize emotional stress to bereaved relatives.
- Although there may be no alternative following catastrophes, the psychological impact of viewing dozens or hundreds of dead bodies may further reduce the reliability of visual recognition as a method for identification.
- Viewing photographs of the highest possible quality may be a better approach.
- Data of the missing person should be used to cross-check visual recognition of a dead body *before* their release.
- Record the name and contact details of the person or relatives who claimed the body together with the body's unique reference number.
- Bodies that can not be identified should be properly stored for further examination and future identification (see "Storage of dead bodies") until forensic specialists can investigate.
- Care should be taken before releasing bodies that are not whole, as this may complicate subsequent management of body parts.

Information management

State authorities bear primary responsibility for the proper handling of information about the dead and missing in catastrophes. This information is

also required for coordination activities (see coordination). Even after relatively small disasters large amounts of information about the dead and missing will be collected and processed. Necessary resources (human, technical and financial) for information management should be planned and allocated accordingly.

Organizational arrangements

- Information centers should be established at regional and/or local levels.
- Local centers act as focal points for collection and consolidation of information on the dead and for attending to the public. They are particularly necessary for receiving tracing requests, leaving photographs and information about the missing, and for the release of information on persons found or identified.
- A national system for management and coordination of information should centralize all information on the dead and missing in disasters and catastrophes. Tracing services of the International Committee of the Red Cross and National Red Cross/Red Crescent Societies may assist in this task.
- Data should flow in both directions between the national and local level.

Information for the public

- The population should be promptly and clearly informed about the response and procedures adopted for:
  - searching for the missing;
  - recovery and identification of dead bodies;
  - collection and release of information;
  - support for concerned families and communities.
- Information can be provided through the local or regional centres.
- A wide range of media can be used:
  - radio, television, newspapers, etc.
  - noticeboards
  - the Internet

Information about dead bodies

- Basic information must be collected about all dead bodies when possible (see "Identification of dead bodies").
- Likewise, information on missing persons which may aid their identification should be collected as soon as possible using a Missing Persons Data Form. More detailed information may be collected later (i.e. using the Interpol DVI forms) and this information entered into an electronic databases at a later stage.
- Information is likely to include valuable personal items and photographs which require careful and secure handling (better to photograph and properly record instead).

- A chain of custody is required to avoid misplacement of information and to ensure the availability of all evidence.
- Centralization and consolidation of information about the dead and missing is essential for increasing the possibility of finding a match between tracing requests for missing persons and available or known information of dead bodies.

Long-term storage and disposal of dead bodies

Once identified, dead bodies should be returned as soon as possible to their bereaved relatives. Conversely, bodies which remain unidentified will require appropriate long-term storage.

Method of disposal/long-term storage

- Burial is the most practical method as it preserves evidence for future forensic investigation, if required.
- Cremation of unidentified bodes should be avoided for several reasons:
  - cremation will destroy evidence for any future identification;
  - large amounts of fuel are needed (usually wood);
  - achieving complete incineration is difficult, often resulting in partially incinerated remains that have to be buried; and
  - it is logistically difficult to arrange for the cremation of a large number of dead bodies.

Location of burial sites

- Careful thought must be given to the location of any burial site.
- Soil conditions, highest water-table level and available space must be considered.
- The site should be acceptable to communities living near the burial site.
- The site should be close enough for the affected community to visit.
- The burial site should be clearly marked and surrounded by a buffer zone that is at least 10m wide, to allow planting of deep-rooted vegetation and to separate the site from inhabited areas.

Distance from water sources

- Burial sites should be at least 200m away from water sources such as streams, lakes, springs, waterfalls, beaches, and the shoreline.
- Suggested burial distance from drinking water wells are provided in table 1. Distances may have to be increased based on local topography and soil conditions.

Table 1. Recommended distance of graves from drinking-water wells

Number of bodies	Distance from drinking water well
4 or less	200m
5 to 60	250m
60 or more	350m
120 bodies or more per 100m2	350m

Grave construction

- If possible, human remains should be buried in clearly marked, individual graves.
- In catastrophes, communal graves may be unavoidable.
- Prevailing religious practices may indicate preference for the orientation of the bodies (e.g. heads facing east, or toward Mecca, etc.).
- Communal graves should consist of a trench holding a single row of bodies each placed parallel to the other, 0.4m apart.
- Each body must be buried with its unique reference number on a waterproof label. This number must be clearly marked at ground level and mapped for future reference.
- Although there are no standard recommendations for grave depth, it is suggested that:
  - graves should be between 1.5m and 3m deep;
  - graves with fewer than five people should allow for at least 1.2m (1.5m if the burials are in sand) between the bottom of the grave and the water table, or any level to which groundwater rises;
  - for communal graves there should be at least 2m between the bottom of the grave and water table, or any level to which groundwater rises; and
  - these distances may have to be increased depending on soil conditions.

Communications and the media

Good public communication contributes to a successful victim recovery and identification process. Accurate, clear, timely and updated information may help to reduce the stress and anguish experienced by bereaved families and affected communities. It also helps to defuse rumors and clarify any misinformation or false expectations about the handling and identification of the dead (see "Frequently asked questions"). The news media (television and radio, newspapers and the Internet) provide indispensable and arguably irreplaceable channels of communication with the public in disasters and catastrophes.

Working with the media

- Generally, most journalists want to report responsibly and accurately. Keeping them informed will minimize the likelihood of inaccurate reporting.

- Engage proactively and creatively with the media:
  A Media-Liaison Officer should be assigned both locally and nationally.
  Establish a Media-Liaison office (as near as possible to the affected area).
  Co-operate proactively (prepare regular briefings, facilitate interviews, etc.).

Working with the public

- An information center for relatives of the missing and the dead should be set up as soon as possible.
- A list of confirmed dead and survivors should be made available, and details of missing individuals recorded by official staff.
- Information should be provided about the processes of recovery, identification, storage and disposal of dead bodies.
- Arrangements for death certification may also need to be explained.

Working with relief agencies

- Humanitarian workers and relief agencies, including UN agencies, the International Committee of the Red Cross, and Red Cross/Red Crescent Societies, have direct contact with affected communities and may act as a source of local information.
- Aid workers are not always the best informed about some technical aspects related to the management of the dead, and may give conflicting and unfounded information, including about the infectious risks of dead bodies.
- Providing correct information to aid agencies on management of the dead will further help to reduce rumors and to avoid incorrect information (see ''Frequently asked questions'').

Information management

- Journalists, both local and international, often arrive on site soon after the events.
- Care is needed to respect the privacy of victims and relatives.
- Journalists should not be allowed direct access to photographs, individual records or the names of victims. However, authorities may decide to release this information in a managed way to help with the identification process.
- Soon after the disaster a decision must be taken whether or not to provide information about the number of victims. The disadvantage of this is that these estimates will undoubtedly be wrong. The advantage is that official statistics may prevent exaggerated reporting by the media.

Support to families and relatives

The dignity of the dead and the needs of the bereaved should be respected at all times throughout the response to catastrophes. The priority for affected families is

to know the fate of their missing loved ones. Therefore mistaken identifications should be avoided, and honest and accurate information should be provided at all times and at every stage of the recovery and identification process.

A sympathetic and caring approach is owed to bereaved families; and psychosocial support for families and relatives should be considered. Their cultural and religious needs should be respected.

Identification of victims

- A family liaison focal point should be established to support relatives and also to help collect information to help identify the missing.
- Families should be informed about findings and the identification of their loved ones before anyone else.
- Families of the dead and missing must be given realistic expectations of the process, including the methods used and timeframes for recovery and identification of remains.
- Families should be allowed to report a missing relative and provide additional information.
- Identification should be conducted as speedily as possible.
- Children should not be expected to aid in the visual identification of dead bodies.
- The need for relatives to view the bodies of their loved ones as part of the grieving process should be respected.
- Once identified, bodies should be released as swiftly as possible to their next of kin.

Cultural and religious aspects

- The overwhelming desire of relatives from all religions and cultures is to identify their loved ones.
- Advice and assistance from religious and community leaders should be sought to improve understanding and acceptance of the recovery, management and identification of the dead bodies.
- Undignified handling and disposal of dead bodies may further traumatize relatives and should be avoided at all times. Careful and ethical management of dead bodies, including disposal, should be ensured, including respect for religious and cultural sensitivities.

Providing support

- Psychosocial support should be adapted to needs, culture and context and should consider local coping mechanisms.
- Local organizations such as the National Red Cross/Red Crescent Societies, NGOs and faith groups can often provide emergency psychosocial care for those affected.

- Priority care should be given to unaccompanied minors and other vulnerable groups. Where possible, they should be reunited and cared for by members of their extended family or community.
- Material support may be necessary for funeral rituals, such as burial shrouds, coffins, etc.
- Special legal provisions for those affected (i.e. rapid processing of death certificates) should be considered and publicized within the affected communities.

Frequently asked questions

Those responsible for or involved in the management of the dead after catastrophes may be asked questions, which offer a good opportunity to inform concerned stakeholders accordingly. Listed below are some of the most likely questions and the recommended answers.

Information for the public

1. Do dead bodies cause epidemics?
No. Dead bodies from most disasters do not cause epidemics. This is because most victims die from trauma, drowning or fire. They do not have epidemic-causing diseases such as cholera, typhoid, malaria or plague when they die.
2. What are the health risks for the public?
The risk to the public is negligible. They do not touch or handle dead bodies. However, there is a small risk of diarrhea from drinking water contaminated by fecal material from dead bodies. Routine disinfection of drinking water is sufficient to prevent water-borne illness.
3. Can dead bodies contaminate water?
Potentially, yes. Dead bodies often leak feces, which may contaminate rivers or other water sources, causing diarrheal illness. However, people will generally avoid drinking water from any source they think has had dead bodies in it.
4. Is spraying bodies with disinfectant or lime powder useful?
No, it has no effect. It does not hasten decomposition or provide any protection.
5. Local officials and journalists say there is a risk of disease from dead bodies. Are they correct?
No. The risk from dead bodies after natural disasters is misunderstood by many professionals and the media. Even local or international health workers are often misinformed and contribute to the spread of rumors.
6. Is there a risk for those handling dead bodies?
For people handling dead bodies (rescue workers, mortuary workers, etc.) in most catastrophes there is a small risk from tuberculosis, hepatitis B and C, HIV, and diarrheal diseases. However, the infectious agents responsible for these diseases do not last more than two days in a dead body (except for HIV, which may survive up

to six days). These risks can be reduced by wearing rubber boots and gloves and practicing basic hygiene (i.e. washing hands).

7. Should workers wear a mask?

The smell from decaying bodies is unpleasant, but it is not a health risk in well-ventilated areas, and wearing a mask is not required for health reasons. However, workers may feel better psychologically if they are using masks. The public should not actively be encouraged to wear masks.

8. How urgent is the collection of dead bodies?

Body collection is not the most urgent task after a disaster. The priority is to care for survivors. There is no significant public health risk associated with the presence of dead bodies. Nevertheless, bodies should be collected as soon as possible and taken away for identification.

9. Should mass graves be used to quickly dispose of the bodies?

No. Rapid mass burial of victims is not justified on public health grounds. Rushing to dispose of bodies without proper identification traumatizes families and communities and may have serious legal consequences (i.e. the inability to recover and identify remains).

10. What should the authorities do with dead bodies?

Dead bodies should be collected and stored, using refrigerated containers, dry ice or temporary burial. Identification should be attempted for all human remains. Photographs should be taken and descriptive information recorded for each body. Remains should be stored (i.e. using refrigeration) or buried temporarily to allow for the possibility of an expert forensic investigation in the future.

11. What are the potential mental health issues?

The overwhelming desire of relatives (from all religions and cultures) is to identify their loved ones. All efforts to identify human remains will help. Grieving and traditional individual burial are important factors for the personal and communal recovery or healing process.

12. How should bodies of foreigners be managed?

Families of visitors killed in a disaster are likely to insist on the identification and repatriation of the bodies. Proper identification has serious economic and diplomatic implications. Bodies must be kept for identification. Foreign consulates and embassies should be informed and Interpol contacted for assistance.

Information for responders

13. I am a volunteer; how can I help?

To be helpful you should promote the proper recovery and management of dead bodies and assist in recording necessary information. You might also assist with the recovery and disposal of the dead, under the direction of a recognized coordinating authority. However, you would first need to be briefed, advised, equipped and supported for this difficult task.

14. I work with an NGO; how can I help?

Providing support for families and collection of information in collaboration with the coordinating authority will best help the surviving relatives. You may also

promote proper identification and treatment of the dead. NGOs should not be asked to carry out the identification of dead bodies unless they are highly specialized for this task and work for and under the direct supervision of a legal authority.

15. I am a health professional; how can I help?

The survivors need you more than the dead. Any professional help in fighting the myth of epidemics caused by dead bodies will be appreciated. Talk about this to your colleagues and members or the media.

Conclusion

Humanitarian interventions in major disaster situations, including catastrophes, are increasingly expected to address the proper management of the dead. National and international forensic services specializing in disaster victim identification, including Interpol DVI teams, may not reach the site of the event for days and even weeks. During this critical time first responders play a critical role in helping to ensure the proper and dignified management of the dead and improving the chances of their identification. In order to fulfil these goals they require simple, practical and easy-to-follow advice and guidance. The manual outlined in this article aims to address these needs. The authors and publishers of the manual will continue to monitor its use and implementation for improvements in its recommendations.

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REPORTS AND DOCUMENTS

A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*

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The United States welcomes the ICRC *Customary International Humanitarian Law* study's discussion of the complex and important subject of the customary ''international humanitarian law'' and it appreciates the major effort that the ICRC and the Study's authors have made to assemble and analyze a substantial amount of material.[1] The United States shares the ICRC's view that knowledge of the rules of customary international law is of use to all parties associated with armed conflict, including governments, those bearing arms, international organizations, and the ICRC. Although the Study uses the term ''international humanitarian law,'' the United States prefers the ''law of war'' or the ''laws and customs of war''.[2]

Given the Study's large scope, the United States has not yet been able to complete a detailed review of its conclusions. The United States recognizes that a

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1 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press/ICRC, Cambridge 2005 (hereinafter, ''Study''). On November 11, 2006, the General Counsel of the Department of Defense and the Legal Adviser for the Department of State transmitted a letter to the President of the International Committee of the Red Cross, Dr. Jakob Kellenberger, providing the U.S. Government's initial reactions to the Study. This article reflects the contents of that letter, which is available at <http://www.state.gov/s/l/rls/82630.htm> and <http://www.defenselink.mil/home/pdf/Customary_International_Humanitarian_Law.pdf.> (last visited on 1 June 2007).

