

INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
INSTITUT INTERNATIONALE DE DROIT HUMANITAIRE
ISTITUTO INTERNAZIONALE DI DIRITTO UMANITARIO



THE CONDUCT OF HOSTILITIES

Revisiting the Law of Armed Conflict

100 Years after the 1907 Hague Conventions and

30 Years after the 1977 Additional Protocols

edited by

Gian Luca Beruto

Assistant to the Secretary-General

with the collaboration of Ms Shirley Morren, Librarian

Current Problems of International Humanitarian Law

Sanremo, 6-8 September 2007

- PROCEEDINGS -

ACKNOWLEDGEMENTS / REMERCIEMENTS / RINGRAZIAMENTI

BRITISH RED CROSS

CAMERA DI COMMERCIO DI IMPERIA

CASINÒ DI SANREMO

COMUNE DI SANREMO

CONFARTIGIANATO DI IMPERIA

CONFINDUSTRIA DI IMPERIA

CROCE ROSSA ITALIANA

CROIX-ROUGE MONÉGASQUE

INTERNATIONAL COMMITTEE OF THE RED CROSS

ITALIAN MINISTRY FOR FOREIGN AFFAIRS

NETHERLANDS MINISTRY OF FOREIGN AFFAIRS

PROVINCIA DI IMPERIA

SWEDISH MINISTRY FOR FOREIGN AFFAIRS

SWISS FEDERAL OFFICE FOR MIGRATION

The International Institute of Humanitarian Law is deeply grateful to the Dragan European Foundation for its precious collaboration which has led once again to the publication of the proceedings of the annual Round Table on current problems of international humanitarian law.

In its efforts to expand its editorial activities the Institute has published several works in the past months, in particular, the proceedings of: *“The Proliferation of Weapons of Mass Destruction and International Humanitarian Law”*; *“The Convention on Chemical Weapons between Disarmament and International Humanitarian Law”*; *“International Peace Operations and International Humanitarian Law”*, organised with the financial support of the Italian Ministry of Foreign Affairs.

The present volume further enriches the collection which was begun in 1999. It covers the records of the Round Table that took place from 6th to 8th September, 2007 in Sanremo on the theme: *“The Conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years after the 1907 Hague Conventions and 30 Years after the 1977 Additional Protocol”*.

The subject matter has been carefully chosen. The geo-political scene in the post-Cold War period has introduced new types of conflicts. Inter-ethnic and inter-religious clashes have multiplied. New types of weapons have appeared. New treacherous threats have gained momentum beginning with international terrorism. The Armed Forces have been called to tackle tasks beyond national borders, often differing a great deal from the tasks of a traditional soldier and no longer limited to the actual conflict itself.

The Hague Conventions are 100 years old. The Additional Protocols to the Geneva Conventions are 30 years old. Are these instruments still appropriate? How can their respect be guaranteed in the face of such unprecedented atrocities and violence? Has the time come to update the present body of norms of international humanitarian law?

This Round Table has tried to find answers to these questions through serious debates, conducted in an informal atmosphere, in which political personalities, legal experts and military operators from all over the world have taken part.

Ambassador Maurizio Moreno
President, International Institute of Humanitarian Law

ORGANISING COMMITTEE
COMITATO ORGANIZZATORE
COMITE' ORGANISATEUR

Chair Dr. Rolph K. JENNY, Vice President, IIHL

Members Dr. Stefania BALDINI, Secretary-General, IIHL

Prof. Yoram DINSTEIN, Member of the Council, IIHL

Dr. Philipp SPOERRI, Director for International Law and
cooperation within the Movement, ICRC

Prof. Frits KALSHOVEN, Honorary Member, IIHL

Mr. Daniel KLINGELE, Head, Human Rights and Humanitarian
Law Section, Swiss Ministry of Foreign Affairs

Dr. Jean François QUEGUINER, Legal Adviser, Legal Division,
ICRC

Prof. Michel VEUTHEY, Acting President, IIHL

TABLE OF CONTENTS / TABLE DE MATIÈRES / INDICE

OPENING SESSION

Michel VEUTHEY

Acting President of the International Institute of Humanitarian Law (IIHL)

MESSAGGIO DEL PRESIDENTE DELLA REPUBBLICA

Giorgio NAPOLITANO

WELCOME STATEMENTS

Claudio BOREA

Sindaco di Sanremo

Gianni VERNETTI

Sottosegretario di stato agli affari esteri, italia

Daniel KLINGELE

Ministry of Foreign Affairs, Switzerland

Liesbeth LIJNZAAD

Legal Adviser, Ministry of Foreign Affairs, Netherlands

Massimo BARRA

Presidente della Croce Rossa Italiana

KEYNOTE STATEMENT

Jacques FORSTER

Vice-President of the International Committee of the Red Cross

***THE CONDUCT OF HOSTILITIES FROM AN ETHICAL,
HISTORICAL AND FUTURE PERSPECTIVE:
INTRODUCTION TO THE TOPIC OF THE ROUND TABLE***

From the 1907 Hague Conventions to the Additional Protocols of 1977 and beyond – Historical Evolution of the Law on the Conduct of Hostilities

Philip SPOERRI, Director for International Law and Cooperation within the Movement, ICRC

Le droit de La Haye, la neutralité et le transit ferroviaire par la Suisse pendant la Seconde Guerre mondiale

Roland HAUDENSCHILD, Secrétariat Général, Bibliothèque Militaire Fédérale et Service Historique, Suisse

***COMBATANTS AND MILITARY OBJECTIVES VERSUS
CIVILIAN PERSONS AND OBJECTS***

The Notions of Combatant, Armed Group, Civilians, and Civilian Population in International Armed Conflicts

Kenneth WATKIN, Judge Advocate General of the Canadian Forces

The Notions of Civilians and Fighters in Non-International Armed Conflicts

Jann K. KLEFFNER, Assistant Professor of International Law, University of Amsterdam

Civilian Direct Participation in Hostilities under International Humanitarian Law

Nils MELZER, Legal Adviser, ICRC

Military Objectives

Hays PARKS, Associate Deputy General Counsel, United States Department of Defense

The Definition of Military Objectives

Knut DÖRMANN, Head of the Legal Division, ICRC

METHODS AND MEANS OF WARFARE

Human Shielding from the Attacker's Perspective

Michael N. SCHMITT, Stockton Professor of International Law, United States Naval War College

The Principle of the Prohibition of Superfluous Injury or Unnecessary Suffering

Théo BOUTROUCHE, Faculty of Law, University of Geneva

Weapons causing Post-Conflict Effects on Civilians

Ronald BETTAUER, Deputy Legal Adviser, U.S. Department of State

Mines, Cluster Bombs, Explosive Remnants of War (ERW)

Knut DÖRMANN, Head of the Legal Division, ICRC

Discussion on Means and Methods of Warfare likely to cause Superfluous Injury and Unnecessary Suffering

Erwin DAHINDEN, Director of International Relations of the Swiss Armed Forces, Member of the IIHL Council

THE CONDUCT OF HOSTILITIES AND SPECIAL PROTECTION REGIMES

The conduct of hostilities and their impact on humanitarian assistance

Arne DAHL, Judge Advocate General of the Norwegian Armed Forces

IMPLEMENTING THE LAW ON THE CONDUCT OF HOSTILITIES

Implementation of the Law on the Conduct of Hostilities by Armed Forces: A View from the Inside

Charles GARRAWAY, Lt. Colonel (ret.), Member IIHL, United Kingdom

Compensation for the Victims of Chemical Warfare in Iraq and Iran

Liesbeth ZEGVELD, Leiden University, Netherlands

CONCLUSION OF THE ROUND TABLE

The Contemporary Challenges to the Law on the Conduct of Hostilities

Dr. Philip SPOERRI, Director for International Law and Cooperation within the Movement,
ICRC

Considerazioni finali

Giovanni Lorenzo FORCIERI, Sotto Segretario di Stato, Ministero di Difesa, Italia

Closing Remarks

Michel VEUTHEY, Acting President, IIHL

OPENING SESSION

Michel VEUTHEY
Acting President
International Institute of Humanitarian Law (IIHL)

Monsieur le Secrétaire d'Etat,
Excellences,
Monsieur le Président du CICR,
Monsieur le Maire,
Chers Amis,

A l'ouverture de cette Table Ronde marquant le 100e anniversaire de la Conférence de la Paix de La Haye et le 30e anniversaire des Protocoles additionnels aux Conventions de 1949, permettez-moi de vous souhaiter la bienvenue et de vous remercier tous d'être venus à Sanremo pour participer à cette 30e Table Ronde et débattre d'un sujet d'une grande actualité.

Je voudrais d'abord brièvement rendre hommage au Professeur Patrnoic. Comme vous le savez tous, il était né en 1921 à Belgrade. Il est décédé à Genève le 6 mai de cette année. Il a été un des co-fondateurs de cet Institut et son animateur jusqu'à la fin de sa vie. Au nom de l'Institut, je souhaiterais ici lui rendre hommage et exprimer toute notre sympathie à sa famille. Je vous invite maintenant à vous lever pour une minute de silence ou de prière à la mémoire du Professeur Patrnoic. Merci.

Je voudrais aussi saluer deux autres fondateurs de l'Institut présents parmi nous, le Professeur Hingorani, de l'Inde, et le Dr. Ugo Genesio, de Sanremo.

Dans cette salle, nous avons parmi les plus grands experts humanitaires, juridiques et militaires. Nous aurons certainement un débat juridique de très haut niveau, grâce aux efforts du Dr. Rolph Jenny, Vice-Président de l'Institut et Président du Comité d'organisation de cette Table Ronde, ainsi que du CICR, en tant que co-organisateur de cette Table Ronde, en particulier du Dr. Philipp Spoerri, Directeur, Jean-François Quéguiner, Conseiller juridique, et des autres Membres de ce Comité, le Professeur Yoram Dinstein, le Professeur Frits Kalshoven, M. Daniel Klingele, Chef de la section des droits de l'homme et du droit international humanitaire de la Direction du Droit International du Département Fédéral

suisse des Affaires étrangères, sans oublier notre Secrétaire Générale, la Dottoressa Stefania Baldini.

Nous sommes quelque 300 participants. Merci à vous toutes et tous d'être ici. Nous voudrions, autant que possible, pouvoir engager un dialogue. Je lance donc un appel aux modérateurs, aux orateurs, et aux intervenants dans les discussions pour limiter leurs interventions dans le temps pour laisser à chacun un temps de parole.

Pendant ces deux jours et demi, nous allons étudier la quasi totalité des règles applicables à la conduite des hostilités. Et nous ne devons pas oublier qu'au-delà des règles existantes ou en élaboration, il y a d'autres considérations d'humanité qui protègent en dernier recours tant les civils que tous ceux qui participeraient directement aux hostilités, que la Clause de Martens a évoquées à La Haye en 1899 et 1907, et qui ont été reprises à Genève en 1949 et en 1977 et à Rome dans les Statuts du Tribunal Pénal International.

Je voudrais ici en citer le texte original français :

« En attendant qu'un code plus complet des lois de la guerre puisse être édicté, les Hautes Parties Contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par Elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique. »

Cet appel aux exigences de la conscience publique et aux lois de l'humanité n'a rien perdu de son actualité : comme en 1907, nous avons aujourd'hui des adversaires asymétriques. Et les attaques contre des civils comme les mauvais traitements infligés de part et d'autre à des personnes capturées nécessitent davantage que des considérations juridiques académiques. Il faut donc insérer notre expertise juridique dans l'esprit de cette Clause de Martens, dans l'exigence de trouver des règles d'humanité impératives pour chacun et bénéfiques à tous, qui seraient ancrées dans les exigences universelles de l'humanité pour la défense de la vie et de la dignité humaine, sans mettre en péril les intérêts politiques et militaires légitimes des parties en conflit.

En vous souhaitant une Table Ronde qui comble toutes vos attentes, je voudrais conclure par cette phrase d'Albert Camus, qui pourrait s'appliquer à notre thème de réflexion : *« Se battre pour une vérité en veillant à ne pas la tuer des armes mêmes dont on la défend »* qu'on pourrait traduire ainsi en anglais : *« To fight for a truth without destroying it by the very means used to defend it »*).

MESSAGGIO DEL PRESIDENTE DELLA REPUBBLICA ITALIANA

Giorgio NAPOLITANO

In occasione della XXX Tavola Rotonda il Presidente della Repubblica esprime apprezzamento all'Istituto internazionale di Diritto Umanitario per la sua intensa e meritoria attività di promozione e di studio delle norme internazionali che proteggono i diritti fondamentali delle persone nelle situazioni di emergenza.

Il tema prescelto "La condotta delle ostilità, rivisitare il diritto dei conflitti armati" a cento anni dalla Convenzione dell'Aja e a trenta anni dai Protocolli Aggiuntivi appare di particolare interesse e attualità alla luce dell'evoluzione dei conflitti armati e dello *status* dei soggetti in essi coinvolti nel mondo contemporaneo.

Alle autorità presenti, ai relatori e a tutti i partecipanti il Capo dello Stato rivolge un cordiale augurio di buon lavoro ed un saluto, cui unisco il mio personale.

Claudio BOREA
Sindaco di Sanremo

Sono particolarmente onorato di portare il mio saluto personale e quello dell'Amministrazione Comunale in occasione della XXX Tavola Rotonda organizzata dall'Istituto Internazionale di Diritto Umanitario di San Remo intorno ai problemi attuali del diritto umanitario.

Il mio benvenuto agli esperti, ai diplomatici, nonché a tutte le personalità internazionali e di rilievo, quest'anno particolarmente numerose, appartenenti al mondo accademico, politico e militare.

Questa Tavola Rotonda permetterà di affrontare nei suoi molteplici aspetti un tema importante, quello della condotta delle ostilità, fondamento del diritto internazionale umanitario, ma soprattutto consentirà di delinearne le possibili evoluzioni definendone i nuovi contorni attuali.

Darà, dunque, la possibilità di riflettere anche sui mezzi e sui metodi di combattimento fino ad arrivare ad analizzare la tematica dell'attuazione delle norme sulla condotta delle ostilità.

Questa Tavola Rotonda si configura infatti come un appuntamento di estrema rilevanza e di estrema attualità che focalizza l'attenzione verso uno dei più importanti temi del diritto internazionale umanitario.

Grazie al lavoro dell'Istituto Internazionale di Diritto Umanitario, di cui il Comune di San Remo ha il piacere di essere co-fondatore, ancora una volta sarà possibile sviluppare un dibattito che, da un lato, permetterà di rinnovare e promuovere idee e riflessioni, dall'altro, configurerà ancora una volta la nostra città come importante punto di riferimento del diritto internazionale.

San Remo e l'Istituto Internazionale di Diritto Umanitario, infatti, condividono da tempo un percorso comune basato sugli stessi valori e sugli stessi obiettivi.

Vogliamo pertanto anche oggi ribadire la nostra volontà di intensificare, se possibile, la cooperazione e la collaborazione con l'Istituto nell'ambito delle rispettive sfere di influenza.

In questa occasione, però, è per me doveroso ricordare il prof. Ptrinogich

recentemente scomparso, presidente e membro co-fondatore dell'istituto dal 1970. L'apporto del professore già docente di diritto internazionale presso l'università di Belgrado e di Ginevra, visit professor presso diverse università italiane, europee e americane è stato determinante oltre che per la diffusione e il rispetto dei principi umanitari, anche per la crescita nel tempo del ruolo dell'Istituto nel contesto internazionale, tanto da garantirne l'indipendenza e l'autorevolezza.

Il suo lungo operato ha lasciato un segno profondo nella nostra città e ha contribuito in modo decisivo a far identificare San Remo anche come centro del diritto umanitario e della pace.

L'apporto del professore è stato decisivo nella creazione e nello sviluppo dello "Spirito di Sanremo", valore ormai riconosciuto e apprezzato a livello internazionale.

Una personalità forte e significativa che è entrata nel patrimonio storico e culturale di San Remo, un amico della città, come lui amava ripetere nei nostri frequenti incontri, a cui va la nostra più sentita riconoscenza.

Per ricordare la sua figura e per mantenerne viva la memoria il Comune, in collaborazione con l'Istituto, ha pensato di istituire e finanziare, a partire dal prossimo anno, un premio da riconoscere a personalità che si siano distinte nel campo della protezione dei diritti umani.

Concludo infine rinnovando il mio augurio di buon lavoro e felice permanenza a San Remo a tutti i partecipanti.

Grazie

Gianni VERNETTI

Sottosegretario di stato agli affari Esteri

Signor presidente, sindaco della città di Sanremo, illustri ospiti e oratori; innanzi tutto non potrei iniziare la mia breve riflessione a nome del Governo Italiano senza rivolgere un caloroso pensiero alla memoria del Prof. Patrignic già ricordato per il lavoro fondamentale di questi anni.

È per me è la seconda volta che ho l'opportunità di presenziare all'apertura dei lavori dell'annuale Tavola Rotonda dell'Istituto; la prima occasione si è verificata lo scorso anno, poche settimane dopo l'assunzione del mio incarico come Sottosegretario agli Affari Esteri.

Se, però, ancora una volta ci troviamo tutti qui riuniti in occasione di questo evento che costituisce una vera e propria pietra miliare dell'agenda umanitaria e del confronto, del dibattito sui temi del diritto internazionale umanitario lo dobbiamo in gran parte alla passione di un uomo che, con grande intelligenza e grande tenacia, ha dedicato un'intera vita a questa attività ed a questo Istituto fino alle ultime settimane della propria esistenza. Sono quindi onorato di rappresentare qui, oggi, ancora una volta il Governo Italiano in questa importante Tavola Rotonda.