2 As the Study itself indicates, the field has traditionally been called the ''laws and customs of war.'' Accordingly, this article will use this term, or the term ''law of war,'' throughout.

significant number of the rules set forth in the Study are applicable in international armed conflict because they have achieved universal status, either as a matter of treaty law or – as with many provisions derived from the Hague Regulations of 1907 – customary law. Nonetheless, it is important to make clear – both to the ICRC and to the greater international community – that, based upon the U.S. review thus far, the United States is concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules. Accordingly, the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.

The United States will continue its review and expects to provide additional comments or otherwise make its views known in due course. In the meantime, this Article outlines some basic methodological concerns and, by examining a few of the rules set forth in the Study, illustrates how these flaws call into question some of the Study's conclusions.

This is not intended to suggest that each of the U.S. methodological concerns applies to each of the Study's rules, or that the United States disagrees with every single rule contained in the study – particular rules or elements of those rules may well be applicable in the context of some categories of armed conflict. Rather, the United States hopes to underline by its analysis the importance of stating rules of customary international law correctly and precisely, and of supporting conclusions that particular rules apply in international armed conflict, internal armed conflict, or both. For this reason, the specific analysis in Part III of four rules is in certain respects quite technical in its evaluation of both the proffered rule and the evidence that the Study uses to support the rule.

Methodological Concerns

There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*. Although it is appropriate for commentators to advance their views concerning particular areas of customary international law, it is ultimately the methodology and the underlying evidence on which commentators rely – which must in all events relate to State practice – that must be assessed in evaluating their conclusions.

State practice

Although the Study's introduction describes what is generally an appropriate approach to assessing State practice, the Study frequently fails to apply this approach in a rigorous way.

- First, for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the "extensive and

virtually uniform'' standard generally required to demonstrate the existence of a customary rule.

- Second, the United States is troubled by the type of practice on which the Study has, in too many places, relied. The initial U.S. review of the State practice volumes suggests that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations. The United States also is troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.
- Third, the Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.
- Fourth, although the Study acknowledges in principle the significance of negative practice, especially among those States that remain non-parties to relevant treaties,[3] that practice is in important instances given inadequate weight.
- Finally, the Study often fails to pay due regard to the practice of specially affected States.[4] A distinct but related point is that the Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a

3 Study, Vol. I, p. xliv (indicating that contrary practice by States not parties to treaties that contain provisions similar to the rule asserted ''has been considered as important negative evidence'').

4 As the Study notes (Vol. I, p. xxxviii), the International Court of Justice has observed that ''an indispensable requirement'' of customary international law is that ''State practice, *including that of States whose interests are specially affected*, should have been both extensive and virtually uniform in the sense of the provision invoked; (…) and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'' *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands, I.C.J Reports 1969*, pp. 4, 43 (emphasis added). In this context, the Study asserts, this principle means that ''[w]ith respect to any rule of international humanitarian law, countries that participated in an armed conflict are ''specially affected'' when their practice examined for a certain rule was relevant to that armed conflict.'' Study, Vol. I, p. xxxix. This rendering dilutes the rule and, furthermore, makes it unduly provisional. Not every State that has participated in an armed conflict is ''specially affected''; such States do generate salient practice, but it is those States that have a distinctive history of participation that merit being regarded as ''specially affected.'' Moreover, those States are not simply ''specially affected'' when their practice has, in fact, been examined and found relevant by the ICRC. Instead, specially affected States generate practice that must be examined in order to reach an informed conclusion regarding the status of a potential rule. As one member of the Study's Steering Committee has written, ''The practice of ''specially affected states'' – such as nuclear powers, other major military powers, and occupying and occupied states – which have a track record of statements, practice and policy, remains particularly telling.'' Theodore Meron, ''The continuing role of custom in the formation of international humanitarian law'', *American Journal of International Law*, Vol. 90, 1996, pp. 238, 249.

greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.

Opinio juris

The United States also has concerns about the Study's approach to the *opinio juris* requirement. In examining particular rules, the Study tends to merge the practice and *opinio juris* requirements into a single test. In the Study's own words,

> ''it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction. … When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*.''[5]

The United States does not believe that this is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris*, the United States does not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law. For example, Additional Protocols I and II to the Geneva Conventions contain far-reaching provisions, but States did not at the time of their adoption believe that all of those instruments' provisions reflected rules that already had crystallized into customary international law; indeed, many provisions were considered ground-breaking and gap-filling at the time. One therefore must be cautious in drawing conclusions as to *opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations, particularly *inter se*, and not in contemplation of independently binding customary international law norms.[6] Even if one were to accept the merger of these distinct requirements, the Study fails to articulate or apply any test for determining when state practice is ''sufficiently dense'' so as to excuse the failure to substantiate *opinio juris*, and offers few examples of evidence that might even conceivably satisfy that burden.

The United States is troubled by the Study's heavy reliance on military manuals. The United States does not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of a customary legal obligation, in the sense pertinent to customary international law, a

5 Study, Vol. I, p. xl.

6 Even universal adherence to a treaty does not necessarily mean that the treaty's provisions have become customary international law, since such adherence may have been motivated by the belief that, absent the treaty, no rule applied.

State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party. Reliance on provisions of military manuals designed to implement treaty rules provides only weak evidence that those treaty rules apply as a matter of customary international law in non-treaty contexts. Moreover, States often include guidance in their military manuals for policy, rather than legal, reasons. For example, the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts. Finally, the Study often fails to distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements. This is notwithstanding the fact that some of the publications cited contain a disclaimer that they do not necessarily represent the official position of the government in question.

A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules. In this regard, the practice volumes generally fall far short of identifying the level of positive evidence of *opinio juris* that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.

Formulation of rules

The Study contains several other flaws in the formulation of the rules and the commentary. Perhaps most important, the Study tends to over-simplify rules that are complex and nuanced. Thus, many rules are stated in a way that renders them overbroad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions. Although the Study's commentary purports to explain and expand upon the specifics of binding customary international law, it sometimes does so by drawing upon non-binding recommendations in human rights instruments, without commenting on their non-binding nature, to fill perceived gaps in the customary law and to help interpret terms in the law of war. For this reason, the commentary often compounds rather than resolves the difficulties presented by the rules, and it would have been useful for the Study's authors to articulate the weight they intended readers to give the commentary.

Implications

By focusing in greater detail on several specific rules, the illustrative comments below show how the Study's methodological flaws undermine the ability of States to rely, without further independent analysis, on the rules the Study proposes.

These flaws also contribute to two more general errors in the Study that are of particular concern to the United States:

- First, the assertion that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all States, including with respect to a significant number of States (including the United States and a number of other States that have been involved in armed conflict since the Protocols entered into force) that have declined to become a party to those Protocols; and
- Second, the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict, notwithstanding the fact that there is little evidence in support of those propositions.

Illustrative Comments on Four Rules in the Study

This Part looks in detail at four rules in the Study, in an effort to illustrate how the United States's methodological concerns about the Study affect the ICRC's conclusions that certain propositions rise to the level of customary international law.

Rule 31: "Humanitarian relief personnel must be respected and protected."

The United States consistently has supported and facilitated relief efforts in armed conflicts around the world, and is keenly aware of the critical role humanitarian relief personnel play in bringing food, clothing, and shelter to civilians suffering from the impact of such conflicts. It is clearly impermissible intentionally to direct attacks against humanitarian relief personnel as long as such personnel are entitled to the protection given to civilians under the laws and customs of war.

Rule 31, however, sets forth a much broader proposition without sufficient evidence that it reflects customary international law. The Study fails to adduce a depth of operational State practice to support that rule. Had it examined recent practice, moreover, its discussion might have been more sensitive to the role of State consent regarding the presence of such personnel (absent a UN Security Council decision under Chapter VII of the UN Charter) and the loss of protection if such personnel engage in particular acts outside the terms of their mission. The Study summarily dismisses the role of State consent regarding the presence of humanitarian relief personnel but fails to consider whether a number of the oral statements by States and organizations that it cites actually reflected situations in which humanitarian relief personnel obtained consent and were acting consistent with their missions.[7] To be clear, these qualifications do *not*

7 Indeed, the authors of the Study may have intended to use the phrase "humanitarian relief personnel" as shorthand for "humanitarian relief personnel, when acting as such." However, the rule as written does not say this, even though Rule 33, which is closely related to Rule 31, reflects the fact that the protection for peacekeepers attaches only as long as they are entitled to the protection given civilians under international humanitarian law.

suggest that humanitarian relief personnel who have failed to obtain the necessary consent, or who have exceeded their terms of mission short of taking part in hostilities, either in international or internal armed conflicts, may be attacked or abused. Rather, it would be appropriate for States to take measures to ensure that those humanitarian relief personnel act to secure the necessary consent, conform their activities to their terms of mission, or withdraw from the State. Nevertheless, a proposition that fails to recognize these qualifications does not accurately reflect State practice and *opinio juris*.

Relevant treaty provisions

Treaty provisions on the treatment of humanitarian relief personnel guide the current practice of many States, and clearly articulate limits to the obligation asserted by Rule 31:

- Article 71(1) of Additional Protocol I (''AP I'') requires that humanitarian relief personnel obtain the consent of the State in which they intend to operate.[8] Article 71(4) prohibits humanitarian relief personnel from exceeding the ''terms of their mission'' and permits a State to terminate their mission if they do so. Even Article 17(2) of AP I, which the Study cites in support of a State's obligation to protect aid societies, describes a situation in which consent almost certainly would be present, since a State that appeals to an aid society for assistance effectively is providing advance consent for that society to enter its territory.
- The Convention on the Safety of United Nations and Associated Personnel, which places an obligation on States Parties to take appropriate measures to ensure the safety and security of UN and associated personnel, applies to situations in which UN personnel are in the host State with the host State's consent, since Article 4 requires the UN and the host State to conclude an agreement on the status of the UN operation.[9]
- Article 12 of Amended Protocol II to the Convention on Conventional Weapons (''CCW Amended Protocol II''), which addresses States Parties' obligations to protect certain humanitarian missions from the effects of mines and other devices, states that ''this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed.''[10] The article continues, ''Without prejudice to such privileges and immunities as they may enjoy (…)

8 As Yoram Dinstein notes, ''In keeping with Article 71(2) of Protocol I, personnel participating in the transportation and distribution of relief consignments must be protected. However, Article 71(1) underscores that the participation of such personnel in the relief action is subject to the approval of the Party in whose territory they carry out their duties.'' *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2004, p. 149.

9 By its terms, the Convention does not apply to enforcement action that the Security Council takes under Chapter VII of the UN Charter.

10 CCW Amended Protocol II, Article 12(1)(a), *International Legal Materials*, Vol. 35, 1996, pp. 1206–1217.

personnel participating in the forces and missions referred to in this Article shall: (…) refrain from any action or activity incompatible with the impartial and international nature of their duties."[11]

- The Fourth Geneva Convention likewise contains both a consent and a "terms of mission" requirement for humanitarian relief personnel. Article 10 states that "[t]he provisions of the present Convention constitute no obstacle to the *humanitarian activities* which the [ICRC] or any other *impartial humanitarian organization* may, *subject to the consent of the Parties to the conflict concerned*, undertake for the protection of civilian persons and for their relief"[12] (emphasis added). Article 9 of the First, Second, and Third Geneva Conventions contains virtually identical provisions.
- Additional Protocol II ("AP II") does not contain provisions relating directly to the acts of humanitarian relief personnel themselves, but Article 18 states that relief actions require the consent of the High Contracting Party in whose territory the humanitarian relief personnel may wish to operate and must be limited to actions of an "exclusively humanitarian and impartial nature".
- The Statute of the International Criminal Court ("Rome Statute") includes as a war crime the act of "[i]ntentionally directing attacks against personnel (…) involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."[13] The Commentary to the ICC Statute states, with regard to this provision, that "[t]he humanitarian assistance should also receive the *consent* of the parties to the conflict the territory of which it must pass or in which it carries out its tasks."[14]

Despite the fact that these treaties clearly qualify State obligations regarding humanitarian relief personnel, Rule 31 lacks any such qualifications. Because the practice of States Parties to treaties presumptively tracks their treaty prerogatives and obligations, one would expect that, to justify omission of these qualifications, the Study would have provided particularly strong evidence of State practice that was inconsistent with them. However, the Study simply concludes that "the overwhelming majority of practice does not specify this condition [of consent]," even after acknowledging that the protection of humanitarian relief

11 Ibid. at Article 12(7)(b).

12 Pictet's Commentary on the Fourth Geneva Convention notes, "In theory, all humanitarian activities are covered (…) subject to certain conditions with regard to the character of the organization undertaking them, the nature and objects of the activities concerned and, lastly, the will of the Parties to the conflict." *Commentary, IV Geneva Convention*, Jean Pictet (ed.), ICRC, 1960, p. 96. It continues, "All these humanitarian activities are subject to one final condition – the consent of the Parties to the conflict. This condition is obviously harsh but it might almost be said to be self-evident." (Ibid., p. 98.). As discussed herein, the United States does not believe that this condition has disappeared since Pictet produced this Commentary.

13 Rome Statute of the International Criminal Court, Article 8(2)(e)(iii), *International Legal Materials*, No. 37, 1998, pp. 999, 1008–1009.

14 Michael Cottier, "War crimes", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, 1999, p. 190 (italics in original).

personnel under the Additional Protocols "applies only to 'authorised' humanitarian personnel as such."[15]

The role of State consent

Much of the practice on which the Study bases its conclusion that State consent is irrelevant is ambiguous or off-point, and in any event, the Study's analysis lacks sufficient attention to detail and context. For instance, peacekeeping implementation agreements such as those among parties to the conflict in Bosnia and Herzegovina, in which each side undertook to provide security assurances to the ICRC, may be seen as a grant of advance consent for the presence of ICRC personnel in the territory of each party.[16] (If the States objected to the presence of the ICRC, they would not have agreed to provide it with security assurances.) The Study relies on other examples of State discussions of the protection of humanitarian relief personnel that specifically allude to the State's support for the Geneva Conventions and their Additional Protocols;[17] as noted above, however, both the Geneva Conventions and the Additional Protocols reflect the need for humanitarian relief personnel to obtain State consent.

The Study cites only seven military manuals, all from States Parties to AP I. The cited excerpts from these manuals offer no indication that these States reject the role of consent. Australia's and France's military manuals simply state that humanitarian relief personnel are given special protection, but this does not explain the scope of and preconditions for a State's obligations.[18] Only one State's manual (Sweden's) states the view that Article 71(2) has achieved the status of customary international law, and it is not clear from the excerpt whether Sweden believes that other paragraphs of Article 71 (including the consent provision in paragraph (1)) also are customary international law.[19] Indeed, the role of consent may be so commonly understood that States, in discussing this issue, simply assume that humanitarian relief personnel will obtain it, particularly given the strong incentives for them to do so. As for many of the UN Security Council resolutions cited as State practice supporting Rule 31, almost all of the peacekeeping operations from which these resolutions stem were established with the consent of the host governments or under the Security Council's Chapter VII authority. Thus, although the resolutions may not themselves recite a condition of consent, consent almost always was a condition precedent – save in the case of Security Council action under Chapter VII, which is plainly an exceptional circumstance with respect to State sovereignty.[20]

15 Study, Vol. I, p. 109.
16 Study, Vol. II, p. 589, paras. 5–6.
17 Ibid., p. 589, para. 8 (citing the Ground Rules for Operation Lifeline Sudan), and p. 593, para. 39 (stating that Zimbabwe regards relevant provisions of the Geneva Conventions "as part of international customary law").
18 Ibid., pp. 589–590, paras. 13 (Australia) and 15 (France).
19 Ibid., p. 590, para. 17.
20 See, e.g., Ibid., pp. 593–596, paras. 41–45, 47–62.

Significant examples of the operational practice of States in this area – which were not included in the Study – are very different from that described by the Study in that they evidence the critical role of State consent. For example, the Civil Military Operations Center and the Humanitarian Operations Center, employed by U.S. and coalition forces in conflicts that include Bosnia, Kosovo, and Afghanistan, required humanitarian relief organizations to coordinate their movements with the coalition forces, in order for those forces to support the organizations' efforts and to ensure their members' safety.[21] Fuller consideration of operational practice undoubtedly would have provided the Study's authors valuable, necessary information.

Terms of mission limitation

Rule 31 also disregards the obvious fact that humanitarian relief personnel who commit acts that amount to direct participation in the conflict are acting inconsistent with their mission and civilian status and thus may forfeit protection. The Geneva Conventions and AP I both recognize, implicitly or explicitly, that during such time as a civilian takes direct part in hostilities, he or she may be targeted. As noted above, to support a rule that ignores the ''terms of mission'' condition, one would expect the Study to provide strong evidence of State practice that ignores States' prerogatives under relevant treaties to provide protection only for humanitarian relief personnel who are providing humanitarian relief. But the Study has not provided such evidence. The Study also fails to provide evidence of *opinio juris* regarding such practice.

Much of the practice cited in the Study actually supports the condition that humanitarian relief personnel must work within the terms of their mission. For instance, Canada's cited manual refers to the *work* of humanitarian relief personnel themselves as protected, and, with regard to non-governmental organizations, notes that NGOs are to be respected ''upon recognition that they are providing care to the sick and wounded.''[22] The Dutch manual uses the more precise term ''personnel engaged in relief activities,'' which may be read as reflecting the ''terms of mission'' requirement.[23] The Study cites the fact that India provides to relief personnel the same protection as medical and religious personnel,[24] but the latter categories of personnel lose their protection from direct attack if they engage in acts harmful to the enemy or directly participate in

21 See generally U.S. Joint Publication 3-07.6, Joint Tactics, Techniques, and Procedures for Foreign Humanitarian Assistance.

22 Study, Vol. II, p. 590, para. 14. Furthermore, the manual cited by the Study is in fact a training manual designed to ''briefly outline (…) the Code of Conduct applicable to all Canadian personnel taking part in all military operations other than Canadian domestic operations.'' Code of Conduct for Canadian Forces Personnel, Office of the Judge Advocate General, Canadian Ministry of National Defense, B-GG-005-027/AF-023 (undated), p. 1–1. It is not an official representation of Canada's *opinio juris* concerning the laws and customs of war; instead, it repeatedly stresses that it is a simplification of applicable laws meant to aid in training.

23 Ibid., p. 590, para. 16.

24 Ibid., p. 591, para. 27.

hostilities. The Report on the Practice of Jordan states that Jordan has "always assumed [*sic*] the safety of those who are engaged in humanitarian action."[25] This, too, fails to support the proposed rule, as it focuses on the actual work of humanitarian relief personnel and is silent about the protections Jordan gives humanitarian relief personnel who act outside their missions' terms. Finally, the Study cites the EU Presidency as saying, "[D]uring armed conflicts, the security of humanitarian personnel was frequently not respected."[26] The only reasonable conclusion to draw from this statement is that State practice is inconsistent with the described rule.

These limitations in treaty provisions, military manuals, and State practice are not inadvertent, but reflect a concerted distinction borne of legitimate State and military security concerns, making it very unlikely that States would acquiesce in the overbroad principle depicted in the rule. For example, during the 1982 Israeli incursion into Lebanon, Israel discovered ambulances marked with the Red Crescent, purportedly representing the Palestinian Red Crescent Society, carrying able-bodied enemy fighters and weapons. This misconduct reportedly was repeated during the 2002 seizure of Bethlehem's Church of the Nativity by members of the terrorist al Aqsa Martyrs Brigade.[27] If the ambulance drivers in these examples were considered to be humanitarian relief personnel and actually were helping fighters in a conflict, Israel would be precluded from taking action under Rule 31 as written. Military commanders also have had to worry about individuals falsely claiming humanitarian relief personnel status, as happened in Afghanistan when some members of Al Qaeda captured while fighting claimed to be working for a humanitarian relief organization. These examples demonstrate why States, in crafting treaty provisions on this topic, have created a "terms of mission" condition for humanitarian relief personnel in a way that Rule 31 fails to do.

Opinio juris

According to the Study, a number of States view themselves as having a legal obligation to protect humanitarian relief personnel as a matter of customary international law. The meaning and soundness of certain cited examples are at best unclear, however. For instance, the Study cites Nigeria and Rwanda as asserting that they are legally obligated to protect humanitarian relief personnel from the effects of military operations, even in the absence of a treaty obligation.[28] Without citations of the actual wording used, and without context, it is not clear whether

25 Ibid., p. 592, para. 30.
26 Ibid., p. 602, para. 111.
27 Similarly, on March 27, 2002, Israeli Defense Forces arrested a driver of a Red Crescent ambulance and seized an explosives belt and other explosive charges from the ambulance. The driver admitted that a terrorist leader had given him explosives to transport to terrorist operatives in Ramallah. See http://www.mfa.gov.il/mfa/government/communiques/2002/apprehension%20of%20ambulance%20harboring%20a%20wanted%20terro (last visited 4 June 2007).
28 Study, Vol. II, p. 592, paras. 33 (Nigeria) and 34 (Rwanda).

these States were asserting that they took this view even in the absence of State consent and in situations in which humanitarian relief personnel were acting outside their mission. The Study also quotes Zimbabwe's submission that it regards the Geneva Conventions' guarantees relating to the activities of relief personnel as part of customary international law, but, as noted above, those Conventions reflect the importance of State consent.[29] Finally, with regard to the Report on U.S. Practice stating that the United States believes that "*unjustified* attacks on international relief workers are also violations of international humanitarian law" (emphasis added), nothing in this statement undercuts the fact that matters may be different when humanitarian relief personnel are acting as combatants, nor does it speak at all to the question of State consent.[30]

Non-international armed conflicts

Although the Study asserts that Rule 31 applies in both international and non-international armed conflict, the Study provides very thin practice to support the extension of Rule 31 to non-international armed conflicts, citing only two military manuals of States Parties to AP II and several broad statements made by countries such as the United Kingdom and United States to the effect that killing ICRC medical workers in a non-international armed conflict was "barbarous" and contrary to the provisions of the laws and customs of war.[31] The Study contains little discussion of actual operational practice in this area, with citations to a handful of ICRC archive documents in which non-state actors guaranteed the safety of ICRC personnel. Although AP II and customary international law rules that apply to civilians may provide protections for humanitarian relief personnel in non-international armed conflicts, the Study offers almost no evidence that Rule 31 as such properly describes the customary international law applicable in such conflicts.

Summary

The United States does not believe that Rule 31, as drafted, reflects customary international law applicable to international or non-international armed conflicts. The rule does not reflect the important element of State consent or the fact that States' obligations in this area extend only to humanitarian relief personnel who are acting within the terms of their mission – that is, providing humanitarian relief. To the extent that the authors intended to imply a "terms of mission" requirement in the rule, the authors illustrated the difficulty of proposing rules of customary international law that have been simplified as compared to the corresponding treaty rules.

29 Ibid., p. 593, para. 39.
30 Ibid., p. 613, para. 181.
31 See, e.g., Ibid., p. 612, paras. 178 (United Kingdom) and 180 (United States).

Rule 45: "The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited." (First sentence)

Protection of the environment during armed conflict obviously is desirable as a matter of policy, for reasons that include issues of civilian health, economic welfare, and ecology. The following discussion should not be interpreted as opposing general consideration, when appropriate and as a matter of policy, of the possible environmental implications of an attack. Additionally, it is clear under the principle of discrimination that parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity.

Nevertheless, the Study fails to demonstrate that Rule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons.[32] First, the Study fails to assess accurately the practice of specially affected States, which clearly have expressed their view that any obligations akin to those contained in Rule 45 flow from treaty commitments, not from customary international law. (The United States disagrees with the Study's conclusion that France, the United Kingdom, and the United States are not among those specially affected with regard to environmental damage flowing from the use of conventional weapons, given the depth of practice of these States as a result of their participation in a significant proportion of major international armed conflicts and peacekeeping operations around the globe during the twentieth century and to the present.) Second, the Study misconstrues or overstates some of the State practice it cites. Third, the Study examines only limited operational practice in this area and draws flawed conclusions from it.

Specially affected States

The Study recognizes that the practice of specially affected States should weigh more heavily when assessing the density of State practice,[33] but fails to assess that practice carefully. France and the United States repeatedly have declared that Articles 35(3) and 55 of AP I, from which the Study derives the first sentence of Rule 45, do not reflect customary international law. In their instruments of ratification of the 1980 CCW, both France and the United States asserted that the preambular paragraph in the CCW treaty, which refers to the substance of Articles 35(3) and 55, applied only to States that have accepted those articles.[34] The U.S. State Department Principal Deputy Legal Adviser stated during a conference in 1987 that the United States considered Articles 35 and 55 to be overly broad and

32 This discussion focuses on only the first sentence in Rule 45.
33 Study, Vol. I, p. xxxviii.
34 The Study includes these statements in Vol. II, p. 878, paras. 152 and 153.

ambiguous and "not a part of customary law."[35] Rather than taking serious account of such submissions, the Study instead places weight on evidence of far less probative value. The U.S. Army JAG Corps Operational Law Handbook, which the Study cites for the proposition that the United States believes that the provision in Rule 45 is binding, is simply an instructional publication and is not and was not intended to be an authoritative statement of U.S. policy and practice.[36] Nor is the U.S. Air Force Commander's Handbook, which the Study also cites as authority.[37]

In addition to maintaining that Articles 35(3) and 55 are not customary international law with regard to the use of weapons generally, specially affected States possessing nuclear weapon capabilities have asserted repeatedly that these articles do not apply to the use of nuclear weapons. For instance, certain specially affected States such as the United States, the United Kingdom, Russia, and France so argued in submissions to the International Court of Justice ("ICJ").[38] The United Kingdom's military manual specifically excepts from the limitation in Article 35(3) the use of nuclear weapons against military objectives.[39] In a report summarizing the Conference that drafted Additional Protocol I, the United States noted:

35 Remarks of Michael J. Matheson, Principal Deputy Legal Adviser, U.S. Department of State, "The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A workshop on customary international law and the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 24, 436. One of the U.S. concerns has been that Articles 35(3) and 55 fail to acknowledge that use of such weapons is prohibited only if their use is clearly excessive in relation to the concrete and direct overall military advantage anticipated. The Study purposefully disregards this objection, even as to the contours of the customary rule. As the commentary states, "[T]his rule is absolute. If widespread, long-term and severe damage is inflicted, or the natural environment is used as a weapon, it is not relevant to inquire into whether this behavior or result could be justified on the basis of military necessity or whether incidental damage was excessive." Study, Vol. I, p. 157.

An example illustrates why States – particularly those not party to AP I – are unlikely to have supported Rule 45. Suppose that country A has hidden its chemical and biological weapons arsenal in a large rainforest, and plans imminently to launch the arsenal at country B. Under such a rule, country B could not launch a strike against that arsenal if it expects that such a strike may cause widespread, long-term, and severe damage to the rainforest, even if it has evidence of country A's imminent launch, and knows that such a launch itself would cause environmental devastation. Indeed, one of the Study's authors has recognized elsewhere that the value of the military objective is relevant to an analysis of when an attack that will cause harm to the environment is permitted. See Louise Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, *International Review of the Red Cross*, Vol. 37 No. 316 January–February 1997, pp. 35, 52.

36 Study, Vol. II, p. 883, para. 186.

37 Ibid., pp. 882–883, para. 185.

38 Letter dated June 20, 1995 from the Acting Legal Adviser of the Department of State, together with the Written Statement of the Government of the United States, pp. 25–28; Letter dated June 16, 1995 from the Legal Adviser of the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Statement of the Government of the United Kingdom, pp. 40–46; Letter dated June 19, 1995 from the Ambassador of the Russian Federation, together with Written Statement of the Government of Russia, pp. 10–11; Lettre en date du 20 juin 1995 du Ministre des affaires étrangères de la République française, accompagnée de l'exposé écrit du Gouvernement de la République française, pp. 31–33.

39 Study, Vol. II, p. 882, para. 184.

> "During the course of the Conference there was no consideration of the issues raised by the use of nuclear weapons. Although there are several articles that could seem to raise questions with respect to the use of nuclear weapons, most clearly, article 55 on the protection of the natural environment, it was the understanding of the United States Delegation throughout the Conference that the rules to be developed were designed with a view to conventional weapons and their effects and that the new rules established by the Protocol were not intended to have any effects on, and do not regulate or prohibit, the use of nuclear weapons. We made this understanding several times during the Conference, and it was also stated explicitly by the British and French Delegations. It was not contradicted by any delegation so far as we are aware."[40]

The Conference Record from 1974, reflecting earlier work on the text that became AP I, records the United Kingdom's view on the issue: "[The UK] delegation also endorsed the ICRC's view, expressed in the Introduction to the draft Protocols, that they were not intended to broach problems concerned with atomic, bacteriological or chemical warfare. (…) It was on the assumption that the draft Protocols would not affect those problems that the United Kingdom Government had worked and would continue to work towards final agreement on the Protocols."[41] In acceding to AP I, both France and the United Kingdom stated that it continued to be their understanding that the Protocol did not apply generally to nuclear weapons. For instance, the United Kingdom stated, "It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons (…). In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons."[42]

The Study's summary states: "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."[43] However, the weight of the evidence – including the fact that ICRC statements prior to and upon conclusion of the Diplomatic Conference acknowledged this as a limiting condition for promulgation of new rules at the Conference; that specially affected States lodged these objections from the time the rule first was articulated; and that these States have made them consistently since then – clearly indicates that these three States are not simply persistent objectors, but rather that the rule has not formed into a customary rule at all.