Nel 2007 cadono due anniversari di fondamentale importanza per il diritto internazionale umanitario: il centenario delle Convenzioni dell'Aja ed il trentennale dei Protocolli Aggiuntivi delle Convenzioni di Ginevra.

Le varie Convenzioni trassero alta ispirazione giuridica e morale dalla I Convenzione di Ginevra del 1864. Esse rappresentarono il primo tentativo organico di tradurre in forma pattizia progetti fino ad allora soltanto ideali, enunciazioni, buoni principi ma mai ancora tradotti, mai ricoperti di quella doverosa veste giuridica necessaria affinché potessero realmente contribuire al mantenimento della pace, alla riduzione degli armamenti in eccesso, alla tutela delle vittime dei conflitti.

Io credo che uno dei principali e, per l'epoca, anche rivoluzionari risultati delle Convenzioni fu lo sviluppo di regole basate sul principio secondo cui i belligeranti non possono disporre di un diritto illimitato nella scelta dei mezzi per nuocere al nemico e nel trattamento dei soldati feriti nonché dei prigionieri e dei civili.

Le Convenzioni dell'Aja proibirono l'uso di determinati armamenti e regolamentarono aspetti importanti riguardanti la gestione dei territori occupati durante e dopo il conflitto nonché il diritto alla neutralità. Esse furono, inoltre, testimoni di un primo tentativo

innovativo di istituire un Tribunale Permanente per gli arbitrati internazionali, una delle prime forme di legalità internazionale.

Tutti elementi che rendono questi strumenti ancora oggi incredibilmente attuali nonostante il secolo trascorso abbia profondamente mutato la scena internazionale, i rapporti fra gli Stati ed i rapporti di forza. Rivestono una particolare importanza anche i due Protocolli Aggiuntivi alle Convenzioni di Ginevra del 1949 relative alle protezioni delle vittime dei conflitti armati; a tal proposito vorrei soprattutto sottolineare la forza normativa del secondo che impone importanti codici di condotta ai belligeranti anche in situazioni di conflitto armato non internazionale, uno sviluppo tanto importante quanto necessario in un mondo in continua evoluzione che vede sempre più le crisi allontanarsi da quel modello classico e tradizionale di confronto internazionale tra Stati per i quali molti degli strumenti del diritto internazionale umanitario furono inizialmente concepiti.

Oggi, infatti, i conflitti sono connotati da parametri molto più complessi ed incerti tra i quali non è sempre facile districarsi sia con riferimento agli aspetti operativi e politici sia a quelli più spiccatamente giuridici.

Detto questo colgo l'occasione per salutare anche le importanti autorità militari qui presenti. Se noi osserviamo l'egregio lavoro che voi avete svolto in questi anni nei recenti teatri di conflitto, penso alla Bosnia Erzegovina, penso al Kosovo, penso all'Afghanistan, penso alla recentissima missione in Libano, guidata UNIFIL 2 dall'Italia, ci rendiamo conto che oggi ci troviamo di fronte a conflitti con una natura profondamente mutata, profondamente differenti, conflitti nei quali prevale e si rende sempre più necessario definire strumenti giuridici per tutelare le popolazioni civili sempre più coinvolte in questi conflitti.

Ecco allora che l'elaborazione di una cultura giuridica internazionale, un diritto, nuovi strumenti per il diritto internazionale umanitario non è teoria, non è accademia ma è necessità concreta, urgente, che noi, che voi con il lavoro egregio che svolgete vi trovate ad affrontare quotidianamente nelle aree di crisi più gravi del nostro pianeta.

Tornando alla nostra riflessione, possiamo a ragione affermare che nel nuovo quadro internazionale i due Protocolli aggiuntivi hanno impresso una spinta determinante verso la ricerca di una maggiore legalità internazionale in situazioni di conflitto armato.

Signori non credo si possa affrontare la tematica oggetto di questa Tavola Rotonda senza fare un riferimento al prezioso contributo al Movimento Internazionale della Croce Rossa di cui, infatti, oggi siamo onorati della presenza di due alti esponenti il Vicepresidente del Comitato Internazionale della Croce Rossa, Jaques Foster, e il Presidente della Croce Rossa Italiana, Massimo Barra.

Il Comitato Internazionale della Croce Rossa e le Società Nazionali di Croce Rossa svolgono da sempre una attività insostituibile di monitoraggio, in tutto il mondo, per verificare l'effettiva applicazione del diritto internazionale umanitario e contemporaneamente per stimolare lo sviluppo dello stesso.

Scusate questa brevissima digressione ma io ho avuto prova di quanto affermo recentemente in Afghanistan, dove ho verificato concretamente, settimanalmente l'insostituibile ruolo della Croce Rossa, una presenza indipendente, libera, autonoma senza peli sulla lingua, capace di monitorare, di correggere, di criticare ma soprattutto capace di dare quel contributo e quell'aiuto che è fondamentale per gestire aree di crisi così difficili.

A nome del Governo Italiano voglio, quindi, ancora una volta, ringraziarvi per il lavoro insostituibile che svolgete con impegno, professionalità e competenza in tante aree di crisi.

Tornando ad oggi, abbiamo apprezzato molto lo studio recentemente realizzato dalla Croce Rossa sul diritto umanitario internazionale consuetudinario, un pregevolissimo sforzo per cercare di colmare alcune delle lacune che ancora esistono nel diritto internazionale pattizio. Un contributo tecnicamente efficace e importante.

Permettetemi ora due parole sulla Croce Rossa Italiana.

Nata da un secolo e mezzo, nel 1864 è una delle più antiche Società Nazionali e rappresenta per noi italiani una di quelle certezze che rassicurano la popolazione quotidianamente, una istituzione nelle quali i cittadini al di là delle parti, al di là delle opinioni si riconoscono con grande affettività con sentimenti di forte riconoscibilità nazionale.

Con la sua attività quotidiana fortemente radicata sul territorio, la Croce Rossa Italiana, anche grazie al suo nuovo presidente, ha rilanciato in maniera considerevole le proprie attività internazionali essendo ora presente nella gran parte dei teatri di crisi che prima ricordavo: in Medio Oriente, nei Balcani, nel Continente Africano, in America Latina. In tutti questi teatri è parte di quell'insostituibile macchina umanitaria costituita da tutti i componenti del Movimento Internazionale di Croce Rossa e Mezzaluna Rossa.

Signori mi onoro pertanto di rappresentare qui oggi il Governo Italiano in occasione di un evento che costituisce sempre un momento di riflessione e approfondimento molto atteso e di vasta risonanza; la mia presenza insieme a quella del mio collega Lorenzo Forceri, Sottosegretario alla Difesa che interverrà alla chiusura di questa importante Tavola Rotonda intende testimoniare l'importanza che il Governo Italiano attribuisce al diritto internazionale umanitario, noi vogliamo da questo punto di vista trainare piuttosto che seguire il dibattito e il confronto su questi temi.

Precedentemente ho fatto riferimento alla I Conferenza di Ginevra del 1864 cui partecipò un'Italia neonata, un'Italia che si era riunita solo 3 anni prima, ed è interessante notare come uno dei primissimi strumenti di diritto internazionale firmati dall'Italia unificata fu proprio una Convenzione umanitaria. Ma posso citare anche esempi più recenti: dalla Conferenza di Roma del 1998, che ha sancito la nascita della Corte Penale Internazionale di cui abbiamo largamente discusso lo scorso anno; al III Protocollo Aggiuntivo alle Convenzioni di Ginevra del '49, fortemente sostenuto dall'Italia che figura tra i primissimi firmatari; sino ad arrivare alla Conferenza sullo stato di diritto in Afghanistan promossa dal Governo Italiano, dal Governo dell'Afghanistan e dalle Nazioni Unite, pietra miliare della nostra azione internazionale in quel teatro.

Oggi, però, la mia partecipazione qui è dettata soprattutto dal profondo riconoscimento del Governo Italiano nei confronti dell'Istituto di San Remo per il lavoro unico che da oramai molti decenni svolge con grande capacità di innovazione per facilitare la divulgazione e l'applicazione del diritto internazionale umanitario; il prestigio e gli alti standard che lo hanno sempre caratterizzato rendono l'Istituto un vero gioiello tra gli istituti di alta formazione internazionale, nonché fonte di profonda soddisfazione ed orgoglio per il nostro Paese che lo ospita.

In questo primo anno e mezzo da Sottosegretario agli Affari Esteri ho realizzato molte missioni e molte iniziative internazionali, sono stato presente in molte aree del mondo ed in almeno 2 o 3 occasioni rappresentanti di governi e ministri, come è accaduto recentemente in Asia Centrale, mi hanno chiesto se potevamo coinvolgere i loro tecnici nelle attività, offrendo anche borse nelle attività di questo Istituto.

Quando Governi di Paesi amici con i quali si collabora e con cui si lavora chiedono e vogliono poter formare alcuni loro tecnici e alcuni esponenti delle loro forze armate presso questo Istituto, per noi è la miglior prova del fatto che il lavoro che quotidianamente svolgete ha un riconoscimento internazionale al di là delle belle parole e al di là delle frasi di rito.

La Tavola Rotonda si tiene in un momento delicato per l'Istituto, che il Governo Italiano segue costantemente da vicino, al suo termine, infatti, si riunirà l'Assemblea Generale che sarà chiamata ad approvare il nuovo Statuto dell'Istituto e che dovrà rilanciarne le attività dotandolo di un'organizzazione ancora più dinamica e efficiente. L'Assemblea dovrà inoltre rinnovare le alte cariche direttive eleggendo il nuovo Consiglio il quale a sua volta nominerà un nuovo Presidente.

A tal proposito io vorrei sottolineare tutto il mio personale supporto nonché quello delle autorità italiane all'Assemblea ed al Consiglio nella certezza che essi sapranno deliberare

nella massima indipendenza e con la consapevolezza dell'importanza di rilanciare le attività dell'Istituto, conservando e rafforzando la sua centralità in un settore, come quello dei diritti umani, di crescente importanza per le relazioni internazionali.

In un contesto come quello attuale in cui purtroppo le situazioni di conflittualità si moltiplicano i Governi e le Istituzioni Internazionali sono sempre più sensibili alle esigenze di disporre di un foro indipendente di discussione, di ricerca e di formazione all'altezza dei tempi.

Criteri di managerialità, di professionalità, di rappresentatività, anche geografica, di collegialità e di rotazione devono sempre più trovare spazio nella gestione di un Istituto che è chiamato ad interagire con la Croce Rossa Internazionale e le diverse Organizzazioni Internazionali che agiscono a Ginevra, Bruxelles e New York ed hanno a cuore il consolidamento nonché la diffusione del diritto umanitario.

A testimonianza dell'attenzione che il Governo Italiano, tra i primi sostenitori dell'Istituto, attribuisce a questo importante processo di riforma desidero sottolineare che il Ministero degli Affari Esteri confermerà e incrementerà nei prossimi anni il proprio sostegno a questo Istituto che per i motivi sin qui detti ritiene importante, utile e necessario.

Signori desidero infine rivolgere a tutti voi l'augurio del Governo e mio personale per il successo dei lavori di questa XXX Tavola Rotonda organizzata dall'Istituto di Sanremo.

Buon lavoro a tutti.

Daniel KLINGELE
Ministry of Foreign Affairs, Switzerland

Mr. President,
Your Excellencies,
Ladies and Gentlemen,
Dear Colleagues,

It is a great honor and a real pleasure for me to welcome you on behalf of the Swiss Federal Department of Foreign Affairs here in Sanremo to the 30th Round Table on current issues on International Humanitarian Law. As the depository State of the Geneva Conventions and the birth place of the ICRC, Switzerland has always considered the strengthening and the dissemination of International Humanitarian Law as a foreign policy priority. This can be seen in its support of many projects and initiatives, such as the Sanremo Round Tables, that allow for an informal and free exchange of thoughts on issues related to International Humanitarian Law. For more than 140 years, contemporary International Humanitarian Law has set limits to the use of armed force. In 1864, the first Geneva Convention for the amelioration of the condition of the wounded in the field laid the foundations of contemporary International Humanitarian Law.

Thanks to the input of the ICRC which had been founded a year before by Henri Dunant in Switzerland, the development started with the Convention of 1864 and continued to a series of milestones, in particular with the Hague Convention, Respect in the Laws and Customs of War on Land of 1907, the Geneva Conventions of 1949, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, the Additional Protocols of 1977, as well as the 1980 Convention on Certain Conventional Weapons and its Protocols. All these instruments I have quoted were indeed a response to the atrocities of their time. For instance, the four Geneva Conventions were a response to the atrocities committed during the Second World War against prisoners of war and the civilian population, and the Additional Protocols of 1977 were originated from the national wars of liberation in the 1960's and 1970's and were all the response to the increased suffering of civilians in armed conflict due in part to developments of weapon technology. In spite of this considerable body of law, the international community is still today confronted with further legal and operational challenges in the application of International Humanitarian Law (IHL) in the context of international and non-international armed conflicts. Since the end of the Cold War, the nature

of the conflicts has changed and even the application of basic IHL rules can be subject to different interpretations.

The proliferation and fragmentation of non-State armed groups, who may have little or no regard for IHL, pose another challenge. Does this mean that IHL is not adapted to the situation which prevails today? In the view of the Swiss Government, this is not the case. In our view, IHL and particularly the rules of the Hague Convention and the Additional Protocols dealing with the conduct of hostilities remain as relevant in conflicts today as they were when they were adopted a hundred and respectively thirty years ago. The challenges IHL currently faces have more to do with the respect, the application and sometimes also the interpretation of certain rules in specific situations than with the existing law itself. This is why it is of utmost importance to clarify certain notions of IHL. We will try to do this in the next two and a half days, here in Sanremo, by revisiting the rules of IHL. The rules must be clear to make the position of the soldier easier in the field, otherwise the law is not enforceable. I am convinced that in this respect, this Round Table will constitute a valuable contribution. I wish you all fruitful discussions and thank you for your attention.

Hundred years after the Second Hague Peace Conference

Liesbeth LIJNZAAD

Legal Adviser, Ministry of Foreign Affairs, Netherlands

Excellencies, Ladies and Gentlemen,

Let me first express my pleasure at being able to participate at this year's Round Table, and may I congratulate the Institute for developing such an interesting programme for the next few days. I believe that many of the current issues in International Humanitarian Law are on the agenda, and hope that we will all have the possibility to discuss, and indeed to deepen our understanding of these crucial issues. It is important to have the opportunity to reflect on the current state of the law and on the contemporary challenges, which is a reason why my government is happy to have been able to contribute to this year's Round Table.

Ladies and Gentlemen,

This year, the Hague Conventions on the Laws of War – perhaps I should say the second series of Hague Conventions – are a hundred years old. The year 2007 seems filled with seminars and colloquia to commemorate and celebrate this hundredth anniversary of the second Hague Peace Conference.

Both the 1907 Hague Conference and its predecessor of 1899 mark a turning point in the relationship between States. For the first time in history the intention was not to end a war or to conclude a peace treaty, but to prevent future armed conflicts. Serious attempts were made to codify existing rules of humanitarian law and to further regulate military conduct, with the intention of alleviating the gruesome effects of war.

The 1907 Conference constituted an almost worldwide effort: while the 1899 Hague Conference had been a party for the happy few – mostly the prerogative of European Powers and their satellites – the 1907 Conference was the first and, as it would turn out, the only near-global summit before the League of Nations era. The gathering of 256 delegates from 44 of the 57 sovereign nations of that time, attempting to lay down the fundamentals of a new world order constitutes a truly unique historic event. I recently spoke to some Latin American diplomats who see this Conference as the very start of their participation and contribution to the international legal system.

At the time the results of the Conference were criticized by some, who had expected more concrete and direct results. Yet, I believe a group of international experts like you will agree that it is an event worth commemorating. One could call the participants of the Conference hundred years ago the pioneers of modern conflict prevention. The Second Hague Conference constituted an important step to a worldwide legal order, in which international relations were to be governed through the rule of law.

Ladies and Gentlemen,

While celebrating the many achievements of the Hague Conference of 1907, however, we should be mindful of the many threats International Humanitarian Law faces today. Clearly the Hague Conventions in themselves do not suffice to address current problems. Several recent conflicts put the centennial of the Second Hague Peace Conference in the shrill light of reality. As Christopher Greenwood stated: looking back at the ideals that were put forward during the two Hague Peace Conferences is a “*sobering experience*” and in many respects even a “*depressing one*”.

The observance of existing rules continues to be a matter for concern. The international community has developed a complex set of rules applicable in situations of armed conflict over the years, but that is not the end of the story – they prove to be a high maintenance possession. We need to continuously ask ourselves: how can we improve compliance with this fundamental body of rules? As we all know, the issue of compliance is especially poignant in non-international armed conflicts. The question is how to get the different participants in conflicts to comply with the principles of International Humanitarian Law (IHL). This is probably more a matter of education than a legal issue, but knowledge and understanding are key to proper application of the law.

Ladies and Gentlemen,

Today’s world, and indeed today’s conflicts, are very different from those of 1907. Current challenges deserve our full attention and require careful study. We have a few days ahead of us to do just that. With new problems, new solutions need to be found. Time has shown that international law has always been able to adapt to new realities,

An important trend in that discussion is the growing variety of the actors. The debate about the laws of war is no longer restricted to diplomats, the military and the ICRC. Civil society has developed into an ever more influential factor in the legal debate. Individuals and a multitude of groupings, associations and non-governmental associations take a keen interest

in issues related to armed conflict. Various NGOs work on issues related to the laws of war, and they play an important role in raising the awareness of society, and of governments in particular about the obligations under IHL. I am happy to note that concern about the proper implementation of IHL today goes beyond the ICRC and the national Red Cross and Red Crescent Societies, and is gaining a broad basis in society at large. Civil society has gained its place at the table, and has clearly made the point that its concerns in these developments ought to play a role.

This is a valuable contribution to the discussion about International Humanitarian Law. It is a next step in an ever more democratic process in international law-making. And it is also a trend that accords with the ideals of the Second Hague Peace Conference of 1907: to create a worldwide legal order, in which international relations are governed by the rule of law. That - Ladies and Gentlemen - is in itself is a good reason to celebrate!

Thank you.

Massimo BARRA
Presidente della Croce Rossa Italiana

Vorrei innanzi tutto associarmi al ricordo del Professore Patrignone portando anche una mia personale testimonianza.

Io ho avuto la fortuna da giovane di venire qui fin dalla seconda edizione di questa Tavola Rotonda e fui accolto dal Dott. Genesio e dal Prof. Patrignone come dei padri e questo ha influenzato un po' anche la mia esistenza. Sono quindi affezionato alla memoria di Patrignone che ricordo essere stato consigliere giuridico della Federazione, della Lega sempre a fianco del Segretario Generale e del Presidente nei momenti difficili del Consiglio dei Governatori, come si chiamava allora e dell'Assemblea Generale della Federazione.

Vorrei che questo spirito di trasmissione, non solo di saperi ma anche di emozioni continuasse e quindi, a chi sarà nuovo presidente dell'Istituto, raccomando a nome della Croce Rossa Italiana di aprirsi il più possibile ai giovani. I giovani della Croce Rossa rappresentano una realtà nel nostro paese, una forte realtà; i nostri giovani sono attivi, non sono attivisti, forse potrebbero diventare un po' più attivisti perchè il mondo ha bisogno di sapere qual'è la situazione dei diritti dell'uomo.

Noi non viviamo più ai tempi della battaglia di Solferino, viviamo in un mondo globalizzato e mediatizzato. La mediatizzazione fa sì che esista un nuovo potere nel mondo che si chiama opinione pubblica ed ha le informazioni che una volta erano riservate ai governi in tempo reale e le informazioni che ci vengono date non sono buone informazioni. Serve quindi un contro-altare e per questo credo che la Croce Rossa non abbia solamente un ruolo operativo ma anche un ruolo di advocacy, un ruolo di segnalazione se non di denuncia, un ruolo di allerta, il ruolo di parlare a nome delle persone più vulnerabili, a nome di quelli che non contano niente perchè non hanno accesso ai mezzi di comunicazione di massa.

Il fatto che si riuniscano 250 eminenti esperti di diritto umanitario non è una grande notizia per i media, il nostro problema è trasformare queste energie in una notizia, cioè fare opinione e credo che in questo il ruolo dei giovani possa essere di fondamentale importanza. Quindi nell'assicurare la disponibilità della Croce Rossa Italiana ad aumentare il suo contributo, la sua partecipazione all'Istituto, chiedo al nuovo Presidente e al nuovo Consiglio di considerare anche questo aspetto di pubblicizzazione delle attività dell'Istituto.

Dobbiamo sapere qual'è la temperatura del mondo, 30 anni fa stavamo meglio o stavamo peggio nei confronti del rispetto dei diritti dell'uomo e delle Convenzioni di Ginevra? Questo potrebbe essere uno dei ruoli di questa Tavola Rotonda: dirci ogni anno

qual'è la temperatura del mondo, se andiamo verso il meglio o stiamo andando verso il peggio ed avere anche il coraggio di denunciare quello che non funziona facendo magari anche l'elenco di tutte le violazioni dei diritti dell'uomo che ci sono state nell'anno precedente.

Alcuni anni fa all'Assemblea Generale delle Nazioni Unite, Bernard Kouchner, attuale ministro degli esteri francese, vecchio attivista della Croce Rossa, mi disse, la "Croix rouge est vieille", la Croce Rossa è vecchia e noi dobbiamo dimostrare che non è vero, uno dei nostri slogan è "la Croce Rossa è giovane" ma per essere giovane dobbiamo coinvolgere i giovani e per coinvolgere i giovani li dobbiamo appassionare, dobbiamo dirgli la verità, non possiamo essere troppo diplomatici; certo il riserbo tradizionale della Croce Rossa è un valore e mi rendo anche conto degli effetti collaterali dannosi di un'eccesso di pubblicità ma allora qual'è però il giusto equilibrio?

In tempi di mediatizzazione in cui la gente vede quello che succede e giudica, tra qualche anno ci potrebbe anche rimproverare di essere stati omissivi o di essere stati troppo timidi.

Credo, quindi, che questa potrebbe essere una agenda nella quale la collaborazione tra l'Istituto Internazionale di Diritto Umanitario, il Movimento Internazionale della Croce Rossa e della Mezzaluna Rossa e, per quello che ci riguarda, la Croce Rossa Italiana possa trovare soddisfazione.

Finisco dicendo che noi abbiamo il dovere di apparire, non per vana gloria ma perché, come diceva il sottosegretario che ringrazio per le sue parole sentite e fuori testo a favore del Movimento Internazionale della Croce Rossa e della Croce Rossa Italiana, apparire ha un ruolo psicoterapico perchè guardando il telegiornale si vedono solo notizie cattive, madri che uccidono i figli, figli che uccidono i padri, teste che rotolano, uno dei pochi flash psicoterapici di conforto per la gente è vedere una mezzaluna rossa o una croce rossa e questo per fortuna almeno in Italia lo vediamo quasi tutte le sere al telegiornale, e quindi noi abbiamo il dovere di apparire e voi pure, non potete essere solamente esperti in una torre d'avorio ma, a mio giudizio, vi dovete sporcare le mani con l'opinione pubblica.

Grazie

KEYNOTE STATEMENT

Jacques FORSTER

Vice-President of the International Committee of the Red Cross

Ladies and Gentlemen,

The majority of casualties stemming from armed conflicts continue to be civilians. In defiance of International Humanitarian Law, civilian persons and objects continue to be deliberately targeted. Civilians are also all too often victims of other violations of rules on the conduct of hostilities, including acts or threats of violence the primary purpose of which is to spread terror among the population, indiscriminate attacks, and starvation.

The ICRC, therefore, warmly welcomes this opportunity to spend these next few days with you looking at the law governing the conduct of hostilities. Questions engendered by the conduct of hostilities have repeatedly received close attention within our organization. Our work in this area is first and foremost motivated by our commitment to help ensure the protection of civilian persons and objects against the effects of hostilities. But it is also the result of the links between what used to be called the law of Geneva and the law of The Hague. How can one expect protection of the injured and the sick, members of the medical services, prisoners of war and civilian victims of armed conflict if the rules on the conduct of hostilities are cast aside?

In line with our traditional approach, a large part of our efforts in this area have focused on acting confidentially to make the belligerents concerned - whether States or non-State actors - aware of violations which have come to our attention, and to do this so as to ensure that such violations do not persist or recur. It is true that this can be a very complex exercise. First, ICRC delegates - for obvious security reasons - are rarely the direct witnesses of military operations and must, therefore, often rely on after-the-fact accounts of the events affecting civilian persons or objects. Second, in order to undertake a credible analysis, we often need access to information which is difficult to obtain because it is considered of military interest. Third, the technological sophistication of war today sometimes requires that data be gathered and analysed by specialists who alone are competent to determine the validity of the arguments invoked to justify an attack or the means employed to carry it out.

We, in no way, view these challenges as grounds for inaction. On the contrary, we are constantly improving and expanding our ability to convince the parties responsible for

violations of the law governing the conduct of hostilities to change their behaviour and uphold their obligations. And even if we cannot determine with certainty that a violation of the rules on the conduct of hostilities has occurred, we can still draw to the attention of the belligerents the consequences of their actions in humanitarian terms.

The ICRC's mandate is not limited to simply taking cognizance of alleged breaches of the law on the conduct of hostilities and working for that law's faithful application, or reminding the warring parties of the human consequences of their operations. As the "guardian" of International Humanitarian Law, we must also examine any practical problems that may arise regarding interpretation or implementation of these norms and, if required, work to further clarify concepts or rules. This work has become even more critical given present-day developments in warfare. The key question, therefore, and the focus of the remainder of this address, is 'what impact these developments in warfare may have on the rules regulating the conduct of hostilities.

As we are all aware, war is changing. One major change is a growing shift of the use of military force away from States to non-State entities, including groups of individuals who use military means to pursue financial or ideological aims. We also see an ever greater concentration of military strength in the hands of a minority of States, and simultaneously an increasing use of violence by armed groups detached from State control, some of which have adopted methods of warfare the primary purpose of which is to spread terror among the civilian population. I shall not elaborate on the issues raised by this new form of warfare and related questions on the conduct of hostilities in the context of counter-terrorism, as I understand there will be presentations devoted to this topic.

A further change is the privatization of warfare, meaning the contracting out of traditional wartime functions of the State and its armed forces to private military and security companies. While the presence of these companies in armed conflict situations is not new, their numbers have grown significantly in recent years and, more importantly, the nature of their activities has altered. In addition to more conventional logistical support, private military and security companies are increasingly undertaking activities closer to the heart of military operations, including protecting military personnel and assets, training and advising armed forces, and maintaining or operating weapons systems.

This privatization challenges the law on the conduct of hostilities, in particular the principle of distinction. If commercial enterprises and their personnel undertake functions intrinsically linked with the operations of war, what then is their status? In addition, it can also be extremely difficult in practice for a belligerent to distinguish between the personnel

and assets of the enemy's armed forces and those of private companies which, though they may be civilians carrying out civilian tasks, nevertheless work closely alongside the armed forces.

War is also changing in terms of the striking inequalities, in some situations, between the belligerents' military abilities. In other words what has come to be known as "asymmetric warfare". This trend will most likely continue in the future as States with adequate expertise and resources acquire an undisputed military supremacy based in large part on their use of the latest information technology.

On the positive side, this new technology may substantially facilitate the often complex process of identifying military objectives. Furthermore, an advanced ability to gather information may help minimize collateral damage by allowing greater precision in determining where and when to launch an attack. Finally, these technological advances permit greater accuracy in the attacks themselves. All this should afford civilian persons and objects heightened protection.

At the same time, however, asymmetry between the warring parties also poses a threat to compliance with certain rules on the conduct of hostilities. A belligerent with far less military strength and technical ability than its adversary is tempted to find ways to compensate that are prohibited by IHL. In response to modern techniques of detection or precision targeting, it may, for example, feign protected status in order to increase the chances of success for its military operations. It may also conceal its military forces or objects among civilians and civilian objects, thereby complicating the task of identifying legitimate targets and greatly increasing the risks of collateral damages. Finally, the militarily weaker party may deliberately strike civilians and civilian objects, either because such attacks - particularly in modern societies - often engender the greatest levels of damage or simply because the belligerent is unable to strike military personnel or installations. Use of human shields is also more frequent in such situations.

Faced with repeated violations of humanitarian law by a militarily weaker enemy, the militarily and technologically stronger belligerent may be tempted to relax its own standards of protection of civilian persons and objects, despite the fact that he remains legally bound by the prohibition of disproportionate attacks. For example, in response to an adversary who persistently conceals combatants and military objectives among the population and civilian objects, the militarily stronger party may gradually revise its interpretation of the principle of proportionality and accept more incidental civilian casualties and damage. Another likely consequence is an expansive interpretation of what constitutes "direct participation in

hostilities" and of the concept of military objective. Such tendencies make the civilian population as a whole more vulnerable to the effects of hostilities.

War is also changing in terms of the domains in which it is waged. Of course armed conflicts are still taking place in the traditional geographic theatres of land, sea and air. However, the "operational space" of modern-day armies also includes cyberspace. Military success is no longer limited to controlling a physical territory - it also includes mastering what strategists have assigned the general term "information", and may also include attacks on cyberspace and various digital information systems. Though the existing law on the conduct of hostilities naturally applies to these new forms of combat, the question becomes whether it is necessary to adopt new rules to govern this new virtual theatre.

The ICRC has certainly not remained passive in the face of these various challenges. The study on Customary International Humanitarian Law undertaken under ICRC's auspices and published in 2005 showed that most rules on the conduct of hostilities apply as customary law to all types of armed conflicts, both international and non-international. They bind States and non-State armed groups.

In 2003 we also initiated a process of research, reflection and clarification on the humanitarian law concept of "direct participation in hostilities". The aim was to identify the elements constituting the concept and to provide guidance for its interpretation in both international and non-international armed conflict. In the framework of this process, informal meetings of experts were organized in cooperation with the TMC Asser Institute. These meetings brought together, in a personal capacity, legal experts from military, governmental and academic circles, as well as from international and non-governmental organizations. A first draft of an Interpretive Guidance on the notion of "direct participation in hostilities" was submitted to the experts for discussion in November 2006. Publication awaits a final round of consultation with the experts and an internal procedure of consolidation.

This process of clarifying the concept of direct participation in hostilities has also addressed the problem posed in this regard by the employees of private military and security companies. More broadly, the ICRC is also working closely with Switzerland's Ministry of Foreign Affairs, which has launched an initiative regarding private military and security companies operating in a conflict environment. It is aimed at promoting respect for International Humanitarian Law and Human Rights in these situations. As private military and security companies draw closer to military operations - and irrespective of whether or not this is a desirable development - it becomes important that they know and comply with the rules of International Humanitarian Law governing the conduct of hostilities.

Finally, the ICRC participated actively in the various meetings of experts held under the auspices of the Harvard Program on Humanitarian Policy and Conflict Research for the purpose of drafting a Manual on Air and Missile Warfare. Much of the Manual will be devoted to the conduct of hostilities. While taking into account the far-reaching developments in the strategies use of air and missile technology, the ICRC feels it is crucial that this Manual be as consistent as possible with existing treaty provisions and customary norms as well as with other relevant instruments such as the *San Remo Manual on International Law applicable to Armed Conflict at Sea*.

The ICRC believes that the challenges regarding the conduct of hostilities cannot primarily be met by developing treaty law. In many circumstances, it is not the rules that are at fault but the will, or sometimes the ability, of the warring parties - and of the international community - to enforce them.

Nevertheless, the ICRC is also conscious that more work remains to be done in the field of the conduct of hostilities. There are divergences in the interpretation of certain formulations regarding the concept of military objective, the principle of proportionality, and the precautionary measures required in attacks and against the effects of attacks.

Implementation of these rules could be improved and specific concepts on which they rely better clarified without disturbing the framework of and legal principles laid down in Additional Protocol 1.

You are now embarking on three days of what I am sure will prove to be rich and full discussions. We look forward to participating in these discussions, but more importantly to listening to your views and comments, both on the conduct of hostilities in general and on the points raised in this address. I thank you for your attention and wish you a successful Round Table.

*THE CONDUCT OF HOSTILITIES FROM AN ETHICAL, HISTORICAL AND FUTURE
PERSPECTIVE: INTRODUCTION TO THE TOPIC OF THE ROUND TABLE*

From the 1907 Hague Conventions to the Additional Protocols of 1977 and beyond
Historical Evolution of the Law on the Conduct of Hostilities

Philip SPOERRI

Director for International Law and Cooperation within the Movement, ICRC

Ladies and Gentlemen,

Rules regulating the conduct of hostilities are probably as ancient as war itself. For instance, the prohibition of direct attacks on certain specified categories of persons - including women and children - and certain objects - such as places of worship - already existed in antiquity. Given that the objective of this Round Table is to celebrate the anniversaries of the 1907 Hague Conventions and the two 1977 Additional Protocols, my presentation will limit itself to the evolution of these rules over the last century.

Given the time constraints, I have also chosen to concentrate on the methods of combat, at the exclusion of the normative framework applicable to means of warfare (which will therefore only be referred to in passing). Particular attention will be given to the protection of civilian persons and objects against the effects of hostilities.

Within this framework, this *exposé* is divided into three chronological parts:

The first segment will look at the codification of the rules governing the conduct of hostilities in the 1907 Hague Conventions.

The second segment will analyse the several attempts to progressively develop and adapt the law to the various technical evolutions that followed the adoption of these 1907 Hague Conventions.

Thirdly and lastly, I will focus on the contributions of the 1977 Additional Protocols to the rules on the conduct of hostilities.

I. The Hague Conventions of 1907: the codification of pre-existing norms or real development of the law?

Concerning the law on the conduct of hostilities, the first Peace Conference of 1899 adopted Convention (II) with Respect to the Laws and Customs of War on Land as well as three declarations. The Second Peace Conference of 1907 worked on this base and continued the codification of the law on the conduct of hostilities in the three theatres of war, namely land, sea and air.

On land warfare, the provisions adopted by the Second Peace Conference were not revolutionary - to say the least. The 44 participating States adopted Convention (IV) and its annexed Regulations which basically restated - although with some additional amendments - the provisions of Convention (II) and its annex of 1899. The key provisions of this codification include:

The general principle that belligerents do not have an unlimited right in the means adopted to injure the enemy (Article 22);

The prohibition of specific methods of combat, including perfidy, attack on persons placed *hors de combat*, to declare that no quarter will be given and the destruction or seizure of enemy property unless such destruction or seizure be imperatively demanded by the necessities of war (Article 23); and,

The prohibition to attack or bombard, "by whatever means", towns, villages, dwellings, or buildings which are undefended (article 25).