40 *Digest of U.S. Practice*, 1977, p. 919.
41 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 5–6 (1977), p. 134.
42 Statement of the United Kingdom, January 28, 1998, revised July 2, 2002. See also statement of France, April 11, 2001.
43 We note that the Study raises doubts about the continued validity of the "persistent objector" doctrine. Study, Vol. I, p. xxxix. The U.S. Government believes that the doctrine remains valid.

General evidence of State practice and opinio juris

Other practice included in the Study fails to support or undercuts the customary nature of Rule 45. This includes examples of States consenting to the application of Articles 35(3) and 55;[44] a State expressing a concern that opposing forces were directing attacks against its chemical plants, without asserting that such attacks would be unlawful;[45] the ICJ indicating in 1996 that Article 35(3) constrained those States that subscribed to AP I, and thus indicating that the Article is not customary international law;[46] draft codes and guidelines issued by international organizations and not binding by their terms;[47] and statements that could just as easily be motivated by politics as by a sense of legal obligation. Some cited practice makes specific reference to a treaty as the basis for obligations in this area. In 1992, in a memorandum annexed to a letter to the Chairman of the Sixth Committee of the UN General Assembly, the United States and Jordan stated that Article 55 of AP I requires States Parties to ''take care in warfare to protect the natural environment against widespread, long-term and severe damage.'' That is, the United States and Jordan described the rule as a treaty-based, rather than customary, obligation.[48] Israel's Practice Report, which states that Israeli Defense Forces do not use or condone methods or means of warfare that Rule 45 covers, contains no suggestion that Israel has adopted this policy out of a sense of legal obligation.[49] With regard to the twenty State military manuals the Study cites (all but one of which are from States Parties to AP I), the Study offers no evidence that any of these nineteen States Parties included such a provision in their manuals out of a sense of *opinio juris*, rather than on the basis of a treaty obligation. In sum, none of the examples given clearly illustrates unequivocal support for the rule, either in the form of State practice or of *opinio juris*.

Domestic criminal laws

The Study lists various States' domestic criminal laws on environmental damage, but some of those laws flow from the obligation in Article 85 of AP I to repress breaches of the Protocol. Certain other States' laws criminalize a broad crime termed ''ecocide,'' but most of the cited provisions fail to make clear whether this crime would apply to acts taken in connection with the use of military force. As noted above, a number of States (including Australia, Burundi, Canada, Congo, Georgia, Germany, Netherlands, New Zealand, Trinidad, and the United

44 Study, Vol. II, p. 879, paras. 157 and 158.
45 Ibid., pp. 887–888, paras. 224 and 225. See also p. 900, para. 280 (CSCE committee drew attention to shelling that could result in harm to the environment, without indicating that such attacks were unlawful).
46 Ibid., pp. 900–901, para. 282.
47 Ibid., p. 878 (para. 156), p. 879 (para. 160), p. 898 (paras. 273 and 274), pp. 898–99 (para. 275), and p. 902 (para. 289).
48 Ibid., p. 891, para. 244.
49 Ibid., p. 890, para. 241.

Kingdom) have incorporated ICC Article 8(2)(b)(iv) into their criminal codes, but the ICC provision prohibits the use of the weapons described in Rule 45 only in those cases in which their use "would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[50] These domestic criminal provisions clearly do not support the broader statement in Rule 45, which would preclude States from taking into account the principles of military necessity and proportionality. Finally, the Study offers almost no evidence that any of these States has enacted criminal laws prohibiting this activity out of a sense of *opinio juris*. The fact that a State recently criminalized an act does not necessarily indicate that the act previously was prohibited by customary international law; indeed, a State may have criminalized the act precisely because, prior to its criminalization in domestic law, it either was not banned or was inadequately regulated.

Operational practice

The Study examines only a limited number of recent examples of practice in military operations and draws from these examples the conclusion that "[p]ractice, as far as methods of warfare (…) are concerned, shows a widespread, representative and virtually uniform acceptance of the customary law nature of the rule found in Articles 35(3) and 55(1)" of AP I.[51] However, the cited examples are inapposite, as none exhibited the degree of environmental damage that would have brought Rule 45 into play. Rather than drawing from that the conclusion that the underlying treaty provisions on which the rule is based are too broad and ambiguous to serve as a useful guideline for States, as the United States long has asserted, the Study assumes that the failure to violate the rule means that States believe it to be customary law. It is notable that, following Iraq's attacks on Kuwait's oil fields, most international criticism focused on the fact that these attacks violated the doctrines of military necessity and proportionality.[52] Most criticism did not assert potential violations of customary rules pertaining to environmental damage along the lines of Rule 45.[53] The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia noted that "it would appear extremely difficult to develop a *prima facie* case upon

50 Rome Statute of the International Criminal Court, Article 8(2)(b)(iv).

51 Study, Vol. I, p. 154.

52 See Yoram Dinstein, "Protection of the environment in international armed conflict", *Max Planck Yearbook of United Nations Law*, Vol. 5 (2001), pp. 523, 543–546 and notes (discussing the illegality of Iraq's acts but noting that "many scholars have adhered to the view that – while the damage caused by Iraq was undeniably widespread and severe – the 'long term' test (measured in decades) was not satisfied").

53 These attacks, of course, violated provisions of the law of armed conflict, particularly those relating to military necessity. The U.S. Government, in concurring in the opinion of the conference of international experts, convened in Ottawa, Canada from July 9–12, 1991, found that Iraq's actions violated, among other provisions, Article 23(g) of the Annex to the 1907 Hague Convention IV and Article 147 of the Fourth Geneva Convention. See Letter dated March 19, 1993 From the Deputy Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/25441, p. 15.

the basis of these provisions [of AP I], even assuming they were applicable."[54] It may be the case that Rule 45 as drafted, like the treaty provisions on which it is based, sets such a limited and imprecise boundary on action as not to function as a rule at all.

Non-international armed conflicts

For all of the reasons that the Study fails to offer sufficient evidence that the provision in Rule 45 is a customary rule in international armed conflict, the Study fails to make an adequate case that the rule is customary international law applicable to non-international armed conflicts. (The Study itself acknowledges that the case that Rule 45 would apply in non-international conflicts is weaker.[55]) The fact that a proposal by Australia to include a provision like Article 35(3) in AP II failed further undercuts the idea that Rule 45 represents a rule of customary international law in non-international armed conflicts.[56]

Summary

States have many reasons to condemn environmental destruction, and many reasons to take environmental considerations into account when determining which military objectives to pursue. For the reasons stated, however, the Study has offered insufficient support for the conclusion that Rule 45 is a rule of customary international law with regard to conventional or nuclear weapons, in either international or non-international armed conflict.

Rule 78: "The anti-personnel use of bullets which explode within the human body is prohibited."

Although anti-personnel bullets designed specifically to explode within the human body clearly are illegal, and although weapons, including exploding bullets, may not be used to inflict unnecessary suffering, Rule 78, as written, indicates a broader and less well-defined prohibition. The rule itself suffers from at least two problems. First, it fails to define which weapons are covered by the phrase "bullets which explode within the human body." To the extent that the Study intends the rule to cover bullets that could, under some circumstances, explode in the human body (but were not designed to do so), State practice and the ICRC's Commentary on the 1977 Additional Protocol reflect that States have not accepted that broad prohibition. Second, there are two types of exploding bullets. The first is a projectile designed to explode in the human body, which the United States agrees would be prohibited. The second is a high-explosive projectile designed primarily

54 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000), para. 15.
55 Study, Vol. I, pp. 156–157.
56 Study, Vol. II, pp. 877–878, para. 150.

for anti-matériel purposes (not designed to explode in the human body), which may be employed for anti-matériel and anti-personnel purposes. Rule 78 fails to distinguish between the two. If, as the language suggests, the Study is asserting that there is a customary international law prohibition on the anti-personnel use of anti-matérial exploding bullets, the Study has disregarded key State practice in this area. Third, the Study extrapolates the rule to non-international conflicts without a basis for doing so.

Bullets covered

With regard to which weapons are covered by the phrase "bullets which explode within the human body," the language in Rule 78 appears to use an effects-based test, and in doing so fails to distinguish between projectiles that almost always detonate within the human body, including those specifically designed to do so; projectiles that foreseeably could detonate within the human body in their normal use; and projectiles that in isolated or rare instances outside their normal use might detonate within the human body. Although there are important practical differences among these types of munitions – and, more generally, between munitions designed to explode within the human body and those designed for other, lawful purposes – the language of the rule suggests that the Study considers all three categories in applying this effects-based test to be illegal. If so, there is no evidence that States have accepted this standard; if States have accepted a rule in this area, it is only with regard to the first category of projectiles – those designed to explode within the human body. Indeed, the Study concedes, "The military manuals or statements of several States consider only the anti-personnel use of such projectiles to be prohibited or only if they are designed to explode upon impact with the human body."[57] The Study, however, ignores the significance of design in its formulation of Rule 78.[58]

The ICRC put forward an effects-based standard at the Second CCW Review Conference in 2001, in proposing that CCW States Parties consider negotiating a protocol that would prohibit the anti-personnel use of bullets that explode within the human body. Although the Study notes the ICRC's own submission to the Review Conference,[59] it fails to note that States Parties did not choose to pursue a protocol or other instrument on this issue. The ICRC proffered this same standard in the now-withdrawn "superfluous injury or unnecessary suffering" ("SIrUS") project. Because of its use of this "effects-based" (rather than design-based) standard, the Study's commentary also brings into the discussion certain weapons that we do not consider to fall within the category of bullets that explode within the human body. The statement in the commentary to Rule 78 that

57 Study, Vol. I, p. 273.

58 Germany's military manual recognizes a prohibition on those exploding bullets "which can disable *only* the individual directly concerned but not any other persons." (Emphasis added.) Study, Vol. II, p. 1788, para. 13. A U.S. legal review states that "an exploding projectile *designed exclusively for antipersonnel use* would be prohibited, as there is no military purpose for it." (Emphasis added.) *Ibid.*, p. 1791, para. 35.

59 Ibid., p. 1794, para. 47.

''certain 12.7mm bullets exploded in human tissue stimulant'' appears to be an effort to include in the category of bullets that explode within the human body the 12.7mm Raufoss multi-purpose ammunition.[60] The Study's statement refers to a 1998 ICRC test that subsequently proved flawed in its methodology, results, and conclusions in a 1999 re-test at Thun, Switzerland, of which ICRC members were observers.[61] The published conclusions of the participants in the re-test did not support the ICRC conclusion that this ammunition should be considered to be the type that explodes in the human body, yet the Study does not mention this 1999 re-test.

Uses covered

The rule as written suggests a total ban on all instances in which exploding bullets may be used against personnel, but State practice does not support this. Efforts to restrict the use of exploding bullets date back to the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (the ''St. Petersburg Declaration'').[62] This Declaration banned the use of exploding bullets in international armed conflict between the States Parties. Only seventeen government representatives, however, signed the St. Petersburg Declaration, with two other States, Baden and Brazil, acceding in 1869. Despite the Study's assertion that the St. Petersburg Declaration represented the practice of ''most of the States in existence at that time,''[63] it actually represented that of less than half of the States then in existence.[64] Furthermore, only one State has acceded to the St. Petersburg Declaration since 1869.[65]

Since the St. Petersburg Declaration, there has been considerable State practice involving the anti-personnel use of exploding bullets, despite the ICRC's statement that governments have ''adhered'' to the Declaration. Two participants in the ICRC-hosted 1974 Lucerne Meeting of Experts on certain weapons conventional weapons concluded:

> ''At present it is widely held that in view of the development in weapons technology and state practice the St. Petersburg Declaration cannot be interpreted literally, or in any case that it has not as such become declaratory of customary international law (…) [T]he prohibition

60 Study, Vol. I, p. 273.

61 In part, the 1998 test was flawed because it was set up in a way that was contrary to the principle that ''in looking at small caliber weaponry, it is necessary to look not just at the bullet but at the entire means of delivery and the context in which the weapon will be used.'' Christopher Greenwood, ''Legal aspects of current regulations.'' Keynote speech at Third International Workshop on Wound Ballistics, Thun, Switzerland, March 28–29, 2001.

62 *American Journal of International Law*, Vol. 1, 1907, Supp. pp. 95–96.

63 Study, Vol. I, p. 272.

64 Of all the independent States in the Western Hemisphere, only Brazil acceded to the St. Petersburg Declaration. Additionally, none of the African or East Asian States in existence at the time acceded to the Declaration.

65 Estonia acceded in 1991.

contained in it serves to illustrate the principle prohibiting the causing of unnecessary suffering, at least as it was contemplated in 1868.''[66]

U.S. legal reviews have detailed State practice contrary to the ICRC's statement and consistent with the conclusion contained in the above quotation. The ICRC fails to cite this contrary practice in its summary of those U.S. legal reviews.[67] The 1923 Hague Draft Rules of Air Warfare (the ''Air Rules''), which explicitly superseded the St. Petersburg Declaration with regard to explosive projectiles, established an exception to the broad ban on explosive bullets for explosive projectiles used ''by or against an aircraft.''[68] Although the Study refers to the Air Rules, it does not note that this exception to the total ban on use of exploding bullets permits their use by aircraft without categorical target restrictions, i.e., permits such use for anti-matériel or anti-personnel use. Since States developed the Air Rules, States widely have employed bullets that may detonate on impact with materiel for both anti-matériel and anti-personnel purposes.[69] Such ammunition was in common use by all States that participated in World War II, and in conflicts thereafter – including in widespread aircraft strafing of enemy forces, a practice common to every conflict since World War I in which aircraft were employed. The considerable State practice involving the use of such anti-matériel weapons against forces are indications that Rule 78's apparently total prohibition on the anti-personnel use of exploding bullets does not reflect customary international law.

The practice the Study cites does not support a rule banning the use of exploding bullets against personnel in all circumstances. The Study includes in Volume II examples from the military manuals of eleven countries, only six of which contain unqualified bans on exploding bullets;[70] the legislation of six countries, only three of which provide additional support for the rule as stated;[71]

66 Pertti Joenniemi and Allan Rosas, *International Law and the Use of Conventional Weapons*, 1975, p. 30.

67 Study, Vol. II, p. 1791, para. 35.

68 Hague Draft Rules of Air Warfare, *American Journal of International Law*, Vol. 17, 1923, Supp., pp. 245–260, Ch. IV, Art. 18.

69 The 2000 update of the 1998 U.S. legal review of the 12.7mm Raufoss Multipurpose ammunition, other sections of which are cited by the Study (Study Vol. II, p. 1791, para. 35), lists widespread use of high-explosive or high-explosive-incendiary projectiles weighing less than 400 grams, many of which may have tended to detonate on impact or within the human body. Although the Study cites this review, it does not provide the full picture of the Study's finding in that it omits this compilation of State practice.

70 The Study cites military manuals of Australia, Belgium, Canada, France, Germany, Italy, New Zealand, Russia, Spain, the United Kingdom, and the United States. (Study, Vol. II, pp. 1788–1789, paras. 8–20.) Of these, Germany's clearly opposes the rule as written, and France's, Italy's, and the United Kingdom's offer inconclusive support. The U.S. Air Force Pamphlet, also cited for Rule 157, bears a disclaimer that states, ''This pamphlet is for the information and guidance of judge advocates and others particularly concerned with international law requirements applicable during armed conflict. It furnishes references and suggests solutions to a variety of legal problems but it is not directive in nature. As an Air Force pamphlet, it does not promulgate official U.S. Government policy although it does refer to U.S., DoD and Air Force policies.'' The U.S. Air Force Pamphlet therefore cannot be considered a useful example of State practice.

71 Legislation of Andorra, Australia, Ecuador, Italy, the Netherlands, and Yugoslavia. Ecuador's legislation bans only the use of exploding bullets by its National Civil Police, and Italy's includes an exception for ''air or anti-air systems''. The Study notes that the 1945 Australian war crimes act prohibited ''exploding bullets.'' Study, Vol. II, p. 1790, paras. 21–26. The Study makes no reference to a 2001 Australian legal

statements made by several States at diplomatic conferences, most of which are ambiguous;[72] and the reported operational practice of only two States.[73] Among all these sources, at most two cite customary international law as the legal basis for regulations on the use of exploding bullets.[74] Even disregarding the existence of contrary State practice, this body of evidence is insufficient to establish the customary nature of the rule as stated.

The examples of operational practice adduced by the Study are particularly questionable. The Report on the Practice of Indonesia states only that exploding bullets are reported as prohibited in Indonesia, an unconfirmed example of State practice.[75] The Report on the Practice of Jordan states only that Jordan ''does not use, manufacture or stockpile explosive bullets'', but does not state whether it does so out of a sense of legal obligation under customary or treaty law, or whether it simply chooses not to do so due to policy or practical concerns.[76] In general, the Study fails to recognize that different militaries have different requirements, and that a State may decide not to use exploding ammunition for military rather than legal reasons.

The only example of actual battlefield behavior cited by the Study in support of Rule 78 is an accusation by the Supreme Command of the Yugoslav People's Army (''JNA'') of the Socialist Federal Republic of Yugoslavia that Slovene forces used exploding bullets.[77] It is unclear whether the bullets were used by ground forces against other ground forces, by airplanes against personnel, or in some other way. Most important, due to the use of ellipses in the Study, it is unclear whether the alleged behavior by Slovene forces was criticized as being ''prohibited under international law'' due to the anti-personnel use of exploding bullets *per se* or, rather, criticized as being used against ''members *and their*

review of the 12.7mm Raufoss Multipurpose projectile, which concluded that munition was legal. Defense Legal Office, Defense Corporate Support, Australian Ministry of Defense, Memorandum CS 97/23/23431 (January 23, 2001), Subject: Legal Review of the 12.7mm Ammunition Produced by NAMMO. The Australian legal review was the subject of a presentation at the ICRC's Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, held at Jongny-sur-Vevey from January 29–31, 2001.

72 Statements made by Brazil and Colombia do not support the assertion that the rule as written is customary, but rather express support for the prohibition of exploding bullets in some context. Study, Vol. II, p. 1790, paras. 28–29. The Study also includes statements by Norway and the UK made at the Second CCW Review Conference (2001) and before the ICJ in the *Nuclear Weapons Case* (1995), respectively. See *Ibid.* at p. 1791, para. 32–33 (Norway) and para. 34 (UK). The Norwegian statement to the ICRC reflects Norway's view that one must consider a number of factors, including intended use, when assessing the legality of a weapon; the UK statement appears to be a description of what the St. Petersburg Declaration provides.

73 The Study sets forth only three purported examples of operational practice: the Report on the Practice of Indonesia (Vol. II, p. 1791, para. 30); the Report on the Practice of Jordan (*Ibid.* at para. 31); and a statement by the Yugoslav Army (*Ibid.* at p. 1792, para. 37). The Report on Indonesia does not actually appear to evidence operational practice; rather, it simply states what applicable law is in Indonesia.

74 These are the military manuals of Germany and, arguably, the Penal Code of Yugoslavia.

75 Study, Vol. II, p. 1791, para. 30.

76 Ibid., para. 31.

77 ''The authorities and Armed Forces of the Republic of Slovenia are treating JNA as an occupation army; and are in their ruthless assaults on JNA members and their families going as far as to employ means and methods which were not even used by fascist units and which are prohibited under international law (…). They are (…) using explosive bullets.'' Ibid., p. 1792, para. 37.

families" (emphasis added) – allegations that, if true, would state a violation of other tenets of international law. It is thus difficult to determine whether this example supports the broad rule postulated by the Study, or a narrower rule restricting certain anti-personnel uses of exploding bullets.

Non-international armed conflict

The Study also asserts that Rule 78 is a norm of customary international law applicable in non-international armed conflicts. The Study, however, provides scant evidence to support this assertion. The St. Petersburg Declaration refers only to international armed conflict between States party to the Declaration; the Declaration does not mention internal conflict. In fact, the Study's only evidence of *opinio juris* in this regard is the failure, in military manuals and legislation cited previously, to distinguish between international and non-international armed conflict. Since governments normally employ, for practical reasons unrelated to legal obligations, the military ammunition available for international armed conflict when engaged in non-international armed conflict, and since there is ample history of the use of exploding bullets in international armed conflict, the Study's claim that there is a customary law prohibition applicable in non-international armed conflict is not supported by examples of State practice. Furthermore, this analysis fails to account for the military manual of the UK, cited in the Study, which prohibits the use of exploding bullets directed solely at personnel *only* in international armed conflict.[78]

Summary

Virtually none of the evidence of practice cited in support of Rule 78 represents operational practice; the Study ignores contrary practice; and the Study provides little evidence of relevant *opinio juris*. The evidence in the Study of restrictions on the use of exploding bullets supports various narrower rules, not the broad, unqualified rule proffered by the Study. Thus, the assertion that Rule 78 represents customary international law applicable in international and non-international armed conflict is not tenable.

Rule 157: "States have the right to vest universal jurisdiction in their national courts over war crimes."

Impunity for war criminals is a serious problem that the United States consistently has worked to alleviate. From the Second World War to the more recent crises in the former Yugoslavia and Rwanda, the United States has contributed substantially towards ensuring accountability for war crimes and other international crimes. Efforts to address the problem of accountability have, logically, focused on

78 Ibid., p. 1789, para. 19.

ensuring that there are appropriate fora to exercise jurisdiction over the most serious violations of international law.[79] One part of this solution is to ensure that those committing such offenses cannot find safe havens, by requiring States Parties to various treaties to reduce jurisdictional hurdles to their prosecution. For example, Article 146 of the Fourth Geneva Convention requires all States Parties to extradite or prosecute an individual suspected of a grave breach, even when a State lacks a direct connection to the crime. The Study, however, does not offer adequate support for the contention that Rule 157, which is stated much more broadly, represents customary international law.

Clarity of the asserted rule

If Rule 157 is meant to further the overall goal of the Study to ''be helpful in reducing the uncertainties and the scope for argument inherent in the concept of customary international law,''[80] it must have a determinate meaning. The phrase ''war crimes,'' however, is an amorphous term used in different contexts to mean different things. The Study's own definition of this term, laid out in Rule 156, is unspecific about whether particular acts would fall within the definition. For the purpose of these comments, we assume that the ''war crimes'' referred to in Rule 157 are intended to be those listed in the commentary to Rule 156. These acts include grave breaches of the Geneva Conventions and AP I, other crimes prosecuted as ''war crimes'' after World War II and included in the Rome Statute, serious violations of Common Article 3 of the Geneva Conventions, and several acts deemed ''war crimes'' by ''customary law developed since 1977,'' some of which are included in the Rome Statute and some of which are not.[81]

Assuming this to be the intended scope of the rule, we believe there are at least three errors in the Study's reasoning regarding its status as customary international law. First, the Study fails to acknowledge that most of the national legislation cited in support of the rule uses different definitions of the term ''war crimes,'' making State practice much more diverse than the Study acknowledges. Second, the State practice cited does not actually support the rule's definition of universal jurisdiction. Whereas Rule 157 envisions States claiming jurisdiction over actions with no relation to the State, many of the State laws actually cited invoke the passive or active personality principle, the protective principle, or a territorial connection to the act before that State may assert jurisdiction. Furthermore, the Study cites very little evidence of actual prosecutions of war crimes not connected to the forum State (as opposed to the mere adoption of legislation by the States).[82] Third, the Study conflates actions taken pursuant to

79 The Geneva Conventions and AP I incorporate elements that reflect these efforts.
80 Study, Vol. I, p. xxix.
81 Ibid., pp. 574–603.
82 ''[I]t should be stressed that custom-generating practice has always consisted of actual acts of physical behavior and not of mere words, which are, at most, only promises of a certain conduct. The frequent confusion seems to result from the fact that verbal acts, such as treaties, resolutions or declaration, are of course also acts of behavior in the broad sense of the term and they may in certain cases also constitute

treaty obligations with those taken out of a sense of customary legal obligation under customary international law. These errors undermine the Study's conclusion that Rule 157 constitutes customary international law.

Diverse understandings of "war crimes"

The national legislation cited in the commentary to Rule 157 employs a variety of definitions of "war crimes," only a few of which closely parallel the definition apparently employed by the Study, and none that matches it exactly.[83] Much of the legislation cited does not precisely define "war crimes" and therefore cannot be relied on to support the rule. Although the military manuals of Croatia, Hungary, and Switzerland, among others, appear to define "war crimes" as "grave breaches," the lack of specificity leaves the intended meaning ambiguous.[84] Even among the few States that employ a definition of "war crimes" similar to that in Rule 156, no State definition mirrors the Study's definition precisely. Canada, for example, includes "grave breaches" of the Geneva Conventions and Additional Protocol I, violations of the Hague Convention, violations of "the customs of war," and possibly certain violations of AP II, but, unlike the Study, does not specifically include "serious violations of Common Article 3 of the Geneva Conventions" in its definition. Furthermore, the Study does not assert that Canada's conception of "violations of the customs of war" matches that of the Study.[85] It is therefore evident, simply by the diversity of definitions of "war crimes" employed by various States, that State practice does not support the contention that States, as a matter of customary international law, have the right to vest universal jurisdiction in their national courts over the full set of actions defined by the Study as "war crimes."

Exercise of universal jurisdiction over only limited acts

Although the Study cites legislation from more than twenty States that supposedly demonstrates the customary nature of Rule 157, not one State claims jurisdiction

custom-generating practice, but only as regards the custom of making such verbal acts, not the conduct postulated in them." K. Wolfke, "Some persistent controversies regarding customary international law", *Netherlands Yearbookof International Law*, Vol. 24, 1993, p. 1.

M. Cherif Bassiouni has discussed the limited practice of States invoking universal jurisdiction to prosecute various international crimes. He notes, "No country has universal jurisdiction for all these crimes [genocide, war crimes, crimes against humanity, piracy, slavery, torture, and apartheid]. It is therefore difficult to say anything more than universal jurisdiction exists sparsely in the practice of states and is prosecuted in only a limited way." M. Cherif Bassiouni, "Universal jurisdiction for international crimes: Historical perspectives and contemporary practice", *Virginia Journal of International Law*, No. 42, 2001, pp. 81, 136 n.195.

83 Study, Vol. II, pp. 3894–3912, paras. 163–245.

84 Ibid., p. 3858, para. 22 (Croatia), p. 3859, para. 28 (Hungary), and p. 3861, para. 38 (Switzerland). The Study also includes a number of citations to State laws and manuals that do not include law of war offenses, but rather refer to provisions such as "other punishable acts against human rights" (Costa Rica, p. 3899, para. 182); "crimes against humanity, human dignity or collective health or prosecutable under international treaties" (Cuba, p. 3899, para. 184); and the substance of Articles 64 and 66 of GC IV related to the trial of civilians in occupied territory (Argentina, p. 3894, para. 163).

85 Ibid., p. 3858, para. 20; see also Ibid., p. 3864–3865, paras. 51–52.

over all the acts cited in Rule 156 as ''war crimes'' in the absence of a State connection to the act, whether it be territorial or based on the active personality, passive personality, or protective principles.[86] The domestic legislation of a number of States, including Australia, Belgium, Colombia, Cyprus, and Zimbabwe, only asserts universal jurisdiction over grave breaches of the Geneva Conventions and AP I.[87] Other domestic legislation is focused even more narrowly: the legislation of Barbados, Botswana, Singapore, and Uganda, for instance, only asserts universal jurisdiction over grave breaches of the Geneva Conventions.[88] Further, many of the military manuals cited (including those of Belgium, France, South Africa, Spain, Sweden, and Switzerland) only refer to universal jurisdiction in the context of ''grave breaches,'' not ''war crimes'' more generally.[89]

Lack of ''pure'' universal jurisdiction

Additionally, several of the examples of State practice in the Study are not evidence of States vesting pure universal jurisdiction in their national courts over a set of offenses. Bangladesh's relevant criminal legislation, for instance, only grants jurisdiction over acts occurring in Bangladesh.[90] The Netherlands' military manual states that its law ''has not entirely incorporated the principle of universality (…). It requires that the Netherlands be involved in an armed conflict.''[91] Other States provide for universal jurisdiction only for a subset of acts within their various definitions of ''war crimes.'' France vests universal jurisdiction in its courts over serious violations of international humanitarian law only in cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and relies on the territoriality, active, and passive personality principles for all other war crimes.[92] Likewise, Australia vests universal jurisdiction in its national courts over ''grave breaches'' of the Geneva Conventions and Additional Protocol I, but requires active personality in order to exercise jurisdiction over other war crimes.[93] Finally, the Study cites several law of war treaties that do not actually illustrate cases in which States Parties agreed to establish universal jurisdiction. For instance, Amended Protocol II to the CCW and the 1997 Ottawa Convention contemplate a territorial link between the State Party and the wrongful act.[94]

86 See Study, Vol. I, p. 604 n. 194 (listing States). This discussion is not intended to suggest that the U.S. Government believes that the Study has shown conclusively the customary nature of Rule 156.
87 Study, Vol. II, p. 3895, para. 166 (Australia); p. 3896, para. 172 (Belgium); p. 3898, para. 180 (Colombia); p. 3899, paras. 185–186 (Cyprus); p. 3912, para. 245 (Zimbabwe).
88 Ibid., p. 3896, paras. 170 (Barbados) and 174 (Botswana); p. 3908, para. 227 (Singapore); p. 3910, para. 236 (Uganda).
89 Ibid., p. 3888, para. 145 (Belgium); p. 3889, para. 148 (France); p. 3890, para. 153 (South Africa); p. 3890, para. 154 (Spain); pp. 3890–3891, para. 155 (Sweden); p. 3891, para. 156 (Switzerland).
90 Ibid., pp. 3959–3960, para. 397.
91 Ibid., p. 3889, para. 150.
92 Ibid., pp. 3900–3901, paras. 192–195.
93 Ibid., pp. 3894–3895, paras. 165–166.
94 Ibid., p. 3885, paras. 132–133.