The work of the second Peace Conference was, on the contrary, quite innovative concerning the conduct of hostilities at sea as well as on the controversial issue of bombardments undertaken by naval vessels during armed conflict. This last point - though debated at length during the first Peace Conference - was not resolved in 1899; therefore, the adoption of Convention (IX) - which adapted the principles governing land warfare to the bombardment by naval forces - was an essential contribution of the 1907 Peace Conference.

Article 1 of this instrument reiterates the principle found in Convention (IV) asserting that the legality of an attack on a town or port depends on whether the site is defended or not. Article 2, however, foresees an exception to this regime, and permits an attack of military targets (including works, military or naval establishments, warships, arms depot or of war material) independently of their location. For the first time, in Convention (IX), the test to judge the legality of an attack was not based solely on the traditional distinction between defended and undefended areas, but also on the eventual military utility of a target.

The introduction of this exception was explained at the time by the particular nature of sea bombardments of military targets located on land that were not carried out for territorial gain, but rather with the intent to weaken the enemy's future resistance and military capacities. With the developments in aerial warfare and long-range artillery, this last criterion soon became the norm, supplanting all other factors.

This normative framework applicable to naval bombardments was completed with a series of measures aimed at minimizing the damage inflicted on civilian persons and objects. Convention (IX) stipulates, for example, that bombardment of military targets could only take

place after prior notice, followed by a reasonable delay, and if the local authorities failed to destroy the target within the time fixed. Further, Article 2, paragraph 3, states that, should military imperatives prevent the granting of a delay, *“the commander shall take all due measures in order that the town may suffer as little harm as possible”*. Nevertheless, this Regulation includes a dose of realism by exonerating the Commander of any responsibility in regards to incidental damage inflicted through a bombardment.

Turning now to air warfare, it must be pointed out that at the end of the 19th century plans were developed to begin using aircrafts offensively. Aware of such projects, the Russian delegation to the First Peace Conference proposed the complete prohibition of the launching of projectiles or explosives from balloons and other methods of similar nature. The rationale for this proposal - as memorialised by Captain Crozier, a member of the US delegation - was that, and I quote *“the persons and objects injured by throwing explosives from them may be entirely disconnected from any conflict which may be in process, and such that their injury or destruction would be of no practical advantage to the party making use of the machine”*. Accordingly, the main military powers adopted, in 1899, a declaration prohibiting aerial bombardment on the grounds that the flying engine and the explosives thrown from them would be insufficiently controllable and could prove harmful to civilian persons and objects and to neutral parties.

Initially applicable for a five-year period, this moratorium expired on 28th July 1904. At the second Peace Conference, some representatives felt that the progress made in aeronautics since 1899 - notably in the ability to steer these machines - rendered obsolete the arguments invoked for their total prohibition. Therefore, opposition was expressed to the renewal of this complete ban, especially from the Russian and Italian delegations who proposed instead a legal regime inspired by the rules for land and sea warfare. They suggested prohibiting the bombardment of undefended areas and which do not host factories or warehouses that could be used by the enemy for war purposes. This position, however, was only supported by a minority of delegations. Hence, at the end of the negotiation, a new Declaration - almost identical to the 1899 one - again called for the total prohibition of aerial bombardments.

The plenipotentiaries attending the 1907 Peace Conference were probably fully conscious that this complete prohibition would soon cede in the face of military realities. The strength of this feeling is best illustrated by the introduction of the phrase *“by any means available”* in Article 25 of Convention (IV) prohibiting attacks on undefended cities, villages, habitations or buildings. Even if Convention (IV) regulates land warfare, this expression was

introduced in 1907 (it is the only significant amendment to the text adopted in 1899) and indicated that the prohibition also applied to the aerial bombardment of terrestrial objectives.

To sum up, the participants at the 1907 Peace Conference perceived, albeit confusedly, that the legal criteria on which the protection of civilian persons and objects were based were in the process of being rendered obsolete by the rapid technological advances in warfare. It also appears that the negotiators of the 1907 Hague Conventions did apprehend that, at the eve of the 20th century, the destruction of structures vital to national defence would constitute a new dimension of warfare and would be superposed to the "classical" invasion of the enemy. This certainly represented a fundamental change in the notion of military objective. The new regulation proposed in Convention (IX) concerning bombardments of military targets from the sea indeed suggests that there was such an understanding. However, these negotiators proved unable to integrate in a global regulation all the various effects that these new military techniques would have on the battlefield and behind the frontlines.

2. The law in pursuit of a progressive strategy: an analysis of a series of failures

As soon as the "Great War" ended, multiple endeavours were undertaken with a view to reaffirming some fundamental principles of International Humanitarian Law (IHL), but also to adapt regulations considered to be (at least partially) outdated. Contrary to what had been done for the first and second Hague Conferences, after the Great War, there has been no effort to achieve a comprehensive codification of IHL; indeed, attempts to adjust the law were carried out piece by piece, by always focusing on a specific mean or method of warfare.

Considering the appalling practices of the main protagonists during the First World War, the reiteration of the prohibition of the use of chemical and bacteriological weapons was deemed a priority. Minds were also set on the adoption of a legal framework regarding submarines, which was inspired by rules applicable to naval warfare. However, the main challenge consisted in adapting the law to the swiftly developing military aeronautic. Indeed, right from the beginning of the 1920's, the spectre of military aviation as an apocalyptic device was looming. This prompted the civil society to start campaigning for the adoption of a more stringent regulation.

A Commission of jurists was thus nominated by the Conference on the Limitation of Armament in Washington in 1921. The Commission was entrusted with the mandate of drafting a Project of Rules meant to clarify and adapt the law to the new realities of air warfare. This text, adopted in 1923, abandoned the traditional distinction between defended and undefended towns. It also explicitly conditioned the legitimacy of an aerial attack to the

presence of a military objective, which was defined as "*an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent*". Finally, the project introduced a form of prohibition of indiscriminate attacks, and repeated the obligation to spare, as much as possible, certain specifically protected objects.

In spite of the invaluable work carried out by the Commission of jurists, no *démarches* were ever performed to try and convene a Diplomatic Conference with a view to negotiating – on this basis – a conventional instrument.

Nevertheless, the Commission's Project had a real impact. Indeed, the rules proposed therein had a definite credibility stemming from the fact that they were drafted by an official commission, established and approved by the world main powers, and composed of legal and military experts. Numerous States took this project seriously enough to introduce all or at least some of its provisions in their respective military manual. This 1923 Project also proved an unavoidable document during the work undertaken by a Commission of eminent international jurists summoned by the ICRC to examine the problem of the protection of the civilian population against aerial bombardments. However, the main conclusion drawn by the ICRC from those consultations was that only an absolute prohibition on aerial bombardments could efficiently protect civilian populations. Accordingly, in submitting its report to the Disarmament Conference of the League of Nations (1932), the President of the ICRC addressed a pressing appeal to this end.

To sum up, the multiple attempts carried out between the two World Wars to regulate air warfare could not achieve the adoption of conventional norms. It would, however, be over-simplistic to infer from the lack of States' political will to negotiate a legally binding instrument the absence of any norm governing the conduct of aerial bombardments. Indeed, States' practice clearly indicated the existence of rules of customary law dealing with this issue, at least in regards to the general principles ensuring the protection of the civilian population and civilian objects. That being said, States were still divided on the concrete modalities of application of those rules, notably in regards to the precise definition of a military objective and on the ways to limit the effects of attacks to lawful targets. Even if those divisions could never affect the validity of the principles, they left States with too wide a margin of appreciation.

States took advantage of this margin of appreciation to try and justify strategic bombardments campaigns which caused extensive damage to the civilian population during the 1930's, and also especially during the Second World War.

At the end of the Second World War, the atrocities caused by strategic bombardment brought resurgence in the demands aimed at conventionally prohibiting - or at least restricting - aerial bombardment of the civilian population and civilian objects. Nevertheless, the more the Diplomatic Conference of 1949 was approaching, the more States' opposition to tackle the problematic related to the means and methods of warfare was growing. This opposition can be explained by the evolution of the political context, marked by the eruption of the Cold War, which led the main aerial powers to try and avoid a debate likely to lead to a restriction of their margin of operation. In addition, this position was stoked by a clear and displayed intention to avoid any debate related to the lawfulness of nuclear weapons. Further, this position was all the more easy to support as two of the main victims of aerial bombardments during the Second World War, that is Germany and Japan, had not been invited to participate in the diplomatic process and were thus unable to share their painful experience. The combination of these elements therefore contributed to progressively limit the mandate of the 1949 Diplomatic Conference to the sole revision of the Geneva Law.

However, very early after the completion of the 1949 Geneva Conventions, the ICRC revived the work aimed at codifying the law on the conduct of hostilities. Building upon the work of a group of experts, the ICRC proposed in 1955 a set of articles published under the title *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*. This draft contained a series of very precise rules aimed at giving concrete expression to the law concerning the protection of the civilian population and civilian objects against the deleterious effects of air warfare. The text also proposed a prohibition of weapons that could spread indiscriminately, mentioning to this extent incendiary, chemical, bacteriological but also radioactive agents. This reference to nuclear weapons caused an intense polemic and in the end, led to the renunciation of the Project during the 19th International Conference of the Red Cross in 1957 in New Delhi.

Following this set back, the ICRC decided to change its strategy and instead of offering a detailed set of regulations to States' approval, it tried to obtain the reaffirmation of certain fundamental principles. This new approach proved fruitful. Indeed, at the 20th International Conference of the Red Cross and Red Crescent in Vienna in 1965, members to the Conference adopted Resolution 28, which solemnly declared that all governments and other authorities responsible for armed operations during a conflict should abide by a set of minimal rules during the conduct of hostilities.

Numerous texts adopted subsequently by the United Nations followed the same approach, that of reaffirming general principles.

A fresh attempt to comprehensively codify the law on the conduct of hostilities was later carried out by the Institute of International Law. The Institute adopted on 9 September 1969 a Resolution on the "*The Distinction Between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction*".

Of course, none of these resolutions were legally binding *per se*, but their adoption - almost without any negative votes - represented serious signs in favour of the customary validity of those principles. Furthermore, those resolutions were not only reaffirming the general principles applying in classical inter-State conflicts, but were explicitly transposing those principles in the context of non-international armed conflicts. In that sense, those resolutions truly paved the way towards the negotiation of the Additional Protocols of 1977.

3. The Additional Protocols of 1977 and beyond

The codification of the general principles of the law on the conduct of hostilities did not pose any difficulty in the context of international armed conflict. But the reiteration of the general principle of distinction in Article 48 was actually reinforced by many rules with a view to ensuring its concrete implementation. Those rules are the ones relating to the definition of a combatant and the armed forces (Articles 43-44), of civilians and civilian population (Article 50), and also those relating to the protection of civilians against direct attacks and to the prohibition of indiscriminate attacks (Article 51), the general protection of civilian objects (Article 52), and finally those on the precautions in attack (Article 57) and against the effects of attacks (Article 58). Compared to the easy acceptance of the fundamental principles supporting them, the adoption of those rules proved more difficult. I will not insist here on those difficulties, which will be extensively discussed all along this Round Table. Suffice to say for now that, despite some shortcomings in the formulation of these provisions which complicate their implementation, their adoption had the unfathomable merit to tune in treaty law with the military reality of this era, in particular in the area of aerial bombardment and of war of national liberation.

In contrast to international armed conflicts, the codification of the law on the conduct of hostilities in non-international armed conflicts proved more delicate. Indeed, even if it reiterates the fundamental principles accruing to the immunity of the civilian population, Additional Protocol II does not offer any definition of the latter. Further, it totally ignores the protection due to civilian objects and never defines the notion of military objective. Finally, the Second Protocol includes almost no other reference to means and methods of warfare. In other words, after having argued for the impossibility of elaborating a unique legal regime

applicable to all conflicts, the plenipotentiaries to the Diplomatic Conference of 1974-1977 were unable to isolate beyond the general principles the specificities of the law governing non-international armed conflict. Nevertheless, we now know that the Study on International Humanitarian Law carried out and published by the ICRC in 2005 has since demonstrated that nearly all the rules of the First Additional Protocol were customary, not only in situations of international armed conflict, but also in non-international armed conflict. I will not further insist on this particular issue as this will certainly be subject to the debates during the Round Table.

I would like to draw three conclusions.

First, the fundamental values underlying the law on the conduct of hostilities are timeless. The general principles on the conduct of hostilities - including the prohibitions to cause unnecessary suffering and superfluous injury or to directly attack the civilian population - were already present in 1907 and their codification was never really brought into question. Those principles are obviously still applying today and they are as pertinent to "new" types of conflicts and "new" forms of waging war as they were to the conflicts or forms of warfare at the time when they were adopted.

Second, standing alone, those general principles proved insufficient in ensuring adequate protection to protected persons under IHL. A more detailed regulation turned out to be essential in order to soften the haziness always floating around the generality of a principle. For instance, the consensus on the principle of distinction is a crucial part of IHL, but it has only a limited significance given the absence of agreement on the precise outline of the notions of combatant or military objective. A detailed regulation, therefore, adds an element of stability to the law by contributing to framing the interpretation and application of the rules inside more precise contours.

Finally, it is precisely at the time of negotiating those rules on the application of the law on the conduct of hostilities that the strongest tensions appeared. It took 70 years of efforts and several failures to end up - with the First Additional Protocol - to a detailed codification of the law on the conduct of hostilities, which now complements the 1907 Hague Conventions. Admittedly, the majority of the rules of application are widely accepted. But the question that now arises is whether a new degree of precision for certain rules, for instance through a clarification process, would today be necessary.

*Le droit de La Haye, la neutralité et le transit ferroviaire par la Suisse
pendant la Seconde Guerre mondiale*

Roland HAUDENSCHILD

Département fédéral de la défense, Secrétariat général,
Bibliothèque militaire fédérale et Service historique, Suisse

Le droit de La Haye

La Suisse, en tant que pays neutre, également pendant la Seconde Guerre mondiale, a appliqué le droit de La Haye mais a été confrontée à des problèmes concernant le transit ferroviaire par ses lignes alpines de chemins de fer. Il s'agit donc d'un élément historique dans le contexte des Conventions de La Haye.

Entrait en vigueur pour la Suisse, le 11 juillet 1910, entre autres, la convention suivante qui est intéressante pour cette description : la Convention V de La Haye concernant les droits et les devoirs des Puissances et des personnes neutres en cas de guerre sur terre, du 18 octobre 1907.

Plus précisément, l'Allemagne, la France et les Etats-Unis avaient ratifié cette convention, tandis que la Grande-Bretagne et l'Italie n'en faisaient pas partie.

La V^{ème} Convention de La Haye précise les droits et devoirs des Puissances neutres ; les articles suivants sont une première source à retenir concernant la neutralité et le trafic ferroviaire :

Article 1: Le territoire des Puissances neutres est inviolable.

Article 2: Il est interdit aux belligérants de faire passer à travers le territoire d'une Puissance neutre des troupes ou des convois, soit de munitions, soit d'approvisionnements.

Article 7: Une Puissance neutre n'est pas tenue d'empêcher l'exportation ou le transit, pour le compte de l'un ou de l'autre des belligérants, d'armes, de munitions, et, en général, de tout ce qui peut être utile à une armée ou à une flotte.

Article 9: Toutes mesures restrictives ou prohibitives prises par une Puissance neutre à l'égard des matières visées par les articles 7 (et 8) devront être uniformément appliquées par elle aux belligérants.

La Convention du St-Gothard

Du point de vue des chemins de fer, la Suisse était encore engagée par un autre traité, la Convention internationale entre la Suisse, l'Allemagne et l'Italie relative au chemin de fer du St-Gothard, conclue le 13 octobre 1909 et mise en vigueur avec effet rétroactif au 1er mai 1909 (cité comme Convention du St-Gothard). La Convention du St-Gothard de 1909 remplace des conventions plus anciennes, surtout celles de 1869 et 1871. Les articles intéressants, une deuxième source dans ce cas, sont les suivants :

Article 2: La Suisse prendra les mesures nécessaires afin que l'exploitation du chemin de fer du St-Gothard réponde dans toutes ses parties à ce qu'on est en droit d'exiger d'une grande ligne internationale.

Article 3: Sauf les cas de force majeure, la Suisse assurera l'exploitation du chemin de fer du St-Gothard contre toute interruption. Toutefois la Suisse a le droit de prendre les mesures nécessaires au maintien de la neutralité et à la défense du pays.

La neutralité

En ce qui concerne la neutralité de la Suisse, il faut retenir ce qui suit: le 20 novembre 1815, par le Traité de Paris, les grandes puissances européennes reconnaissent la neutralité perpétuelle de la Suisse et garantissent l'inviolabilité de son territoire.

Selon la Constitution fédérale de 1848 la neutralité n'est pas un des buts de l'État mais un instrument. Par les Conventions de La Haye, le droit de la neutralité est établi par écrit pour la première fois. Lors de la Première Guerre mondiale, la neutralité et les frontières sont respectées par les belligérants. En 1920, avec l'adhésion à la Société des Nations, la Suisse pratique une neutralité différenciée ; elle retourne à la neutralité intégrale en 1938. Le Conseil fédéral réaffirme la neutralité de la Suisse au début de la Seconde Guerre mondiale, en 1939. L'application de la neutralité, donc la politique de neutralité, est de la compétence du Conseil fédéral et de l'Assemblée fédérale.

La situation en Europe dans les années 1930 se présente comme suit: avec la prise de pouvoir de Mussolini en 1922 en Italie et de Hitler en Allemagne en 1933, la Suisse se trouve entre deux dictatures. Elle est le gardien des Alpes, ainsi que des transversales de chemin de fer les plus courtes entre l'Allemagne au nord et l'Italie au sud. Avec le blocus des Alliés contre l'Allemagne après le déclenchement de la Seconde Guerre mondiale, en septembre 1939, commencent les mesures de blocus et contre-blocus des années de guerre.

La Suisse a des relations économiques aussi bien avec les pays de l' Axe qu'avec les pays Alliés. Il faut bien le retenir, les négociations commerciales entre la Suisse neutre et les belligérants ont un caractère particulier.

Le transit

La Convention de la Haye pour la guerre terrestre de 1907 contient des dispositions concernant l'exportation et le transit du matériel de guerre. Mis à part cela, il n'existe pas de règles de droit international se rapportant à la politique économique d'un pays neutre.

La Suisse maintient donc un trafic normal avec toutes les Puissances qui se fonde sur le principe de la réciprocité.

Pour les matières premières, comme le charbon et l'acier, notre pays dépend entièrement de l'Allemagne. L'industrie suisse exporte dans les pays de l' Axe aussi bien que dans les pays Alliés. Une situation particulière se développe cependant dans le transit, surtout entre l'Allemagne et l'Italie et vice-versa. L'Italie dépend économiquement de l'Allemagne pour l'énergie, en particulier pour le charbon, mais aussi pour le fer et l'acier.

Jusqu'en 1940, ce trafic se déroule sur mer par la Manche, l'Atlantique et la Méditerranée. Le 10 juin 1940, l'Italie entre en guerre aux côtés de l'Allemagne et, par conséquent, les Anglais bloquent la voie maritime entre les deux pays de l' Axe. C'est à ce moment que le trafic de marchandise entre l'Allemagne et l'Italie est dévié. Il se déroule désormais par chemin de fer, à travers les Alpes. Tandis que le chemin de fer du Mont-Cenis est rendu pendant des années impraticable à cause des destructions des partisans français, le chemin de fer du Brenner est surtout utilisé pour des transports militaires, d'hommes et de matériel.

Restent, au centre de l'Europe, les transversales alpines en Suisse, c'est-à-dire les chemins de fer du Gothard et du Lötschberg-Simplon. Ce sont des voies de transit idéales, intactes et non menacées par les avions des Alliés.

Ainsi, en été 1940, commence un important trafic de transit par chemin de fer entre l'Allemagne et l'Italie. Les trains nord-sud transportent surtout du charbon, du fer et de l'acier, tandis que ceux sud-nord contiennent des produits alimentaires de toutes sortes.

La situation de la Suisse

Les deux transversales alpines ferroviaires passaient au centre du Réduit que l'armée suisse venait d'occuper dès l'automne 1940. De ce fait, les installations ferroviaires étaient soigneusement gardées jour et nuit par la troupe et les ouvrages, comme les ponts et tunnels, étaient préparés pour les faire sauter. Grâce aux lignes principales électrifiées en Suisse, les

trains circulaient comme en temps de paix. Le chemin de fer du Gothard était exploité par les chemins de fer fédéraux (CFF) et la ligne du Lötschberg par la compagnie du BLS (Bernner Alpenbahn Bern-Lötschberg-Simplon), tandis que le Simplon était également du domaine des CFF.

La particularité de la Suisse en politique commerciale fut de trouver des accords avec les Puissances belligérantes et d'organiser de façon autonome son économie de guerre. Au blocus de Alliés suivait le contre-blocus de l'Axe.

Au début du conflit, la Suisse fournissait du matériel de guerre à la France et à l'Angleterre. Selon le droit international (Conventions de La Haye) et le Règlement sur la guerre terrestre, précisément la Convention sur les devoirs des neutres, la Suisse pouvait exporter librement son matériel (de guerre) dans tous les pays. L'égalité de traitement n'entraînait pas en ligne de compte, puisque l'Allemagne n'avait rien commandé en Suisse. La situation changea complètement en été 1940 avec l'encerclement de la Suisse par les Puissances de l'Axe. Des livraisons pour les Alliés étaient devenues impossibles. Comme le Conseil fédéral avait accordé la liberté d'exportation vers tous les pays, il était possible de livrer en direction opposée, c'est-à-dire en Allemagne. Avec l'entrée en guerre de l'Italie, celle-ci passait du non-belligérant, qui avait rendu de précieux services à la Suisse, à l'alliée de l'Allemagne. La Suisse avait pu s'approvisionner, grâce au libre transit à travers l'Italie, de produits et de matériel arrivés au port de Gênes. Cela changeait avec la participation de l'Italie à la guerre.

Dans les tractations avec l'Allemagne, la Suisse possédait tout de même un avantage non négligeable: le transit ferroviaire par le Gothard et le Lötschberg-Simplon. L'Allemagne soutenait largement l'économie italienne, surtout avec du charbon, du fer et de l'acier. Chaque jour, 1'800 wagons de marchandise allemands traversaient la Suisse en destination de l'Italie. En septembre 1943, après la capitulation de l'Italie, l'Allemagne occupait tout le nord de l'Italie. La Suisse était donc encerclée par une seule puissance. Dans cette nouvelle situation, l'Allemagne dépendait encore plus des voies de transit à travers la Suisse. Par contre, la Convention internationale de La Haye de 1907 sur la guerre sur terre imposait aux neutres certaines obligations concernant le transit, précisément l'interdiction de transports militaires dans une seule direction. Des biens civils peuvent acquérir, par des événements militaires, un caractère militaire, par exemple des biens réquisitionnés. Pour de tels biens, la Suisse devait restreindre le transit sud-nord. Pour la Suisse, le transit ferroviaire était un élément vital mais

rendu vulnérable par les contrôles de tout mouvement effectués par les Allemands. La Suisse administrait le transit de façon autonome ; il n'était pas réglé par des contrats.

Dans cette situation particulière étaient applicables aussi bien la Convention de La Haye de 1907 sur la guerre terrestre, que la Convention du Gothard de 1909 signée par la Suisse, l'Allemagne et l'Italie. Par ces accords, la Suisse avait certains droits et devoirs qui étaient de sa responsabilité. La Suisse s'engageait, par la Convention du Gothard, vis-à-vis de l'Allemagne et de l'Italie à assurer l'exploitation de la ligne du Gothard sans interruption, sauf en cas de force majeure. La Suisse avait cependant le droit de prendre les mesures nécessaires au maintien de sa neutralité et à la défense du pays (Article 3).

La Convention de La Haye sur la guerre terrestre

- prescrit aux neutres l'exclusion de transports militaires en transit, dans un seul sens
- autorise l'exportation ou le transit de matériel de guerre à condition que tous les belligérants soient traités de façon égale.

La Suisse a toujours exclu le transit du matériel de guerre. Cela valait également pour le butin de guerre et cette exclusion de transit a été étendue aux transports sud-nord, après que les Allemands eurent occupé l'Italie du nord. Les transports s'effectuaient, comme à l'ordinaire, dans le sens nord-sud et étaient d'une importance capitale pour les puissances de l'Axe durant la guerre. Seulement, vers la fin de la guerre, les transports subirent des restrictions; les livraisons allemandes commençaient à avoir du retard, mais le transit de charbon vers l'Italie demeurait inchangé. Pour la Suisse, les livraisons contractuelles avaient la priorité sur le transit vers l'Italie ; elle appliquait le «*do ut des*».

La liberté de transit a toujours été respectée très exactement, puisque le libre passage était d'une importance vitale pour un pays comme la Suisse, sans accès à la mer. L'attitude indépendante de la Suisse provoqua les Puissances de l'Axe et les Alliés. Ce n'était pas possible de les satisfaire, quel que soit le comportement de la Suisse. Notre pays appliqua le principe du «*do ut des*» comme mentionné. Vers la fin de la guerre, nous utilisions le charbon de transit pour nos propres moyens, parce que les livraisons pour la Suisse n'arrivaient plus ou en quantités trop faibles. Une fois que le charbon d'Allemagne cessa d'arriver, le transit par le Gothard s'arrêta automatiquement.

Conclusion

C'est ainsi, en ce qui concerne la politique commerciale, que la Suisse a dû chercher une voie médiane entre les pays de l'Axe et les Alliés, mais aussi entre la Convention de La

Haye pour les neutres et la Convention du Gothard. La balance à trouver par une politique de neutralité était difficile et exigeante. Dans l'ensemble, le chemin choisi par la Suisse a réussi mais non sans difficultés permanentes.

*COMBATANTS AND MILITARY OBJECTIVES VERSUS
CIVILIAN PERSONS AND OBJECTS*

*The Notions of Combatant, Armed Group, Civilians,
and Civilian Population in International Armed Conflicts*

Kenneth WATKIN

Judge Advocate General of the Canadian Forces

Introduction

I would like to thank the conference organizers for the opportunity to speak at this conference which is attended by such a distinguished group of participants. It is almost 20 years to the day that I was last in San Remo and I must say the reception has been as warm and welcoming and the location as pleasant as I remembered it. The courses offered here at the International Institute for Humanitarian Law are unique in that they provide an opportunity to learn about humanitarian law in a truly “international” setting. The experience of the course I took in 1987 has had a tremendous effect on me personally regarding my understanding of the law governing armed conflict. We endeavour within our office to get as many officers as we can here for your course. I must say given the location we certainly don’t lack for volunteers.

The subject matter of this conference: “revisiting” the law of armed conflict governing the conduct of hostilities is a timely one given the nature of the contemporary complex security situation and the resulting challenges facing States and the rest of the world community. The operational environment is a fast changing one and its impact on international law is evident to government and military lawyers, academics and increasingly to those practising international and domestic criminal law. The fact that the issue of the use of force in International Humanitarian Law and Human Rights Law has such a prominent place in the conference agenda is but one indication of that change. The tendency to deal with the Law of Armed Conflict (otherwise known as International Humanitarian Law) and Human Rights Law as almost exclusive disciplines does not reflect the reality of the modern battlespace.

Similarly, the concepts of “combatant” and “civilian”, so fundamental to International Humanitarian Law, have come under increasing scrutiny. It is of course that topic about which I have been asked to speak although, as I will note, the question of “rights” and “human rights” is a theme that is not far from the issue of “status” under the laws governing

armed conflict. Before embarking on my topic: “*The notions of combatant, armed group, civilians and civilian population in international armed conflicts*” I would like to emphasize a couple of points to counterbalance what will be at times during this presentation a somewhat critical assessment of the state of the law governing combatant and civilian status.

Implementing and enforcing existing Law

First, there is a rich body of treaty and customary international law relating to the issue of combatancy. There is universal acceptance of the Geneva Conventions and coming from a nation which has ratified both the Additional Protocols to the Geneva Conventions we are part of the 85% of the world’s States which have reached a consensus, if not always a common understanding, on the conduct of hostilities provisions of those Protocols.¹ Even in respect of States which have not accepted all of the provisions of the Protocols it is the wording in those “hard law” documents, particularly on the issues of targeting and collateral damage, which form the basis of discussion in respect of both the “soft law” and an increasing “public” and academic debate. Further, in respect of military forces common operating procedures among alliance members ultimately result in many Protocol standards forming part of operational doctrine regardless of how the conflict is categorized that applies to non-signatory nations.

While there is continuing debate and discussion regarding the *ICRC Customary International Law Study* methodology and sources (here I must indicate my general appreciation for that work by indicating it has a prominent place on my book shelf and I refer to it often in the course of my duties) the breadth of references in that study to the Protocols, the Conventions and Hague law in military manuals is impressive in its own right as it highlights the degree to which humanitarian law is impacting on military doctrine and operations.

Secondly, there are two ways in which the issue of “combatant/civilian” status can be assessed: the “macro” strategic approach, or as we say in the military the “large hand-small map” effect, and the micro detailed oriented method which seems to take up so much of a lawyer’s time and effort. From a strategic perspective I am referring to the principle of distinction, which, with the idea that the means and methods of warfare are not unlimited,

¹ There are 194 Parties to the Geneva Conventions, 167 States Parties to Additional Protocol I, 163 to Additional Protocol II and 192 member States of the United Nations. (For the number of State Parties to the GCs, and AP I & II see <http://www.cicr.org/ihl.nsf/CONVPRES?OpenView> and for member States of the United Nations see <http://www.un.org/Overview/unmember.html>) (last visited 3 September 2007).

forms the basis of International Humanitarian Law. To put the importance of the principle of distinction in context, I simply refer to the assessment of Professor Hersch Lauterpacht in the immediate post-World War II period that “*whatever may have been the original merits of that distinction, the phenomenon of total war has reduced it, in most respects, to a hollow phrase.*”² The casualties both military and civilian, estimated by John Keegan to be 20 and 50 million respectively, stand as a tragic reminder of that fact.³ As a result much of the post World War II effort by the international law community has been to reinforce that principle. Who can be targeted (generally combatants) and those who cannot (generally civilians) is reflected not only in the Additional Protocols but also in the rules and doctrine governing the conduct of hostilities by many military forces. That effort has had significant success and plays an essential role in the conduct of contemporary operations by many State armed forces.

It has reinforced the idea that there are no “quasi-combatants”. Factory workers and other civilians who support the war effort, but who are not active participants cannot be lawfully targeted. However, it is also clear that challenges remain, not the least of all is getting State and non-State armed forces to implement the law as it presently exists. In this regard, I can only highlight and whole heartedly endorse the effort being made by the ICRC to seek compliance with existing norms of International Humanitarian Law.

A Challenging Task

However, beyond these general principles, resolving the question of combatant/civilian status has always been a difficult and controversial task. It plagued the earliest efforts to define belligerent status leading up to 1907 Hague Law. The famous Martens Clause which has since been more widely applied to all cases not covered by the codified provisions of International Humanitarian Law was not born out of a magnanimous desire to extend humanitarian principles to all affected by warfare. Rather, it reflected the very uncertain, and in many respects unsatisfactory, state of affairs regarding belligerency upon which the juridical bedrock of contemporary notions of combatancy have been founded. After powerful and less powerful States could not reach consensus over issues related to the broader participation of citizens in armed conflict and the extension of the *levée en masse* to occupied territories, the President of the Conference, Friedrich von Martens, noted that the cases not dealt with would “*remain under the protection and empire of the principles of*

² H. Lauterpacht, „The Problem of the Revision of the Law of War“, *British Year Book of International Law*, Vol.29, 1952, p.360, p.364.

³ John Keegan, *A History of Warfare*, Vintage Books, 1993, p. 50.

international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.”⁴

True to the theme of this conference a “revisiting” of the Law of Armed Conflict in 2007 should involve a clear headed analysis of the degree to which combatant and civilian status has clarified by treaty law over the past century. At a cursory level of analysis as I look at the law, the questions of who is a combatant and who is a civilian are relatively straightforward. To qualify for combatant status one must do the following:

1. Be commanded by a person responsible for his or her subordinates;
2. Have a fixed distinctive sign recognizable at a distance;
3. Carry arms openly;
4. Conduct operations in accordance with the laws and customs of war.

These are the minimum four criteria of the 1907 Hague Land Warfare Regulations.

Further there is the requirement to: a) belong to a Party to the conflict; and b) an organized group found in Geneva Convention III.

Then there is the provision, sometimes but incorrectly seen as an historical anomaly, relating to the *levée en masse*.

Of course Additional Protocol I, Article 43 clarifies that medical personnel and chaplains are not combatants and whenever a paramilitary or armed law enforcement agency is incorporated into the armed forces notification must be given to other Parties to the conflict. The Protocol then goes beyond that and in certain narrowly prescribed circumstances, understood by Canada to include in occupied territory and those referred to in Art. 1, para. 4 (specific situations in the exercise of the right of self-determination), limits the visible indicia of distinction to carrying arms openly during each military engagement and during such time the combatant is visible to the adversary while engaged in a military deployment.

By definition in Article 50 of Additional Protocol I everyone else is a “civilian”. This all of course occurs in the context of an international armed conflict which, depending upon the international law expert consulted or case read, really just applies to armed conflict between States, although I must admit the wide acceptance of Additional Protocol I, which incorporates limited conflicts relating to self determination within the scope of Common

⁴ See Ministry of Foreign Affairs, *The International Peace Conference*, Martinus Nijhoff, 1907, p. 548. See also Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, *European Journal of International Law*, Vol.11, 2000, p.187 (for an outline of the struggle to expand an interpretation of the Martens Clause to all of humanitarian law.).

Article 2 of the Geneva Conventions, would appear to indicate “international” armed conflict might be broader than State on State conflict.⁵

On one level it seems so simple. Yet that is not the reality. The world in which military forces operate, legal experts provide advice and courts will increasingly be asked to rule is far more nuanced and complex than suggested by a simple reading of the treaty law. Here lies the problem. As important as it is to reinforce the application of the existing treaties they represent at their best the written consensus regarding laws that are 100 and 30 years old. Those laws are not by any means clear or comprehensive and they are being increasingly challenged both in respect of their scope and relevance to contemporary armed conflict. The treaty law also does not represent the full breadth and scope of customary international law.