Limited practice of prosecutions

Furthermore, although the Study lists more than twenty States that have enacted or have drafted legislation apparently vesting universal jurisdiction in their national courts over ''war crimes,'' the Study cites a mere nineteen instances in which State courts supposedly have exercised universal jurisdiction over ''war crimes.''[95] Of these nineteen, two are not relevant because the defendants were not accused of ''war crimes,'' but of either genocide or genocide and crimes against humanity, respectively.[96] In another case cited in the Study, the government of Australia claimed jurisdiction based on the protective principle of national interest; the court based its decision on the plain language of a criminal statute and explicitly rejected the need to consider whether universal jurisdiction was applicable.[97] Additionally, in one Dutch case, the victims of the war crimes were Dutch citizens; consequently, the Dutch court based its jurisdiction on the passive personality principle, not on the basis of universal jurisdiction.[98]

If one puts these four inapposite cases aside, the remaining fifteen cases cited by the Study offer only weak evidence in support of Rule 157. In six of these cases, States explicitly claimed jurisdiction based not on customary rights but on rights and obligations conferred in treaties, primarily under Article 146 of the Fourth Geneva Convention.[99] The nine cases in which States claimed jurisdiction

95 Although Volume II of the Study contains references to twenty-seven cases, the Study does not assert that eight of these cases are examples of States exercising universal jurisdiction over war crimes. For example, the Musema case appears to be a situation in which Switzerland simply determined that dual criminality existed in Switzerland with regard to the offense for which the ICTR sought the defendant.

96 The *Munyeshyaka* case in France and the *Demjanjuk* case in the United States (which subsequently was overturned on unrelated grounds). In the *Demjanjuk* case, the Israeli arrest warrant on which the extradition request was based charged that Demjanjuk had operated the gas chambers in Treblinka ''with the intention of destroying the Jewish people [i.e., genocide] and to commit crimes against humanity.'' *Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 578 (6th Cir. 1985). For the *Munyeshyaka* case, see Study, Vol. II, p. 3915, para. 253.

97 The *Polyukhovich* case. The majority opinion stated, ''It is enough that Parliament's judgment is that Australia has an interest or concern. It is inconceivable that the court could overrule Parliament's decision on that question. That Australia has such an interest or concern in the subject matter of the legislation here, stemming from Australia's participation in the Second World War, goes virtually without saying (…). It is also unnecessary to deal with the alternative submission that the law is a valid exercise of the power because it facilitates the exercise of universal jurisdiction under international law.'' 91 ILR 13–14 (1991).

98 The *Rohrig and Others* case. ''Article 4 of the Decree on Special Criminal Law [that the defendants were charged with violating] was, however, in accordance with international law as being based on the principle of 'passive nationality' or 'protection of national interests.'" 17 ILR 393, 396 (1950).

99 See Study, Vol. II, p. 3914, para. 251 (*Sarić*), pp. 3914–3915, para. 252 (*Javor*), pp. 3915–3916, para. 254 (*Djajić*), pp. 3916–3917, para. 255 (*Jorgić*), p. 3917, para. 256 (*Sokolović*) and para. 257 (*Kusljić*). The prosecution in the *Sokolović* and *Kusljić* cases successfully argued that crimes committed by the accused (Bosnian nationals) in Bosnia and Herzegovina were part of an international armed conflict, and that obligations under Article 146 of the Geneva Conventions (relating to grave breaches) therefore were applicable. It follows that this arguably strained reliance on the Geneva Conventions denotes a hesitance to claim a right to universal jurisdiction under customary international law. In addition, the German Penal Code permitted its domestic courts to exercise jurisdiction over grave breaches ''if this was provided for in an international treaty binding on Germany''. Thus, the German law explicitly looks to the existence of a treaty permitting the exercise of such jurisdiction, and does not rely on any customary international legal ''right.''

based on customary rights come from only six States: Belgium, Canada, Israel, the Netherlands, Switzerland, and the United Kingdom.[100] The practice of six States is very weak evidence of the existence of a norm of customary international law. This body of practice is insufficiently dense to evidence a customary right of States to claim jurisdiction over the broad array of actions listed in rule 156, and is further weakened when one examines the facts of those cases. Indeed, in many of these cases, States were prosecuting acts that had been committed before the Geneva Conventions were adopted, but that ultimately were considered grave breaches in the Conventions.[101] Thus, although the prosecuting States were not in a position to rely on their treaty obligations as a basis for their prosecutions, the acts at issue effectively were grave breaches. These cases, therefore, should not be construed as supporting a customary right to claim jurisdiction over most of the acts listed in Rule 156 as ''war crimes'' on the basis of universality.

Opinio juris

Finally, and significantly, the Study fails to demonstrate that sufficient *opinio juris* exists to declare Rule 157 customary international law. National legislation vesting universal jurisdiction over particular acts evidences the view of that State that it has the right to exercise such jurisdiction, but does not indicate whether that view is based on customary law or treaty law.[102] Among the evidence cited by the Study, at most nine States express a definitive *opinio juris* as to the customary nature of the right to vest universal jurisdiction (with the majority of those nine having never exercised this jurisdiction).[103] The majority of States that have adopted legislation make explicit in their laws that universal jurisdiction is based on prerogatives gained through treaties, not through customary international law. For example, the Geneva Conventions Act of Barbados provides that ''a person who commits a grave breach of any of the Geneva Conventions of 1949 (…) may be tried and punished by any court in Barbados that has jurisdiction in respect of

100 These are, from Belgium: *Public Prosecutor* v. *Higaniro* (*Four from Butare* case) and *Public Prosecutor* v. *Ndombasi*, which led to the *Case Concerning the Arrest Warrant of 11 April 2000* (*I.C.J. Reports 2002*, p. 3); from Canada: the *Finta* case; from Israel: the *Eichmann* case; from the Netherlands: the *Knesevic* case and the *Ahlbrecht* case – the latter of which concerned acts committed in occupied Holland and therefore is not a clear example of the invocation of universal jurisdiction; from Switzerland: the *Grabez* case and the *Niyonteze* case; and from the United Kingdom: the *Sawoniuk* case. For the *Ahlbrecht* case, see 14 ILR 196 (1947).

101 In the *Finta, Ahlbrecht, Sawioniuk*, and *Eichmann* cases, the only ''war crimes'' of which the defendants were accused would have constituted grave breaches of the Fourth Geneva Convention, including forced deportation and murder of protected persons, if that Convention had been in effect at the time they were committed. See *Regina* v. *Finta*, 69 O.R. (2d) 557 (Canadian High Ct. of Justice 1989), 14 ILR 196, 2 Cr App Rep 220 (UK Court of Appeal, Criminal Division 2000), and 36 ILR 5, respectively.

102 The Geneva Conventions, for instance, require States Parties to ''enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.'' See, e.g., 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 146.

103 These States are Australia, Azerbaijan, Bangladesh, Belarus, Belgium, Ecuador, Switzerland, Tajikistan, and possibly New Zealand.

similar offences in Barbados as if the grave breach had been committed in Barbados.''[104] The legislation of France, Ireland, and Spain,[105] among others, also makes explicit that claims of universal jurisdiction stem from treaty law. Given the salience of treaty obligations in these and other instances, it is inappropriate to assume that the remaining States – those that do not explicitly state the legal basis for their legislation – do so out of a sense of entitlement arising from customary international law.

Summary

The State practice cited is insufficient to support a conclusion that the broad proposition suggested by Rule 157 has become customary: examples of operational practice are limited to a handful of instances; a significant number of the examples do not support the Rule; and the cited practice utilizes definitions of ''war crimes'' too divergent to be considered ''both extensive and virtually uniform''.[106] Moreover, the Study offers limited evidence of *opinio juris* to support the claim that Rule 157 is customary.

Conclusion

The United States selected these rules from various sections of the Study, in an attempt to review a fair cross-section of the Study and its commentary. Although these rules obviously are of interest to the United States, this selection should not be taken to indicate that these are the rules of greatest import to the United States or that an in-depth consideration of many other rules will not reveal additional concerns. In any event, the United States reiterates its appreciation for the ICRC's continued efforts in this important area, and hopes that the discussion in this article, as well as the responses to the Study by other governments and by scholars, will foster a constructive, in-depth dialogue with the ICRC and others on the subject.

104 Study, Vol. II, p. 3896, para. 170.
105 Ibid., p. 3901, para. 194 (France); pp. 3902–3903, para. 202 (Ireland); p. 3909, para. 229 (Spain).
106 *North Sea Continental Shelf Cases, I.C.J. Reports 1969*, p. 43.

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Customary International Humanitarian Law: a response to US comments

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Introduction

The study on customary international humanitarian law (the Study)[1] was carried out by lawyers at the International Committee of the Red Cross at the explicit request of states. The study was proposed by the Intergovernmental Group of Experts for the Protection of War Victims in January 1995 among a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law.[2]

In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.[3] The ICRC took

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this mandate very seriously and spent nearly ten years on research and consultation involving more than 150 governmental and academic experts.

The comments on the Study provided by two of the most prominent US government lawyers, John Bellinger, Legal Adviser of the Department of State, and William Haynes, General Counsel of the Department of Defense, are the first formal comments to be received by the ICRC at governmental level.[4] They are proof of the fact that the US government takes the Study, and international humanitarian law in general, very seriously and as such are to be welcomed. Beyond their symbolic value, these comments are also of academic significance and deserve to be studied in detail.

As one of the co-authors of the Study, I have been given an opportunity to respond to these comments. Below are my principal observations. As the main thrust of the US comments deals with the methodology of the Study, my response focuses largely on methodological issues as well. In so doing, my response follows the structure of the US comments and addresses the following questions:

1. What density of practice is required for the formation of customary international law and what types of practice are relevant?
2. How did the Study assess the existence of *opinio juris*?
3. What is the weight of the commentaries on the rules?
4. What are the broader implications of the Study with respect to Additional Protocols I and II and the law on non-international armed conflicts in particular?

The US comments also address four particular rules, namely Rule 31 (protection of humanitarian relief personnel), Rule 45 (prohibition on causing long-term, widespread and severe damage to the environment), Rule 78 (prohibition of the use of anti-personnel exploding bullets) and Rule 157 (right to establish universal jurisdiction over war crimes). This response does not intend to go into every detail of the US comments on these four rules but will deal with the main aspects of those comments as part of the discussion on methodological issues.

1 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* and *Volume II: Practice*, Cambridge University Press, 2005 (hereinafter Study).

2 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–7 January 1995, Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84 (that "the ICRC be invited to prepare, with the assistance of experts on IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies").

3 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1. "International humanitarian law: From law to action – Report on the follow-up to the International Conference for the Protection of War Victims", *International Review of the Red Cross*, No. 310, 1996, p. 58.

4 See John B. Bellinger and William J. Haynes, "A US Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study", in this issue, pp. 443–471.

1. State practice

Density of practice

While it is agreed that practice has to be "extensive and virtually uniform" in order to establish a rule of customary international law,[5] there is no specific mathematical threshold for how extensive practice has to be. This is because the density of practice depends primarily on the subject-matter. Some issues arise more often than others and generate more practice. One only has to compare, for example, the practice with regard to targeting and to the white flag of truce. Questions of targeting – for example the distinction between civilians and combatants and between civilian objects and military objectives – are discussed every day in connection with various armed conflicts, are addressed in nearly every military manual, analysed in international fora, in judgments, and so forth. Practice on the protection of the white flag of truce, on the other hand, is rather sparse. In general, the topic is rarely discussed, as there are relatively few concrete cases. Nevertheless, whatever practice there is on the protection of the white flag of truce is uniform and confirms the continued validity of the rule, regardless of limited practice. Such a differentiated approach is inevitable in any area of international law.[6]

Furthermore, in order to correctly quantify the density of practice it is necessary to determine the correct value of each element of practice. While some elements of practice may constitute single precedents, other elements may reflect numerous precedents. This is particularly the case of military orders, instructions and manuals, which reflect what armed forces are trained and instructed to do and what they end up doing most of the time. Hence, a single military manual may represent numerous precedents and thus a substantial quantum of practice.[7]

In addition, the nature of the rule has to be taken into account – whether it is prohibitive, obligatory or permissive. Prohibitive rules for example, of which there are many in humanitarian law, are supported not only by statements recalling the prohibition in question but also by abstention from the prohibited act. Hence, rules such as the prohibition of use of certain weapons, for example

5 International Court of Justice, *North Sea Continental Shelf cases, Judgment*, 20 February 1969, ICJ Rep. 1969, p. 43, § 74.

6 Thus, in the *Wimbledon* case, the Permanent Court of International Justice relied on two precedents only, those of the Panama and Suez canals, to find that the passage of contraband of war through international canals was not a violation of the neutrality of the riparian state. Permanent Court of International Justice, *The S.S. Wimbledon*, (1923), PCIJ Series A, No. 1, pp. 1, 28. Obviously the Court could not cite more examples, as the number of international canals is limited. See also C. H. M. Waldock, "General course on public international law", *Recueil des cours*, Vol. 106 (1962), p. 1, at p. 44, who observes that "on a question concerning international canals, of which there are very few in the world, the quantum of practice must necessarily be small".