The question might be asked whether the existing treaty law represents a success on the part of the international community (the view of the optimist) or reflects its failure in dealing with combatant and civilian status (the perspective of the pessimist). From either perspective there are significant issues which remain to be resolved some 100 years after they were first internationally addressed by those who acknowledged the need to codify or otherwise reach a common understanding of the laws governing warfare.

Unresolved Issues

Even a brief outline of the unresolved or unclear issues related to combatant status highlights the challenges. I have already indicated the lack of initial consensus reflected in the Martens Clause. The limitations on the treaty provisions are also graphically reflected in the post World War II attempt to deal with organized resistance movements in occupied territory in Geneva Convention III. Notwithstanding the significant reliance placed on guerrilla operations by Allied Powers during the Second World War the requirement that organized resistance movements had to meet the traditional combatant requirements, including wearing a fixed distinctive sign and carrying arms openly, has prompted widespread recognition that the provisions are unrealistic.⁶ In the words of Colonel Draper “[i]f memory be short, so is

⁵ See L. C. Green, *The Contemporary Law Of Armed Conflict*, 2d ed., 2000, pp 51-56. ([T]o some extent certain non-international conflicts have come under the aegis of international law since 1977 with the adoption of Article 1(4) of Protocol I and Protocol II additional to the 1949 Geneva Conventions . . .).

⁶ For example see Howard Levie, “Prisoners of War in International Armed Conflict”, *American Journal of International Law*, Vol.75, N.3, July 1991, pp. 699-700 (“*this attempted enlargement of the provisions of prior conventions accomplished little or nothing.*”).

gratitude."⁷ The underlying question of the status of personnel who do not necessarily operate at all times in uniforms or carry arms openly is an increasingly important one given the contemporary widespread use of special forces and para-military armed groups in operations. Even thirty years ago there was a grudging and somewhat back handed recognition in Additional Protocol I that operations would be conducted by combatants out of uniform.⁸ Such forces have quickly become the armed forces of choice in dealing with contemporary security challenges including international armed conflict.

In respect of occupied territory, there remains the issue of the status of security forces engaged in battling insurgent forces which do not meet the restricted criteria of combatancy. While it has been noted that AP I generally deals with police and paramilitary forces in respect of combatancy, the Geneva Conventions and their Protocols do not directly deal with the issue of indigenous police forces and the interface of those security forces with any ongoing armed conflict. The ICRC Commentary does indicate that police officers of the occupied territory cannot be required to participate in measures aimed at opposing legitimate belligerent acts, although they can trace and punish "*hostile acts committed in circumstances other than those laid down in Article 4 of the Third Geneva Convention*".⁹ This continuing link to the "legitimacy" of the opponent insurgent force means ordinary police forces could be engaged against organized armed groups illegally involved in the armed conflict. What then is their relative "status"?

The issue of the status of organized resistance movements and the involvement of police forces who are not "combatants" highlight that even in the narrow and very traditional view of what constitutes an international armed conflict there are significant parallels with the challenges of determining status in non-international armed conflict. Indeed, this connection is reflected in the justification for the organized resistance movement provision, presented during the negotiations of Geneva Convention III, that recognizing that such groups and members of other militia and other volunteer corps must belong to a Party to the conflict as a condition of legitimacy "*refutes the contention of certain authors who have commented on the Convention that this provision amounts to a 'ius insurrectionis' for the inhabitants of an occupied territory*".¹⁰ The contemporary connection between occupation and other insurgencies can be

⁷ Colonel G.I.A.D. Draper, "The Legal Classification of Belligerent Individuals", in Michael A. Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflict*, Kluwer International Law, 1998, p.101.

⁸ Art. 44(7).

⁹ See ICRC Commentary, Geneva Convention IV, Art. 54, para. 2 at www.icrc.org.

¹⁰ See ICRC Commentary, GC III, Art. 4.

found in the new *U.S. Army, Marine Corps Counterinsurgency Field Manual* where it is stated: “an insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control.”¹¹ The 2003 Iraq conflict has highlighted some limitations of the existing treaty law in even a traditional post conflict situation. The issue is even more complex if one considers that occupation has rarely fit neatly into the traditional scope of the “black letter” law. As a result questions have arisen as to whether there is a *de jure* or *de facto* (or policy) link where the laws of occupation would extend to territory simply under the effective control of a State, group of States or international organization. What then would be the status of the State armed forces and any opposing insurgent groups?¹²

Similarly most United Nations operations or coalition based State involvement in enforcement actions (the “three block” wars and “small” wars of the 21st Century) don’t fit nicely into the classic ideas of international or non-international armed conflict. However, from a normative perspective International Humanitarian Law is often applied as a matter of “spirit and principle”.¹³ What then of the status of the participants?

There is also the question of what actually constitutes an “international armed conflict” within which the combatant/civilian interface is applied. Is it truly limited to State on State conflict? As is set out in the Targeted Killing Decision it does not appear that the Israeli High Court of Justice has seen such conflict limited to inter-State conflict.¹⁴ Coming from a country where the “Caroline” incident took place it is evident that the right of the exercise of self-defence under international law can occur in the context of a State fighting non-State actors.¹⁵ Faced with non-State actors who project terrorist violence across international borders and even continents it is also not clear that the emerging preference for

¹¹ 2 para. 1-2 (2007).

¹² See Eyal Benvenisti, *The International Law of Occupation*, Princeton, 1993, 2004, p.4. See also Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, 1999, pp.111-143 and Steven R. Ratner, „Foreign Occupation and International Territorial Administration: The Challenges of Convergence“, *European Journal of International Law*, Vol. 16, 2005, pp. 695-698.

¹³ For example, see Canadian Forces doctrine Manual: *The Law of Armed Conflict at the Operational and Tactical Level*, B-GJ-005-104/FP-021, August 13, 2001, at 17-1, para. 1702 available at http://www.forces.gc.ca/jag/training/publications/loac_man_e.asp; and the United Nations Secretary-General’s *Bulletin Observance by United Nations Forces of International Humanitarian Law* 38 I.L.M., 1999, p.1656.

¹⁴ *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al*, See HCJ 769/02, 13 Dec 2006, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

¹⁵ See Christopher Greenwood, “International Law and the ‘War Against Terrorism’” *International Affairs*, Vol.78 2002, pp.301, 308; see also Abraham D. Sofaer, “On the Necessity of Pre-emption”, *European Journal of International Law*, Vol.14, 2003, p.209 (for a general discussion of the *Caroline* dispute).

the term “*conflicts not of an international character*” fits the bill particularly when one notes Common Art. 3 of the Conventions limit the treaty application to conflicts “*occurring in the territory of one of the High Contracting Parties*”.

In this respect a number of nations, including Canada, conduct operations on the high seas in respect of the ongoing campaign against terrorism (or the “CAT” as we refer to what other nations might call the Global War on Terrorism-GWOT). While I might borrow from the American author Mark Twain and indicate that I believe predictions of the death of State vs. State international armed conflict are “*greatly exaggerated*” it is also clear that the predominate form of conflict is non-international in character.¹⁶ Even here it is not uncommon in military circles to see State armed forces referred to as “combatants” while the opposing forces are often termed as insurgents, enemy forces or armed groups. This *de facto* use of the term “combatant” stands in contrast to the term “fighters” suggested in the *Sanremo Manual on the Law of Non-International Armed Conflict*¹⁷ where it is used to seek to avoid any confusion with the meaning of combatant in the context of International Humanitarian Law.

Unlawful Combatants

Perhaps one of the glaring omissions in the treaty law is the lack of direct acknowledgement of the customary international law based concept of “unlawful combatant”. Even a cursory view of the academic literature and case law highlights that “unlawful combatants” have long been part of international armed conflict and the law that governs it.¹⁸ In a seminal article on the point in 1951, Richard Baxter highlighted the challenges of dealing with “*persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949*”.¹⁹ Equated to spies and mercenaries their existence at law is also reflected in Canadian doctrine as well as that of other

¹⁶ See *Human Security Report 2005: War and Peace in the 21st Century*, Oxford University Press, 2005, p.23 available at <http://www.humansecurityreport.info/HSR2005/Part1.pdf> (where it is indicated that 95% of conflicts occur within States.).

¹⁷ See “The Manual on the Law of Non-International Armed Conflict”, *Israel YearBook on Human Rights*, vol.36, 2006, para. 1.1.2, p.4

¹⁸ Lester Nurick and Roger W. Barrett, “Legality of Guerrilla Forces Under the Laws of War”, *American Journal of International Law*, 1946, p.40. See also Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, Occasional Paper Series, 2005. pp.45-47

¹⁹ Richard R. Baxter, “So-called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs”, *British Yearbook of International Law*, 1951, pp. 323, 328.

countries²⁰ and even contemporary court decisions.²¹ Under Canadian doctrine “unlawful combatants” include civilians taking a direct part in hostilities, mercenaries and spies.²² Consistent with the status of spies, civilians who take a direct part in hostilities do not, if their participation is not perfidious, commit a breach of humanitarian law, but rather the domestic law of the State which captures them. They are, however, acts for which international law provides no protection.

It is at this point that a rigid bifurcated system of “combatant” and “civilian” status presents significant practical challenges in respect to the application of International Humanitarian Law. In a narrow reading of Additional Protocol I anyone who is not a legitimate combatant is a “civilian”. This can occur even if the member is part of an organized armed group, but that group does not belong to a Party to the conflict or does not otherwise comply with the constitutive conditions of combatancy. In theory at least, they might even be wearing a uniform. The idea that civilians retain their status but not their protection for such time as they take a direct part in hostilities is also fraught with potential dangers. Being a “civilian” also carries with it the notion of “legitimacy”. The recognized involvement of “civilians” in hostilities might put all civilians at risk. Beyond the realm of the “black letter” law it is conceptually difficult to see why a person can remain a “civilian” and still participate directly in “combat”.

The fact that military forces can be lawfully directed to target certain civilians (those who take a direct or active part in hostilities) has the potential to significantly undermine the principle of distinction itself. One only has to put themselves in the shoes of a military commander who seeks to reinforce the principle of distinction by directing his forces to target combatants (lawful or unlawful) and never target civilians. It would be ironic for a lawyer to then state no there is no such thing as an “unlawful combatant” at law and under a strict reading of the law certain “civilians” can be targeted.

It might even be argued that treaty law appears to allow for three classes of people: combatants, civilians who take a direct part in hostilities and other civilians. However, it is more complicated than that and it can be suggested that in addition to the three categories noted above a careful reading of the Protocol also recognizes otherwise lawful combatants who fall within Article 44(4) [they are not referred to as “civilians”]. Of course there remains

²⁰ See also United Kingdom Ministry of Defense, *The Manual of The Law of Armed Conflict*, Oxford, 2004, para. 11.4, p. 279

²¹ See *Hamdi v. Donald H. Rumsfeld*, 124 S. Ct. 2004, pp.2633-2640 (where reference is made to “enemy combatants,” “lawful combatants,” and “unlawful combatants.”).

²² See *The Law of Armed Conflict at the Operational and Tactical Levels*, 2001, Chap 3, Sect 4.

that “combatant like” forces, who may not qualify for legitimate combatant status no matter how organized or violent they are, but in reality are not true “civilians”. This is an area of the law which could benefit from further clarity.

Notwithstanding its established basis in customary international law the term “unlawful combatants” was unfortunately not referred to in the *ICRC Customary International Law Study*. Instead, in the Study’s very first Rule “combatant” is used in a generic sense described as “persons who do not enjoy the protection against attack accorded to civilians”.²³ This would of course include “civilians” who take a direct part in hostilities under the “meaning” of combatant. It is not clear why this approach was taken. It would seem to be an attempt to avoid the controversial issue of “legitimacy” which has so plagued the discussion of combatant status. While lawful combatants would be entitled to prisoner of war status and “generic” combatants would not necessarily be so privileged, it is not clear that avoiding the issue in this manner will ultimately clarify the law.

Civilians

When do civilians cross the line and lose the protection of their status? When do they become lawful targets? As many of you are aware, the Asser Institute and the ICRC are coordinating a conference of experts to deal with this important issue. There will undoubtedly be more said on this subject during this conference. Suffice it to say that civilians have long been present on, or near, the battlefield in a variety of roles including providing logistic support to military forces. This is reflected in both the Hague Law and the Geneva Conventions where prisoner of war status is provided to certain categories of civilians. Depending on the function they perform civilians may be lawful targets. If not, their presence puts them at increasing risk.

There is also an increasing presence of private security contractors. It appears evident that the degree to which such contractors are in danger of crossing the line into the realm of “unlawful combatancy” will be in many ways contextually driven. For example, are they participants in an international armed conflict? What is the nature of their participation? Is the provision of private security to government leaders and business interests during occupation more akin to the performance of a policing type function? There is also the issue that being an “unlawful combatant” is not contrary to international law. Unfortunately the

²³ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* 3, Rule I Cambridge University Press, 2005

debate about “private contractors” often gets mired in questions of how they are controlled and held accountable which can in turn cloud the question of their status at law.

Regarding the protection of civilians it must be remembered that a primary consideration of humanitarian law is their protection. However, they remain at risk due to their proximity to valid military targets. Civilians are subject to the collateral effects of a valid attack through the principle of “double effect” even though they are not performing a combatant function. This is an area of the law which requires further discussion and development. As is reflected in the 2006 Israeli Targeted Killing case, it appears that the courts may be asked to provide solutions to the very questions that have to date escaped consensus by the international legal community. Simply reinforcing the *status quo* will not necessarily assist those courts in reaching a conclusion that reflects the requirements of the international community in the 21st Century.

Conclusion

The need to reinforce the principle of distinction so clearly set out in Additional Protocol I is evident. However, that goal will remain somewhat aspirational without a consensus on what that principle means; who is a valid target; and the protection that must be provided to those who are *hors de combat* regardless of their “status”. A particular challenge will be to deal with the “legitimacy” aspect of combatancy. Rather than seeking to avoid debate on this issue it needs to be faced head on. The lawful or unlawful aspect of participation in warfare is unlikely to disappear any time soon. What is unfortunate is when the standard to treatment applied to captured personnel is linked to the notion of legitimacy. Here treaty law provides excellent guidance on what standards must be applied regardless as to the status of the detained person, as the Fourth Geneva Convention sets up a regime for the treatment of “unlawful combatants” that parallels that which applies to POWs. Similarly, Article 75, which has largely been recognized to reflect customary international law, reinforces the application of human rights standards in the treatment of persons who are in the power of a Party to the conflict including those who are arrested, detained or interned.

As I have noted, the application of existing humanitarian law is an important step in seeking to limit the tragedy of war. There are important initiatives such as the Direct Participation meetings, the *Air and Missile Warfare Manual* and the *San Remo Manual on Non-International Armed Conflict* which will advance our mutual understanding of the law. However, as Yoram Dinstein has noted in his book *The Conduct of Hostilities*, there is a lethargy that has developed in the 21st Century regarding what has been historically semi-traditional quarter century reviews of the Geneva Conventions. There is much to clarify in

the law. The role of international law, and in particular humanitarian law, in an increasingly interconnected and rapidly changing world, is being challenged in respect of both its relevance and effectiveness. It is difficult to see how lethargy can remain an option.

The Notions of Civilians and Fighters in Non-International Armed Conflicts

Jann K. KLEFFNER,

Assistant Professor of International Law, University of Amsterdam

This paper discusses the distinction between different categories of persons in non-international armed conflicts. This is one of the areas in which the distinction between international and non-international armed conflicts remains particularly acute.

In a first step, I will briefly explain why (1), before turning to the treaty provisions applicable in non-international armed conflicts relevant for our analysis (2). In a subsequent step, I will consider the findings of the *ICRC's Customary Law Study* on the matter (3). Lastly, I will discuss the three broad approaches that can be deduced from the aforementioned sources (4).

1. The reason for the difference between international armed conflicts and non-international armed conflicts: absence of combatant status in non-international armed conflict

The main reason for the persistent difference between international armed conflict and non-international armed conflict when it comes to distinguishing between those persons who are legitimate targets and those who are entitled to protection is the absence of combatant status in non-international armed conflict. Combatant status and its consequences – chiefly: combatant privilege and entitlement to prisoners of war (POW) treatment upon capture – do not apply in non-international armed conflict. In non-international armed conflict, acts lawful under the laws of armed conflict remain in principle punishable under domestic law. All that the laws of armed conflict do is to encourage (not oblige) ‘the authorities in power’ to grant

the widest possible amnesty to persons who have participated in the armed conflict,²⁴ provided such persons have not committed war crimes or other international crimes, which States are obliged to investigate and prosecute. Furthermore, those who have directly participated in hostilities in a non-international armed conflict and have been interned or detained are not entitled to treatment as prisoners of war.

In short, combatant privilege and prisoner of war status are, therefore, of no relevance to non-international armed conflicts. This is only different for situations in which members of non-State armed forces are granted that status in accordance with a special agreement envisaged under Common Article 3 or by virtue of a unilateral act of one or more Parties to the conflict.

Another consequence, which the absence of combatant status entails – and this is most pertinent for our subsequent discussion – is that in non-international armed conflicts the principle of distinction cannot be conceptualised in the same way as in international armed conflicts.²⁵ This is so because the principle of distinction in international armed conflict has the notion of ‘combatant’ as reference point: civilians are all those who are not combatants. In contrast, the law of non-international armed conflicts is deprived of that reference point.

That the principle of distinction – in its generic meaning that Parties to an armed conflict must distinguish between those who are legitimate objects of attack and those who enjoy protection – is equally applicable in non-international armed conflicts is beyond dispute.²⁶ But how, then, is that distinction made in the absence of combatant-status?

2. The relevant treaty provisions

The relevant treaty provisions applicable in non-international armed conflicts do not provide a clear answer to the aforementioned question.

Common Article 3 does not employ the term ‘combatant’ or ‘civilian’, let alone define it. Instead, the wording of the provision suggests a distinction between, on the one hand, persons taking no active part in the hostilities, and, on the other hand, those who do take an

²⁴ Cf., Art. 6(5) AP II.

²⁵ See for example, ICTY Trial Chamber, Prosecutor v. Mrksic et al, Judgment of 27 September 2007, par. 457.

²⁶ See J.M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, Vol. I: Rules Cambridge, Cambridge University Press, 2005, Rule 1, with Summary of the abundant evidence in relation to non-international armed conflicts at pp. 5-8.

active part in the hostilities. At the same time, however, the provision refers to ‘members of armed forces who have laid down their arms’ as one sub-category of ‘persons taking no active part in the hostilities’. In so doing, Common Article 3 confirms the existence of, and membership in, ‘armed forces’ in non-international armed conflicts, while not distinguishing between State armed forces and non-State armed forces. Furthermore, the provision is addressed to ‘each Party to the conflict’, thereby recognizing the existence of collective entities that face each other, at least one of which is a non-State actor. Indeed, together with the intensity of the armed violence, it is the existence of these collective entities – organized armed groups – which is central in distinguishing genuine armed conflicts from mere internal disturbances, sporadic acts of violence and the like, which are beyond the reach of the laws of armed conflict. Common Article 3 is, however, inconclusive as to where precisely the dividing line lies for purposes of the principle of distinction. Is it solely between those who actively participate in the hostilities and those who do not, or does the notion of ‘membership in armed forces’ alter that equation?

In contrast to Common Article 3, Additional Protocol II and subsequent treaties that apply in non-international armed conflicts employ the terms ‘civilians’ and ‘civilian population’ on various occasions.²⁷ Yet, they do not define the terms. The drafting history of Additional Protocol II reveals that the attempt failed to define ‘civilians’ negatively in ways similar to the First Additional Protocol as anyone who is not a member of the armed forces or of an organized armed group.²⁸ It has nevertheless been suggested that this deletion should not be understood to have done away with the basic distinction between members of organized armed groups, on the one hand, and civilians (being those who are not members of organized armed groups), on the other hand.²⁹ In fact, it may be argued that the provision in Additional Protocol II, which stipulates that civilians lose their protection ‘*unless and for such time as they take a direct part in hostilities*’³⁰, confirms such an approach.³¹ One might add that

²⁷ Cf., Art. 5(1)(b) and (e) and Part IV (Arts. 13-18) AP II; Arts. 3(7)-(11) Amended Protocol II to the CCW; Art. 2 Protocol III to the CCW; Arts. 8(2)(e)(i), (iii) and (viii) ICC Statute.

²⁸ M. Bothe, et al., *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, Martinus Nijhoff Publishers, 1982, p. 671.

²⁹ M. Bothe, *Direct Participation in Hostilities in Non-International Armed Conflict*, Paper submitted to the Second Informal Expert Meeting organized by the International Committee of the Red Cross and the TMC Asser Institute, The Hague, The Netherlands, 25-26 October 2004, p. 9 (on file with author).

³⁰ Art. 13(3) of AP II.

³¹ Bothe, *supra* n. 29. See also Y. Sandoz, et al., (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht, Nijhoff, 1987, p. 1453 at para. 4789 where Sylvie Junod equally juxtaposes members of armed forces or armed groups and civilians by stating that

Additional Protocol II is at least as explicit as Common Article 3 as regards the existence of, and membership in, 'armed forces' and 'organized armed groups'. Be that as it may, a conceptualisation of the principle of distinction under the Protocol in the aforementioned way still leaves unaffected the ambiguity surrounding the principle of distinction with respect to all those non-international armed conflicts, which do not reach the relatively high threshold of Additional Protocol II.³²

3. *The ICRC Customary Law Study*

If one then turns to the *ICRC Customary Law Study* one can only conclude that it does not remedy the ambiguity left by the conventional law of non-international armed conflicts.

Rule 1 of the Study sets forth the principle of distinction for all armed conflicts in language reminiscent of the law of international armed conflicts in as much as it refers to 'civilians' and 'combatants'.³³ The Study clarifies, however, that '[t]he term "combatant" in this rule is used in its generic meaning, indicating *persons who do not enjoy the protection against attack accorded to civilians*, but does not imply a right to combatant status or prisoner-of-war status'.³⁴ Such wording thus shifts the attention away from the question who is the object of legitimate attack, to the question who is a 'civilian' and thus enjoys protection, and to the ensuing question under what conditions civilians lose their protection on account of their direct participation in hostilities (Rule 6). In fact, the approach under treaty law for international armed conflicts ('civilians are those who are not combatants', in combination with a clear definition of 'combatants') is turned on its head: combatants are all those who do not enjoy protection accorded to civilians. The principle of distinction as expressed in the *ICRC Customary Law Study* thereby centres around the question who is a 'civilian'.

For international armed conflicts, in turn, that question can be answered by reference to Article 50(1) of the First Additional Protocol and its corresponding rule of customary

'[t]hose who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts.'

³² Recall that Art. 1(1) of AP II requires that the conflict take place between the armed forces of a State 'and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the Second Additional Protocol]'.

³³ Cf., *supra* n. 26.

³⁴ *Id.*, emphasis added.

international law.³⁵ Yet, under the law of non-international armed conflict the answer is far from clear. The *ICRC Customary Law Study* also acknowledges this. It asserts with regard to non-international armed conflicts that members of State armed forces are not considered civilians.³⁶ So, that much seems to be clear. Yet, the Study finds that practice is ambiguous ‘as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6’.³⁷ It is on this question – the status of members of non-State organized armed groups – that I will concentrate in the following.

Three alternative approaches present themselves.

4.1 Membership Approach

The first approach is to draw an analogy to the law of international armed conflicts, and to make a distinction between two groups of persons: members of armed forces (including those of the State as well as non-State organized armed forces), on the one hand, and all others, on the other hand. One could refer to the former as ‘fighters’ (a term borrowed from the *San Remo Manual on the Law of Non-International Armed Conflict*), in order to avoid any confusion about their lacking the entitlement to combatant-privilege and prisoner of war status.³⁸ Such ‘fighters’ would be legitimate targets, regardless of whether or not they are directly/actively³⁹ participating in hostilities at the time of being made the object of attack, much as combatants in international armed conflicts. All those who are not ‘fighters’ would be considered ‘civilians’ entitled to protection. Civilians, in turn, would lose their protection (but not their status) as civilians when and for such time as they take a direct/active part in hostilities.

4.2 Specific Acts Approach

³⁵ Cf. Henckaerts and Doswald-Beck, (eds.), *supra* n. 26, at p. 18.

³⁶ *Id.*, at p. 19.

³⁷ *Id.*

³⁸ See *The Manual on the Law of Non-International Armed Conflict*, San Remo, International Institute of Humanitarian Law, 2006, reprinted in *Israel Yearbook on Human Rights*, Vol.36, 2006, (Special Supplement, 71 pp.) p. 4 at s. 1.1.2.

³⁹ The two notions of taking an ‘active’ part in the hostilities in Common Art. 3 of the Geneva Conventions and of taking a ‘direct’ part in hostilities in Art. 13(3) of the second Additional Protocol are understood to be synonymous, see e.g. ICTR Trial Chamber, *Prosecutor v. Jean-Paul Akayesu*, judgment of 2 September 1998, p. 629.

A second approach is to distinguish solely between those who do and those who do not actively/directly participate in hostilities. Those who do, in turn, would include members of organized armed groups, as well as other individuals. The most significant difference to the 'membership approach' consists of the fact that *all* those who directly/actively participate in hostilities are subjected to the same regime: they may not be made the object of attack '*unless and for such time*' as they take a direct/active part in hostilities. This second approach would make the legality of an attack upon members of organized armed groups dependent on the specific act of actually directly/actively participating in hostilities. Prior to and after such direct participation, they would be entitled to protection, with the exception of the deployment to and return from such participation, which is understood to fall within the notion of 'direct participation in hostilities'.⁴⁰ Such a construction would thus create a stark contrast to international armed conflicts, where a distinction is drawn between civilians (who can only be targeted if and for such time as they take a direct part in hostilities) and combatants (i.e., members of the armed forces of a Party to a conflict, who are targetable at all times). This is the so-called 'specific acts approach'⁴¹.

4.3 Direct participation on a Gliding Scale

Thirdly, as an intermediate position between the membership and specific act approaches one could rely solely on the direct participation of persons, subject to the important qualification that the notion of 'active/direct participation in hostilities' is interpreted differently for members of organized armed groups than for those who are not members. In relation to the first category of persons, membership would be construed as 'permanent active participation' so that they remain targetable as long as their membership in the armed group lasts. In contrast, those who are not members of such groups would only lose their protection while engaging in the specific act of actually directly/actively participating in hostilities.

⁴⁰ It has also been argued that other preparatory acts may be covered, cf., Sandoz, et al., (eds.), *supra* n. 31, p. 1453 at para. 4788. For a recount of the discussion of the temporal scope of the loss of protection due to direct participation in hostilities during the series of Expert Meetings on the Notion of Direct Participation in Hostilities, co-organized by the International Committee of the Red Cross and the T.M.C. Asser Institute, see Summary reports of these meetings available on the ICRC website at: <www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205> at pp. 59-62.

⁴¹ *Ibid.*, Summary Report 2005, pp. 60-62.

4.4 Discussion

Let us now consider the merits and disadvantages of the three different approaches.

From a conceptual point of view, the strength of the membership approach consists of its accommodating most clearly the notion that an armed conflict involves at least two *Parties* with their own armed forces, which are equal before the laws of armed conflict. Members of organized armed groups do not act as atomised individuals, but as part of a structured collective whose very purpose is to use armed force and inflict death and injury and damage to objects of such an intensity so as to reach the threshold of a non-international armed conflict. To be part of the fighting force of a Party to an armed conflict is fundamentally different from persons, who participate in hostilities independently from the Parties.

Furthermore, the membership approach upholds the fundamental precept that the Parties to an armed conflict are equal before the laws of armed conflict as it makes members of both State armed forces and non-State organized armed groups permanently targetable. In contrast, the specific acts approach would result in more restraints for governmental armed forces (who, as noted earlier, are not considered civilians⁴²) when targeting members of armed groups than in the reverse situation in which members of armed groups target governmental armed forces. In fact, it would make it virtually impossible for State armed forces to employ force offensively rather than defensively.⁴³

The '*direct participation on a gliding scale approach*' does not share this problem of a legal asymmetry between the Parties to an armed conflict as far as the targeting of persons is concerned. To construe membership in an organized armed group as permanent direct participation causes such members to be a legitimate object of attack for the entire duration of their membership and thus produces the same results as the membership approach. The '*direct participation on a gliding scale approach*' is however open to the objection that it conflates two conceptually distinct categories of persons – members of armed groups and others who directly participate in hostilities without being members of such groups – under one and the same heading of 'direct participation'. Yet, that latter notion is intrinsically linked to 'civilians' at least in the wording of the Second Additional Protocol⁴⁴ and other relevant sources.⁴⁵

⁴² Cf., *supra* n. 36.

⁴³ For the limited exception in relation to preparatory acts or the return from direct participation cf., *supra* n. 40.

⁴⁴ Art. 13(3) AP II.

⁴⁵ See e.g. Art. 8(2)(e)(i) ICC Statute.

Notwithstanding that, according to the '*direct participation on a gliding scale approach*', members of armed forces are deprived of their immunity from being made the object of attack for the entire duration of their membership, it is deeply counter-intuitive to regard them as 'civilians'. More importantly still, to do so runs the risk of blurring the lines for the purpose of the principle of distinction and thereby negatively impacting on the protection of those who deserve it.

While the foregoing considerations suggest that the membership approach has considerable merits in comparison to the other two approaches, one cannot fail to also note a number of pitfalls and necessary caveats, which in my view, condition its viability. A first such caveat relates to the type of members of organized armed groups, who are to be considered legitimate objects of attack. The term 'membership approach' conveys the impression that *any* such member would lose the protection against being attacked for the entire duration of his/her membership, regardless of the function that that person fulfils. However, such an approach is unduly broad and would create an imbalance between State armed forces and non-State armed forces opposite to the imbalance created by the specific acts approach. This is so because it would impose *less* restraints in the targeting of members of organized armed groups than of members of State armed forces. Much as State armed forces, organized armed groups may include members devoted to functions other than fighting. Indeed, certain categories of members of organized armed groups, most notably medical and religious personnel, are expressly entitled to protection, provided they abstain from committing hostile acts outside their humanitarian function.⁴⁶ It is, therefore, submitted that only 'fighters' should be liable to attack for the entire duration of their membership, 'fighters' being those members of organised armed groups who assume fighting functions on an ongoing basis, including those who are part of the command and control structure.⁴⁷

Secondly, it is submitted that, in analogy to the law of international armed conflict, the category of persons mentioned in Article 4A(4) of the Third Geneva Convention should also

⁴⁶ Cf., Art. 9 AP II. Although Art. 9 AP II does not include an express provision on the loss of protection of medical and religious personnel, this flows from an analogous application of Art. 11(2) 1st sentence AP II. In this vein, see also Rule 25 of the Customary Law Study, Henckaerts and Doswald-Beck, (eds.), *supra* n. 26, at pp. 79, 80-81, 84-85.

⁴⁷ In this vein, see also N. Melzer, *Draft Interpretative Guidance on the Notion of "Direct Participation in Hostilities"*, prepared for the Fourth Expert Meeting on the Notion of "Direct Participation in Hostilities under IHL" Geneva, 27 / 28 November 2006, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute, 2006, p. 15 (on file with author).

be considered civilians in non-international armed conflicts.⁴⁸ In other words, persons who accompany the armed forces without actually being members thereof should be immune from being made the object of attack, unless and for such time as they directly participate in hostilities.⁴⁹

A third caveat, which builds on the two preceding observations, concerns the availability of reliable intelligence on which to base the reasonable and honest determination that a person is a 'fighter'. If one considers today's non-international armed conflicts, it is readily apparent that organized armed groups differ considerably. Some (probably the minority) are relatively stable, possess a clear organizational structure, are identifiable because they wear uniforms or other distinctive signs (at least occasionally), and occupy part of the territory of the State against which they fight.⁵⁰ At the opposite end of the spectrum are armed groups, which meet the threshold of being considered 'organized' within the meaning of the laws of armed conflict,⁵¹ yet whose organization is more amorphous, whose members do not distinguish themselves from the rest of the population, and the group does not exercise control over territory. In between these two outer ends are various other types of organized armed groups. What complicates matters even further is that organized armed groups change, depending on the phase of an armed conflict and the success or failure of the opposing Party to contain, disrupt, or defeat them. Against this background, the determination of whether or not a person is a fighter will be more difficult in some armed conflicts or some phases of an armed conflict than in others. Much will depend on the availability of sufficient intelligence. Indeed, an obligation to gather such intelligence with a view to establish the status of a person flows from the rules on precautionary measures. These rules require, amongst other, that Parties to an armed conflict do everything feasible to verify that targets are military objectives. The *ICRC Customary Law Study* finds these rules to be equally applicable in non-international armed conflicts.⁵² If intelligence is ambiguous, the general presumption in favour of civilian

⁴⁸ The same applies to those persons mentioned in Art. 4A(5) of the Third Geneva Convention, i.e., members of the merchant marine and the crews of civil aircraft of the Parties to the conflict, but these categories are in all likelihood hardly of relevance in the context of non-international armed conflicts as far as organised armed groups are concerned.

⁴⁹ Similarly, see N. Melzer, *supra* n. 47, p. 15, especially footnote 32 and accompanying text.

⁵⁰ The *Fuerzas Armadas Revolucionarias de Colombia* (FARC) in Colombia and the *Liberation Tigers of Tamil Eelam* (LTTE) in Sri Lanka are arguably examples.

⁵¹ For the views of international bodies on the required degree of organization, see L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002, pp. 134-141.

⁵² Cf., especially in the present context Rule 16 of the *Customary Law Study*, Henckaerts and Doswald-Beck, (eds.), *supra* n. 26,, at pp. 51, 55. See also the judgment in the *Targeted Killings* case of the Israel

status in case of doubt, which obliges Parties to an international armed conflict to err on the side of caution,⁵³ appears to be at least equally wise in non-international armed conflicts.⁵⁴ Not to do so would increase the risk of the mistaken targeting of civilians to an unacceptable degree. In practice, such a presumption will at times result in something akin to the specific acts approach, which makes a person a legitimate target of attack only if and for such time he/she takes a direct part in hostilities. It is acknowledged that such an approach is open to the objection that it is incompatible with the principle assumption of equality of the Parties to an armed conflict before the law. After all, it would ultimately result in members of armed groups, who fail to distinguish themselves from the civilian population, to be granted more protection from attack than members of State armed forces. Indeed, it would reward them for behaviour, which undermines the principle of distinction. However, it needs to be stressed that this imbalance does not result from granting members of armed groups more rights or imposing on them less obligations under the laws of armed conflict. Rather, it is the consequence of the protection from the effects of hostilities to which *civilians* are entitled.