7 This may be compared to the facts in the *Wimbledon* case, above note 6, in which the Permanent Court of International Justice relied on two precedents only. But those two precedents represented a significant amount of practice, as many vessels, from all over the world, passed through the Panama and Suez canals. So a reference to just two precedents represented a wider body of practice than a first impression might suggest.

blinding laser weapons, are supported by the continued abstention from using such weapons. However, it is difficult to quantify this abstention, which occurs every day in every conflict in the world.

Permissive rules, on the other hand, are supported by acts that recognize the right to behave in a given way but that do not, however, require such behaviour. This will typically take the form of states taking action in accordance with those rules, together with the absence of protests by other states. The rule that states have the right to vest universal jurisdiction in their courts over war crimes (Rule 157) is such a rule. There are now numerous cases of national prosecution on the basis of universal jurisdiction, without objection from the state concerned – in particular the state of nationality of the accused, for war crimes in both international and non-international armed conflicts. It is true that there are relatively few cases of prosecution on the basis of universal jurisdiction, compared to the number of war crimes possibly committed. But this is so because a foreign court is not necessarily a convenient forum to investigate and prosecute persons suspected of having committed war crimes in their own or a third country, not because of a belief that states are not entitled to prosecute on the basis of universal jurisdiction. This is understandable and explains why states chose to set up ad hoc tribunals and courts and finally a permanent International Criminal Court to deal with this issue. But this does not mean that the practice is not dense enough, as suggested, to demonstrate the existence of a customary rule, in particular as we are dealing with a permissive rule. The principle of universal jurisdiction means that war crimes are crimes under international law, like piracy, slavery and apartheid, and hence that all states have an interest that they be prosecuted. This principle was first established in the Geneva Convention as an obligation with respect to the serious violations (''grave breaches'') enumerated therein and was later confirmed in Additional Protocol I.[8] It has gradually been expanded to apply to all serious violations of humanitarian law as a permissive rule.

Finally, as a result of the extensive and broad-based research and consultation underlying the Study, never before has so much practice been proffered in such a systematic and detailed manner to explain the existence of rules of customary international law.[9] As Judge Theodor Meron of the International Criminal Tribunal for the former Yugoslavia has noted:

> what makes this study unique is the seriousness and breadth of the method used to identify practice. In addition to the ICRC archives on nearly forty recent armed conflicts and various international sources,

8 Geneva Conventions I–IV, Articles 49/50/129/146; Additional Protocol I, Article 85(1).

9 Each of the 161 rules in Volume I is supported by a specific section in Volume II detailing the practice related to that rule. Many of these practice sections in Volume II are further divided into subtopics addressing such issues as examples (see e.g. examples of acts considered to constitute direct participation in hostilities, Study, above note 1, Vol. II, p. 115–127), qualifying clauses (see e.g. practice related to the ''feasibility'' of precautions in attack, ibid., pp. 357–62), exceptions (see e.g. exceptions to the prohibition of attack against objects indispensable for the survival of the civilian population, ibid., pp. 1166–74), definitions (see e.g. practice related to the definition of torture, cruel, inhuman and degrading treatment, ibid., pp. 2149–61), etc.

including those of the United Nations, regional organizations, and other international organizations, the study drew on research projects in nearly fifty countries that its sponsors had commissioned with a view to identifying national practice in international humanitarian law. Such an effort has never been undertaken before. No restatement of international law has even tried to amass such a rich collection of empirical data.[10]

Types of practice considered

A study on customary international law has to look at the combined effect of what states say and what they actually do. As a result, ''operational State practice in connection with actual military operations'' was collected and analysed. To the extent that they were available, the Study considered official reports and statements on the conduct of actual military operations. For example, such reports and statements from the United States were examined with respect to targeting decisions in the Korean War, the Vietnam War and the Gulf War, among others.[11]

But an examination of operational practice alone is not enough. In order to arrive at an accurate assessment of customary international law one has to look beyond a mere description of actual military operations and examine the legal assessment of such operations. This requires an analysis of official positions taken by the parties involved, as well as other states. When a given operational practice is generally accepted – for example military installations are targeted – this supports the proposition underlying that practice, namely that military installations constitute lawful military targets. But when an operational practice is generally considered to be a violation of existing rules – for example civilian installations are targeted – that is all it is, a violation. Such violations are not of a nature to modify existing rules; they cannot dictate the law.[12] This explains why acts such as attacks against civilians, pillage and sexual violence remain prohibited notwithstanding numerous reports of their commission. The conclusion that these acts are considered to be violations of existing rules can be derived only from the way they are received by the international community through verbal acts, such as military manuals, national legislation, national and international case-law, resolutions of international organizations and official statements. These verbal acts provide the lens through which to look at operational practice.

10 Theodor Meron, ''Revival of customary humanitarian law'', *American Journal of International Law*, Vol. 99, No. 4 (October 2005), p. 833.

11 See, e.g., Study, above note 1, Vol. II, pp. 213–15, §§ 549–54, citing *inter alia* Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, revised edn, Office of Air Force History, US Air Force, Washington, DC, 1983; US Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, DC, 1968; and US Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992.

12 See International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Merits, Judgement*, 27 June 1986, *ICJ Reports 1986*, p. 98, § 186.

Weight of resolutions

As a result of the above considerations, the Study had to take into account resolutions adopted by states in the framework of international organizations, in particular the United Nations and regional organizations.[13] As indicated, the Study is premised on the recognition that ''resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution depends on its content, its degree of acceptance and the consistency of State practice outside it''.[14] A list containing the voting record of all cited General Assembly resolutions was therefore included in the Study and used during the assessment.[15] Most importantly, resolutions were always assessed together with other state practice and were not used to tip the balance in favour of a rule being customary.[16]

Weight of ICRC statements

As explained in the introduction to the Study, official ICRC statements, in particular appeals and memoranda on respect for international humanitarian law, have been included as relevant practice because the ICRC has international legal personality.[17] The practice of the organization is particularly relevant in that it has received an official mandate from states ''to work for the faithful application of international humanitarian law applicable in armed conflicts and … to prepare any development thereof''.[18] The Study did not, however, use ICRC statements as primary sources of evidence supporting the customary nature of a rule. They are cited to reinforce conclusions that were reached on the basis of state practice alone. Hence, ICRC practice likewise never tipped the balance in favour of a rule being customary.

State reactions to ICRC memoranda or appeals would clearly be a more important source of evidence. To the extent that these reactions were known, they have been included – both the positive ones (e.g. to the ICRC appeal in October 1973 to the parties to the conflict in the Middle East),[19] as well as the critical ones (e.g. US reply in January 1991 to an ICRC memorandum on the applicability of

13 The Study looked at resolutions adopted by the UN Security Council, General Assembly, ECOSOC and Commission on Human Rights, as well as by *inter alia* the African Union (AU), Council of Europe, European Union (EU), Gulf Cooperation Council (GCC), League of Arab States (LAS), Organization of American States (OAS), Organization of the Islamic Conference (OCI) and the Organization for Security and Cooperation in Europe (OSCE).

14 Study, above note 1, Vol. I, pp. xxxv–xxxvi.

15 Study, above note 1, Vol. II, pp. 4351–4382.

16 For example, when it could not be concluded that Rule 114 was part of customary law in non-international armed conflicts, resolutions in support of such a conclusion did not tip the balance because practice outside them was not consistent. See Study, above note 1, Vol. I, pp. 413–414.

17 See e.g. ICTY, *The Prosecutor* v. *Blagoje Simić* et al., Case No. IT-95-9-PT, Decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness, 27 July 1999, released as a public document by Order of 1 October 1999, § 46 and footnote 9.

18 Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Article 5(2)(c) and (g).

19 See e.g. Study, above note 1, Vol. I, pp. 5, 9 and 20–21.

international humanitarian law in the Gulf region).[20] Even when these reactions were not known, it was still considered appropriate to report on these memoranda and appeals. The role of ICRC appeals and of states' reaction thereto in the formation of customary international law is also acknowledged by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the Interlocutory Appeal on Jurisdiction in the *Tadić* case in 1995:

> As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.[21]

Weight of NGO statements

NGO statements were included in Volume II under the category of "Other Practice", which served as a residual category of materials that were not given any weight in the determination of what is customary. The term "practice" in this context was not at all used to denote any form of state (or other) practice that contributes to the formation of customary international law. Like Volume I, Volume II of the Study was shared with the experts consulted. The types of practice included in Volume II did not change from the time of the first expert consultations in 1999 to final publication in 2005. There was no objection expressed to the inclusion of such a category in 1999, nor later on.

Hence, only part of the practice collected in Volume II was actually taken into account in Volume I. In that respect, Volume II may give the wrong

20 See e.g. ibid., p. 67.

21 ICTY, *The Prosecutor* v. *Duško Tadić aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, para. 109.

impression that everything included in it was somehow considered relevant for the establishment of customary law. This is clearly not the case, and the practice in Volume II was assessed on the basis of the methodology as set out in the introduction to the Study.[22] In general, only the practice cited in the commentaries on the rules was deemed relevant, and this never included statements of non-governmental organizations.

It is important in this respect to explain that the methodology set out in the introduction was applied for each rule without necessarily repeating the various considerations of that methodology. To do so would have made the Study unnecessarily long and not very user-friendly. The purpose was to produce a user-friendly tool for practitioners and this explains much of the format.

Weight of practice from non-party states

The Study in no way assumed that a rule is customary merely because it is contained in a widely ratified treaty. As stated in the introduction:

> This study takes the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question. Consistent practice of States not party has been considered as important positive evidence. Contrary practice of States not party, however, has been considered as important negative evidence. The practice of States party to a treaty vis-à-vis States not party is also particularly relevant.[23]

The distinction between contracting parties and non-contracting parties was taken into consideration in the assessment of each rule.[24] To this effect, a list of ratifications for all cited treaties was included in the Study,[25] and so-called ''negative lists'' were used – lists of countries that are not party to relevant treaties – to identify practice of non-party states. It is interesting to note how these lists can differ considerably from one treaty regime to the other. For example, the list of states party to Additional Protocol I differs considerably from the list of states party to the 1954 Hague Convention on the Protection of Cultural Property.[26] This also means that to the extent that different treaties contain the same or similar rules, a state's practice and ratification record have to be matched up with respect to all relevant treaties. Although the United States is not a party to Additional

22 See, in particular, Study, above note 1, Vol. I, pp. xxxii–xxxvi.
23 Ibid., p. xliv.
24 See, e.g., the considerations in the commentary on numerous rules related to the principle of distinction, including Rule 1, Study, above note 1, Vol. I, p. 4 ; Rule 2, ibid., p. 9 ; Rule 6, ibid., p. 20, Rule 7, ibid., p. 26 ; Rule 8, ibid., p. 30 ; Rule 11, ibid., p. 38 ; Rule 14, ibid., p. 47 ; Rule 15, ibid., p. 52. See also Rule 83, ibid., p. 284; and Rule 86, ibid., p. 293.
25 Study, above note 1, Vol. II, pp. 4153–4180.
26 Azerbaijan, India, Indonesia, Iran, Iraq, Israel, Malaysia, Morocco, Myanmar, Pakistan, Thailand and Turkey are not party to Additional Protocol I but are party to the 1954 Hague Convention on the Protection of Cultural Property (at 1 June 2007).

Protocol I, for example, it is a party to Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons (CCW), which contain a number of rules that are identical to those in Additional Protocol I. Thus while the United States has not supported the principle of distinction, the prohibition of indiscriminate attacks and the principle of proportionality through ratification of Additional Protocol I, it has supported these rules *inter alia* through ratification of Amended Protocol II to the CCW, which applies in both international and non-international armed conflicts.[27]

In addition, a number of provisions in Additional Protocol I were not found to be customary, as a result of the weight accorded to negative practice of states that remain non-parties to the Protocol. This was the case, for example, for the presumption of civilian status in case of doubt,[28] the prohibition of attacks on works and installations containing dangerous forces,[29] the relaxed requirement for combatants to distinguish themselves[30] and the prohibition of reprisal attacks against civilians as contained in Additional Protocol I.[31] Many would probably argue that the Study accorded too much weight to such limited contrary practice. But when apparent contrary practice of a non-party state was not deemed sufficient to block the emergence of a rule of customary law, this is also explained in the commentary.[32] The commentaries never hide or gloss over negative practice that was collected.

Specially affected states

The Study did duly note the contribution of states that have had "a greater extent and depth of experience" and have "typically contributed a significantly greater quantity and quality of practice". A perusal of both Volumes I and II reveals evidence of the significant contribution to practice made by such states. Because of its experience with armed conflict, the United States, in particular, has contributed a significant amount of practice to the formation of customary humanitarian law. It also has taken positions on many points of interpretation of the law and these are often noted in the commentaries.[33]

Hence, it is clear that there are states that have contributed more practice than others because they have been "specially affected" by armed conflict. Whether, as a result of this, their practice *counts more* than the practice of other states is a separate question. The statement of the International Court of Justice in respect to the need for the practice of "specially affected" states to be included was

27 See Amended Protocol II, Articles 2–3.
28 Compare Additional Protocol I, Article 50(1), second sentence, with commentary to Rule 6, Study, above note 1, Vol. I, pp. 23–24.
29 Compare Additional Protocol I, Article 56 with Rule 42, ibid., Vol. I, pp. 139–142.
30 Compare Additional Protocol I, Article 44(3), second sentence, with commentary to Rule 106, ibid., Vol. I, pp. 387–389.
31 Compare Additional Protocol I, Article 51(6) with commentary to Rule 146, ibid., Vol. I, pp. 520–523.
32 See e.g. Rule 21 (precaution in attack, related to the choice of military objectives), ibid., Vol. I, p. 67, and Rule 65 (prohibition of killing, injuring or capture by resort to perfidy), ibid., Vol. I, p. 225.
33 See, e.g., in Part I alone of the Study, above note 1, Vol. I, pp. 13, 24, 31, 36, 45, 64–65 and 76.

made in the context of the law of the sea – and in particular in order to determine whether a rule in a (not widely ratified) treaty had become part of customary international law.[34] Given the specific nature of many rules of humanitarian law, it cannot be taken for granted that the same considerations should automatically apply. Unlike the law of the sea, where a state either has or does not have a coast, with respect to humanitarian law any state can potentially become involved in armed conflict and become "specially affected". Therefore, all states would seem to have a legitimate interest in the development of humanitarian law. But again, this does not preclude the contribution by some states of more, and more detailed, practice than others in fields in which they are "specially affected".

Nevertheless, with respect to Rule 45 on widespread, long-term and severe damage to the environment, the Study notes that France, the United Kingdom and the United States have persistently objected to the rule being applicable to nuclear weapons. As a result, we acknowledge that with respect to the employment of nuclear weapons, Rule 45 has not come into existence as customary law. With regard to conventional weapons, however, the rule has come into existence but may not actually have much meaning, as the threshold of the cumulative conditions of long-term, widespread and severe damage is very high. The existence of this rule under customary international law is supported, in part, by the abstention from causing such damage. The United States may be considered a persistent objector with respect to Rule 45 in general, including for conventional weapons, but that is a case the United States would have to make.

2. *opinio juris*

Although the commentaries on the rules in Volume I do not usually set out a separate analysis of practice and *opinio juris*, such an analysis did in fact take place for each and every rule to determine whether the practice attested to the existence of a rule of law or was inspired merely by non-legal considerations of convenience, comity or policy. When the establishment of *opinio juris* was difficult, this is discussed in more detail in the commentaries.[35] Hence, the Study did not simply infer *opinio juris* from practice. The conclusion that practice established a rule of law and not merely a policy was never based on any single instance or type of practice but was the result of consideration of all the relevant practice. It is true that it can never be proven that a state votes in favour of a resolution condemning acts of sexual violence, for example, because it believes this to reflect a rule of law or as a policy decision (and it could be both). However, the totality of the practice on that subject indicates beyond doubt that the prohibition of sexual violence is a rule of law, not merely a policy.

34 International Court of Justice, *North Sea Continental Shelf cases*, above note 3.
35 See e.g. the commentary on Rule 114 for non-international armed conflicts, Study, above note 1, Vol. I, p. 414.

In the same vein, military manuals and teaching manuals may put forward propositions that are based on law, but may also contain instructions based on policy or military considerations that go beyond the law (although they may never fall *below* the law). This distinction was always kept in mind. Rules that were supported by military manuals were, considering the totality of practice, supported by practice of such a nature as to conclude that a rule of law was involved and not merely a policy consideration or a consideration of military or political expediency that can change from one conflict to the next. For example, the fact that the United States has decided, as a matter of policy rather than law, that it "will apply the rules in its manuals whether the conflict is characterized as international or non-international" was recognized as a policy decision in the Study. Hence, US military manuals are never cited as supporting evidence for rules applicable in non-international armed conflicts.

Finally, it was considered that teaching manuals authorized for use in training represent a form of state practice. In principle, a state will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting state practice. Several such documents were found and incorporated, including, for example, from Germany,[36] the United Kingdom,[37] and the United States.[38] A complete listing of the military manuals, including teaching manuals and other similar documents, is included in Volume II of the Study.[39]

3. Formulation of rules

Any description of customary rules inevitably results in rules that in many respects are simpler than the detailed rules to be found in treaties.[40] It may be difficult, for example, to prove the customary nature of each and every detail of corresponding treaty rules. The formation of customary law through practice cannot yield the same amount of detail as complicated negotiations at a diplomatic conference. It was therefore necessary to discuss certain issues in more detail in the commentary.

36 See e.g. Germany: Publication ZDv 15/1, *Humanitäres Völkerrecht in bewaffneten Konflikten: Grundsätze*, DSK VV230120023, Bundesministerium der Verteidigung, June 1996; and Taschenkarte (pocket card), "Humanitäres Völkerrecht in bewaffneten Konflikten: Grundsätze", bearbeitet nach ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch*, Zentrum Innere Führung, June 1991.

37 See e.g. UK: *The Law of Armed Conflict*, D/DAT/13/35/66, Army Code 71130 (Revised 1981), Ministry of Defence, prepared under the direction of the Chief of the General Staff, 1981 (updated yearly).

38 See e.g. United States: *Your Conduct in Combat under the Law of War*, Publication No. FM 27-2, Headquarters Department of the Army, Washington, November 1984, and *Instructor's Guide: The Law of War*, Headquarters Department of the Army, Washington, April 1985.

39 See Study, above note 1, Vol. II, pp. 4916–4207.

40 Compare the description of the principle of distinction in Additional Protocol I, Articles 48–52 with the terse statement in the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that the principle of distinction constitutes a "cardinal principle" of humanitarian law and one of the "intransgressible principles of international customary law", *Advisory Opinion*, 8 July 1996, *ICJ Reports* 1996, p. 226, §§ 78–79.

For example, in connection with Rules 31 and 55 on the protection of humanitarian relief personnel and access for humanitarian relief missions respectively, the issue of consent to receive such personnel and missions is openly discussed in the commentary and there was no intention to go beyond the content of the Additional Protocols.[41] The problem lay in the formulation of a rule that would cover both international and non-international armed conflicts. It was problematic to use the term ''consent from the parties'', including consent from armed opposition groups, in a rule that would cover both international and non-international armed conflicts. It is also clear that, by reading these rules together with Rule 6, humanitarian relief personnel lose their protection when they take a direct part in hostilities.

With respect to the weight of the commentary, the reader should be aware of the Authors' Note which had been inadvertently omitted from Volume I when it was first published in 2005 but which has been included in its 2007 reprint:

> This volume catalogues rules of customary international humanitarian law. As such, only the black letter rules are identified as part of customary international law, and not the commentaries to the rules. The commentaries may, however, contain useful clarifications with respect to the application of the black letter rules and this is sometimes overlooked by commentators.[42]

The commentaries are particularly important to determine the content of a number of rules which are formulated as summaries capturing a range of practice, without having a specific equivalent in treaty law.[43] However, the Study does not claim to have proven that each and every element of the commentaries themselves is part of customary law, such as the list of war crimes in Rule 156.

As to the formulation of Rule 78 on exploding bullets, the wording was carefully chosen and clearly is not a literal transcription of the St. Petersburg Declaration, thereby reflecting the evolution of state practice. On the other hand, the wording that only projectiles ''designed'' or ''specifically designed'' to explode within the human body are prohibited was not used, because this requires proof of the intent of the designer of the projectile. Instead the formulation used in Rule 78 is based on the understanding that projectiles that foreseeably detonate within the human body in their normal use do so as a result of their design, though perhaps not through specific intent, and that it is the explosion of projectiles within the human body which states have sought to prevent through practice in this field. The argument that states have allegedly used anti-matériel exploding bullets that

41 See Study, above note 1, Vol. I, pp. 109 and 196–197.

42 Ibid., Vol. I, 2007 reprint (with corrections), p. li.

43 See, e.g., ibid., Vol. I, Rule 42 (works and installations containing dangerous forces); Rules 43–44 (protection of the environment); Rule 84–85 (incendiary weapons); Rule 94 (slavery and slave trade); Rule 95 (uncompensated or abusive forced labour); Rule 98 (enforced disappearance); Rule 99 (arbitrary deprivation of liberty); Rule 105 (respect for family life); Rule 116 (identification of the dead); Rule 133 (respect for property rights of displaced persons); and Rule 134 (respect for specific needs of women).

"may have tended to detonate on impact or within the human body"[44] is not accompanied by evidence that they actually did so detonate. The argument therefore does not provide evidence of "foreseeable" detonation, as outlined above and in the text explaining Rule 78, and so does not contradict it.

It is important to note that the ICRC did not, as suggested, propose at the Second CCW Review Conference "negotiating a protocol" that would prohibit the anti-personnel use of bullets that explode within the human body and so the lack of state action in this direction is not relevant. The reference to a "1998 ICRC test that subsequently proved flawed" is incorrect as the test in question, like the subsequent test in 1999, was conducted by the Swiss Ballistic Test Range in Thun, Switzerland, using internationally accepted test protocols, and not by the ICRC.

4. Implications

First, the conclusion of the Study that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all states is supported by the evidence proffered. This should not come as a surprise, as many of them were already customary in 1977, exactly thirty years ago.[45] It is true, on the other hand, that a number of provisions in the Protocols were new in 1977, but they have become customary in the thirty years since their adoption because they have been extensively and virtually uniformly accepted in practice.[46] In addition, as pointed out above, a number of their provisions have not become customary because they are not uniformly accepted in practice.[47]

The Study has approached the Additional Protocols, and for that matter any other treaty, in a cautious manner and has not assumed that a rule is customary merely because it is contained in a widely ratified treaty.[48]

Second, the conclusion of the Study that many rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in non-international armed conflict is the result of state practice to this effect. States set this evolution in motion as early as 1949 with the adoption of common Article 3 and their subsequent practice confirmed it. They built further on this practice and in 1977, now 30 years ago,

44 Bellinger and Haynes, above note 4, n. 69.

45 The Additional Protocols were adopted on 8 June 1977 after four negotiation sessions (1974–7) of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. As its title suggests, the Conference thus sought to reaffirm existing rules of customary humanitarian law as well as developing new rules.

46 See, e.g., the prohibition of starvation in Article 54 of Additional Protocol I and Article 14 of Additional Protocol II, which is now considered to be part of customary international law (Rule 53 of the Study).

47 See notes 28–31 above and accompanying text. In addition, the Study does not deal with the customary nature of a number of provisions, as they are not as such addressed in it, including Article 1(4) (wars of national liberation), Article 36 (new weapons), Article 45 (presumption of prisoner-of-war status) and Articles 61–67 (civil defence) of Additional Protocol I.

48 See note 23 above and accompanying text.

adopted Additional Protocol II, the first-ever treaty devoted entirely to the regulation of non-international armed conflict. This process has been further accelerated since the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda in 1993 and 1994 respectively.

Indeed, developments of international humanitarian law since the wars in the former Yugoslavia and Rwanda point towards an application of many areas of humanitarian law to non-international armed conflicts. For example, every humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international armed conflicts.[49] Furthermore, in 2001, Article 1 of the CCW was amended so as to extend the scope of application of all existing CCW Protocols to cover non-international armed conflict.[50]

The criminal tribunals and courts set up, first for the former Yugoslavia and Rwanda and later for Sierra Leone, deal exclusively or mostly with violations committed in non-international armed conflicts. Similarly, the investigations and prosecutions currently under way before the International Criminal Court are related to violations committed in situations of internal armed conflict. These developments are also sustained by other practice such as military manuals, national legislation and case-law, official statements and resolutions of international organizations and conferences. In this respect particular care was taken in Volume I to identify specific practice related to non-international armed conflict and, on that basis, to provide a separate analysis of the customary nature of the rules in such conflicts. Finally, where practice was less extensive in non-international armed conflicts, the corresponding rule is acknowledged to be only ''arguably'' applicable in non-international armed conflicts.[51]

When it comes to ''operational practice'' related to non-international armed conflicts, there is probably a large mix of official practice supporting the rules and of their outright violation. To suggest, therefore, that there is not enough practice to sustain such a broad conclusion is to confound the value of existing ''positive'' practice with the many violations of the law in non-international armed conflicts. This would mean that we let violators dictate the law or stand in the way of rules emerging. The result would be that a whole range of heinous practices committed in non-international armed conflict would no longer be considered unlawful and that commanders ordering such practices would no longer be responsible for them. This is not what states have wanted. They have wanted the law to apply to non-international armed conflicts and they have wanted commanders to be responsible and accountable. As a result, the expectations of lawful behaviour by parties to non-international armed conflicts have been raised

49 See the 1996 Amended Protocol II to the CCW on mines, booby-traps and other devices, the 1997 Ottawa Convention banning anti-personnel landmines, the 1998 Rome Statute of the International Criminal Court, the 1999 Second Protocol to the Hague Convention on the protection of cultural property, the 2000 Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict, the 2003 Protocol V to the CCW on explosive remnants of war.

50 Until then only Amended Protocol II of 1996 was applicable to non-international armed conflict. The amendment of Article 1 thus affected the scope of application of the existing Protocols I–IV.

51 These are Rules 21, 23–24, 44–45, 62–63 and 82.

to coincide very often with the standards applicable in international armed conflicts. This development, brought about by states, is to be welcomed as a significant improvement for the legal protection of victims of what is the most endemic form of armed conflict, non-international armed conflicts.

State practice and customary humanitarian law have thus filled important gaps in the treaty law governing non-international armed conflicts. The divide between the law on international and non-international armed conflicts, in particular concerning the conduct of hostilities, the use of means and methods of warfare and the treatment of persons in the power of a party to a conflict, has largely been bridged. But this is not to say that the law on international and non-international armed conflicts is now the same. Indeed, concepts such as occupation and the entitlement to combatant and prisoner-of-war status still belong exclusively to the domain of international armed conflicts. Consequently, the Study also contains a number of rules whose application is limited to international armed conflict,[52] and a number of rules whose formulation differs for international and non-international armed conflicts.[53]

Conclusion

As pointed out above, the ICRC was requested by states to undertake this study in order to assist in the difficult task of identifying customary humanitarian law. It is no exaggeration to say that nearly 10 years of broad-based research and widespread consultation have resulted in the most comprehensive and thorough study of its kind to date. The Study represents, therefore, a best possible effort in providing a snapshot of customary international humanitarian law that is as accurate as possible. Because of its origin – a mandate from the international community – the Study seeks to be a working tool at the service of practitioners involved with humanitarian law, not a handbook of theoretical considerations, and has already found its way into the jurisprudence of several states, including the United States.[54]

Although the Study has now become the starting point of any discussion on customary humanitarian law, it should not be seen as the final word on custom because, per definition, it cannot be exhaustive and the formation of customary law is an ongoing process. The ICRC has accordingly teamed up with the British Red Cross Society and initiated a project, based at the Lauterpacht Centre for

52 These are Rules 3–4, 41, 49, 51, 106–108, 114, 130 and 145–147.

53 These are Rules 124, 126 and 128–129.

54 See United States, Supreme Court, *Hamdan* v. *Rumsfeld, Secretary of Defense*, et al., Case No. 05-184, 29 June 2006, p. 69. See also Israel, The Supreme Court Sitting as the High Court of Justice, *Adalah and others* v. *GOC Central Command, IDF and others*, 23 June 2005, HCJ 3799/02, paras. 20, 21 and 24, and *The Public Committee against Torture in Israel and others* v. *The Government of Israel and others*, 13 December 2006, HCJ 769/02, paras. 23, 29–30 and 41–42; ICTY, Appeals Chamber, *Prosecutor* v. *Hadžihasanović and Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, IT-01-47-AR73.3, 11 March 2005, paras. 29–30, 38 and 45–46.

International Law of Cambridge University, to update the practice contained in Volume II of the Study.

With a view to this update we remain receptive to further comments on the Study in general but also to information and comments on any further specific practice states and experts wish to share with us. This should be part of an ongoing dialogue. The US comments and this response should be seen as part of that dialogue.

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