Conclusion

One can come a long way in conceptualising the principle of distinction in non-international armed conflicts by way of analogy to the law of international armed conflict, subject to the important qualification that combatant privilege and prisoner of war status do not apply. Such a distinction draws the line between those members of organized armed

Supreme Court Sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, HCJ 769/02, judgment of 11 December 2005. Although the analysis of the Israeli Supreme Court in that case is based on the law of international armed conflict, it is instructive in the present context, in as much as the case is also concerned with the difficulty of identifying members of armed groups who do not qualify as combatants. In its discussion of the temporal element of the loss of protection of a civilian due to his or her direct participation in hostilities, the Court set forth a differentiated approach. It distinguished a civilian, who takes such part one single time, or sporadically and who later detaches him/herself from such activity, from a civilian who joins a terrorist organization 'which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them'. The former civilian, held the Supreme Court, regains protection as soon as he/she detaches him/herself from that activity, while the latter remains targetable for as long as he/she 'is committing the chain of acts' (cf., Judgment at para. 39). The Supreme Court then continued to elaborate a number of safeguards, which, in the view of the Court, make such an approach viable. The first such safeguard is that 'well based information is needed before categorizing a civilian as falling into one of the discussed categories' (*ibid.*, para. 40). See also N. Melzer, *supra* n. 47, p. 44-45.

⁵³ Cf., Art. 50(1) 2nd sentence API.

⁵⁴ L. Moir, *The Law of Internal Armed Conflict*, Cambridge, Cambridge University Press, 2002, p. 59 ('[W]here insurgents cannot be differentiated from civilians, they must cease to be legitimate targets'). See also N. Melzer, *supra* n. 47, p. 45-46.

groups who assume fighting functions on an ongoing basis ('fighters') and all others ('civilians'). The former are liable to attack for the duration of their membership, while the latter are protected unless and for such time as they directly participate in hostilities. At the same time, the idiosyncrasies of non-international armed conflicts militate against a wholesale transplant of the principle of distinction, as it applies during international armed conflicts. This is not only due to intriguing issues under Human Rights Law, which the targeting of members of organized armed groups during non-international armed conflicts raise and which I have not addressed.⁵⁵ Rather, a more nuanced approach is also required due to the variety and changing nature of organized armed groups. The 'membership approach' may be viable *vis-à-vis* certain of these groups, but bears the risk of undermining civilian protection if adopted *vis-à-vis* others. Much will depend on the concrete circumstances in a non-international armed conflict and, not the least, the available intelligence. In the absence of hard and fast rules, if a given approach proves to be acceptable, therefore, ultimately depends on whether it strikes a reasonable balance between military considerations and humanitarian concerns.

⁵⁵ See, e.g., N. Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict', *International Review of the Red Cross*, Vol.87, 2005, p. 737 at pp. 748-750; L. Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?', *International Review of the Red Cross*, Vol.88, 2006, p. 881, pp. 889-891.

Civilian Direct Participation in Hostilities under International Humanitarian Law

Nils MELZER

Legal Adviser, ICRC

Setting out the factual background for his presentation on “Civilian Direct Participation in Hostilities under International Humanitarian Law”, Dr. Melzer recalled that armed conflicts are now predominantly of non-international character, that battlefields have shifted into civilian population centres, that armed actors often fail to distinguish themselves properly from the civilian population and that the increasing intermingling of civilians and armed actors is accompanied by an increasing involvement of civilians in military operations. All of these factors inevitably lead to confusion as to the distinction between ‘legitimate targets’ and ‘protected persons’ and emphasize the importance of distinguishing between civilians directly participating in hostilities, who may be lawfully targeted, and peaceful civilians, who must remain protected against direct attack.

Recalling the basic rules on lawful targeting of persons under International Humanitarian Law (IHL), Dr. Melzer then commented that while protections against direct attack exist in law for non-combatant civilians (and armed force personnel *hors de combat* or serving as medical and religious personnel), there is no definition in treaty law, state practice or jurisprudence of what conduct amounts to "direct participation in hostilities" and, therefore, leads to loss of civilian protection. This lack of definition leads to a lack of criteria for the distinction between peaceful civilians and civilians directly participating in hostilities; and a lack of guidance as to the applicability to hostile civilians of the paradigms of law enforcement and of hostilities.

In 2003, the ICRC and the TMC Asser Institute therefore initiated a multi-annual, informal expert process for the clarification of the notion of "direct participation in hostilities" through the interpretation of existing IHL in the light of the circumstances prevailing in

modern armed conflicts. The expert process includes between 40 and 50 legal experts from academic, military, humanitarian, governmental and non-governmental backgrounds, each participating in their personal capacity. In the course of a number of expert meetings, the experts addressed the concept of 'civilian' under IHL; the basic concept of 'direct participation in hostilities'; and the 'modalities of suspension of protection'. This clarification process is likely to come to a conclusion in 2008 with the publication of a comprehensive *Interpretive Guidance on the Notion of Direct Participation in Hostilities*.

Based on the discussions held at four expert meetings between 2003 and 2006, Dr. Melzer then provided a summary of the preliminary results of this still ongoing expert process. With regard to the question of who qualified as a civilian under IHL, the expert meetings had shown that it was important to distinguish the organized armed forces, groups and units who actually conduct hostilities on behalf of a Party to an international or non-international armed conflict ("armed forces" in a functional sense) from civilians, who do not - or only sporadically, spontaneously or in an unorganized manner - directly participate in hostilities.

Based on the discussions held during the expert meetings it was suggested that the notion of "direct participation in hostilities" essentially referred to specific acts carried out by individuals, which are specifically designed to support one Party to the conflict by directly causing harm to the military effort or military capacity of another Party or by directly inflicting death, injury or destruction on persons or objects not under the effective control of the acting individual. Accordingly, if and for such time as civilians carry out acts meeting these criteria they lose their civilian protection against direct attack.

The expert meetings also addressed the specific modalities according to which civilians directly participating in hostilities lose protection against direct attack. In temporal terms, it was proposed that civilians regain protection in the intervals between specific hostile acts, whereas members of organized armed forces, groups or units of a Party to the conflict lose civilian protection for as long as they assume fighting function within such forces.

All feasible precautions have to be taken in determining whether a civilian has lost protection and, in case of doubt, it must be presumed that the person in question is entitled to protection against direct attack. If a civilian has lost protection against direct attack, the armed force may lawfully be used against that civilian to the extent that it is reasonably necessary in the concrete circumstances and is not otherwise prohibited by IHL.

Civilian direct participation in hostilities is neither prohibited nor privileged by IHL. In the absence of such prohibition, civilian direct participation in hostilities does not, in and of

itself, constitute a war crime. However, in the absence of combatant privilege, civilians having directly participated in hostilities remain subject to prosecution for any act penalized under domestic law, which they may have committed during their participation.

In concluding his presentation, Dr. Melzer recalled that he was speaking in his personal capacity and not on behalf of the ICRC and emphasized that these preliminary results were still subject to further discussion and revision in the course of the expert process.

Military Objectives

Hays PARKS

Associate Deputy General Counsel, United States Department of Defense

It is a pleasure to return to Sanremo following a lengthy absence. My first Sanremo visit was in 1978, when I attended the Institute's Fifth Course on the Law of War. I returned twice more to participate in the Round Table. Upon arrival in 1981 I went for a long run, following which I fell and broke my cheekbone. I regained consciousness laying on a stainless steel maternity delivery table in the Sanremo Hospital emergency room surrounded by three nuns, wondering who this crazy man was clad only in running shoes and shorts. I was spirited away to a military hospital in Germany to repair the damage. In my forty-year career, I believe it is the only time where there is proof positive that I fell on my face in the execution of my duties. I'll try not to repeat my 1981 performance either figuratively or literally today.

The original title of this panel was *Must we revise the definition of military objective?* The panelist arguing for revision was to have been Major General Charles Dunlap, the Deputy Judge Advocate General of the U.S. Air Force. His views on military objectives have been widely published and likely would have resulted in spirited debate. When his schedule precluded his participation, I was invited to step in as a replacement panelist. In addition to being a poor substitute, the panel's topic was changed and, I suspect, should prove less contentious.

General Dunlap and I served as co-panelists at a conference hosted by the German Red Cross in Berlin in June 2005 honoring Professor Knut Ipsen, where we offered our differing views on this topic. Given time limitations, it will not be possible to offer our point-counterpoint in detail. For those interested, I am providing a citation to our papers.

I will touch briefly on three points:

First, the fact that the United States is not a State Party to the 1977 Additional Protocol I and its definition of “military objective” in Article 52, paragraph 2, is not germane to today’s discussion. The United States is a Party to Amended Protocol II of the 1980 Convention on Certain Conventional Weapons, which contains the same definition. The United States has applied the definition in its targeting determinations for more than two decades. While the ICRC’s Customary International Humanitarian Law conclusion that “*State practice establishes ... [Article 52, para. 2 is] a norm of customary international law applicable in both international and non-international armed conflicts*” may be overly ambitious, the fact remains that the military objective definition enjoys broad acceptance.

With respect to the details of the definition, both Major General A.P.V. Rogers and Professor Yoram Dinstein have offered excellent descriptive explanations in their respective works. In large measure their explanations have been incorporated into the new *British Manual of the Law of Armed Conflict*. They have proved invaluable in discussion of military objective in the forthcoming U.S. law of war manual as well.

Second, there has been much debate in some circles as to whether or not objects that are “war sustaining” are military objectives. Terms such as “war-fighting” “war-sustaining” are descriptive rather than legal terms. As I concluded in my 2005 Berlin paper, I found the arguments to be a wonderful academic exercise from which otherwise there is little to be gained. The definition of military objective in Additional Protocol I and the CCW indicates an object becomes a military objective when by virtue of its “*nature, location, purpose or use makes[s] an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.*” “Military advantage” was not intended to be limited to tactical gains or otherwise range limiting. If an object falls within the definition, it is a military objective. Discussion as to whether or not an object is not a military objective because it may be “war fighting” or “war sustaining” is speculative in the absence of a clear view of a specific conflict, a particular object, and a specific set of circumstances at the time a decision must be made.

The third point is the one on which I’d like to spend the greatest part of my time, as I believe it focuses on the concerns of many. This involves the suggestion by General Dunlap and a *protégé* of his, Major Jeanne Meyer, an Air Force judge advocate, of broadening or revising the definition of military objective to include attacks on civilian morale. Brigadier General Dunlap argues for making certain civilian objects into military objectives in order to attack civilian morale – what I refer to as “boutique bombing” -- while Major Meyer suggests target selection with an emphasis on civilian morale. General Dunlap also argues for a return

to a form of Just War Tradition in target selection where the enemy is “evil.” I respectfully but strongly disagree with these arguments.

In my years of research I have been fascinated and amused by the degree to which attacks on civilian morale have been a Holy Grail for some airpower advocates. During and following World War I Royal Air Force Air Marshal Lord Trenchard asserted that “*the moral [morale] effects of bombing [including bombing the civilian population] outweighed the material at a ratio of twenty to one,*” prompting one airpower historian to observe that Trenchard was the master of the “*wholly unfounded statistic.*”

The argument of Trenchard and other airpower advocates did not receive universal acceptance. Writing as Minister of Munitions in October 1917, Winston S. Churchill stated:

It is improbable that any terrorization of the civil population which could be achieved by air attack would compel the Government of a great nation to surrender.... In our own case we have seen the combative spirit of the people roused, not quelled, by the German air raids.... Nothing that we have learned of the capacity of the German population to endure suffering justifies us in assuming that they would not be rendered more desperately resolved to them.

Nonetheless advocates in France, Italy, Germany, Great Britain and the United States pursued attacks on civilian morale as a justification for airpower development, as a “bonus” airpower could bring to winning a war with a “knock-out” punch.

The Royal Air Force used the “morale bombing” argument to sustain its existence between World Wars I and II. It put theory into practice through RAF ‘policing’ of its colonies in Somaliland, Iraq, Palestine, India, South-west Arabia, and parts of its colonial empire in Africa. Indigenous tribes whose conduct strayed were persuaded to return to British colonial ways with a “demonstration” bombing by RAF aircraft adjacent to their village, employing this new means of warfare to “shock” them. When the demonstration failed, attacks on villages and their populations followed, usually with military success but with a disregard for legality issues. RAF “policing” validated its concept of attacks on civilian morale. As one RAF officer commented in 1923:

The shocks and interruptions, the inconvenience and indignity of it all, will tell in the end. The civilized nation will go through the same three phases as did the semi-civilized tribe: alarm, indifference, weariness, followed ultimately by compliance with our will.

Ironically, advocates of “attacks on civilian morale” always attributed a vulnerability of enemy civilian morale to such attacks while concluding that its own civilian population was of “stronger character” and able to withstand such attacks. The obvious point is that the line between lawfully bombing economic and industrial targets with an “intentional but incidental” effect on the morale of the civilian population *vis-à-vis* bombing an enemy civilian population solely for the purpose of terrorizing it was a thin one, with airpower advocates emphasizing the former while denying the latter. In some respects, this was a subtle advance in the law. In denying that attacks on civilian morale had as their purpose terrorization of the civilian population, advocates acknowledged that attacks to terrorize the civilian population were illegal. But advocates of “morale bombing” pushed the line to its breaking point. In World War II, that breaking point was crossed by Axis and Allied air forces without success in breaking enemy civilian morale.

Marshal of the Royal Air Force Sir Arthur Harris, commander of Royal Air Force Bomber Command from early 1942 to the end of the war in Europe, concluded that “*The idea that the main object of bombing German industrial cities was to break the enemy morale proved to be totally unsound.... [M]orale bombing was completely ineffective against so well-organized a police state as Germany.*” Harris’s remarks mirror those of the post-war British Bombing Survey Unit, which concluded “*In so far as the offensive against German towns was designed to break the morale of the German civilian population, it clearly failed,*” a conclusion shared by the U. S. Strategic Bombing Survey.

The historical record is well established: attacks on civilian morale as such have not been effective. Article 51, para. 2 of Additional Protocol I states:

The civilian population as such, as well as individual civilians, shall not be made the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

What constitutes either an “attack on civilian morale” or “acts or threats of violence among the civilian population” requires definition. Incorporation of the words “*acts or threats of violence the primary purpose of which is to spread terror among the civilian population*” constitutes an acknowledgement that civilians will experience fear and possibly terror as a result of lawful attacks on military objectives near them. The language prohibits attacks intended for the purpose of causing fear or terror rather than an effect that is a natural consequence of lawful military actions. The prohibition remains vague, however. The ICRC Commentary on Additional Protocol I states: “*The provision is intended to prohibit acts of violence the primary*

purpose of which is to spread terror among the civilian population without offering substantial military advantage." This unfortunate and rather strange choice of words [in italics] incorrectly suggests attacks to terrorize remain legally permissible if such attacks offer a substantial military advantage.

World War II "morale" bombing had a drug-addictive effect on its proponents. When morale attacks failed, British and American air leaders sought more, arguing that one (or more) days of massive bombing of German cities would cause a collapse of civilian morale and force an end to the war. A subsequent analysis concluded that "*Only when Germany was overrun and Hitler died did the will to resist finally flicker out.*"

Today, some airpower enthusiasts continue efforts to resurrect attacks on civilian morale, notwithstanding the lessons of history or present-day law of war prohibitions.

Thus on February 25, 1991, on the eve of the Coalition ground offensive to liberate Kuwait, the Commander, U.S. Central Command, announced his approval of air strikes that evening to destroy a statue of Saddam Hussayn and the "Hands of Victory" monument. Each was identified as a "*psychological target,*" with the implausible argument that upon learning that each had been destroyed, revealing Saddam's impotence, the Iraqi people would rise up and oust Saddam, alleviating the need for Coalition ground combat operations. A neglected detail is that the two objects had been on the list of nominated targets since December 1990, but had not been approved for attack because they were regarded as having little to no military value.

Eventually the Commander, U.S. Central Command, the Secretary of Defense, and Chairman, Joint Chiefs of Staff, agreed these were not military objectives. Yet there remains a continuing temptation by some to exploit airpower's capabilities to attack civilian morale in the face of history and obvious policy, legal and moral issues. This penchant by some for some theoretical "knock-out punch" through airpower undoubtedly is the point giving many concerns about a broader definition of military objective.

The recent articles by Brigadier General Dunlap and Major Meyer argue for a limited return to targeting morale. However limited, their arguments are a step back to earlier but unsuccessful airpower arguments that wars could be prevented or ended sooner with an attack on civilian morale. History proves this is a perilous slippery slope.

Such arguments are inconsistent with the lessons not only of history but present day. Civilians and civilian morale have been subjected to terrorist attack around the world - in New York City, Washington, Riyadh, Nairobi, Dar es Salaam, Bali, Jakarta Casablanca, Istanbul, Madrid, and London, to name a few. These attacks initially may have struck fear in

the civilian population. In the long run civilians steeled themselves against the attacks and became more defiant in their resistance.

Recognition is due to the tremendous technological progress of the past four decades with respect to development of precision guided weaponry, spurred primarily by the U.S. Air Force. These advances employ technology to comply with the law of war principle of distinction, but also for the military advantage gained in terms of reduced aircraft sorties, reduced munitions expenditures, and risk to aircrews. But technological advances cannot become the tail wagging the dog in devaluing sound law of war provisions that enable a civilian object to become a military objective only when there is a "*definite military advantage*" rather than what history shows has proved a highly speculative argument.

Thank you.

The Definition of Military Objectives

Knut DÖRMANN

Head of the Legal Division, ICRC

The definition of military objectives is set forth in Article 52(2) of Additional Protocol I to the four Geneva Conventions⁵⁶ (AP I). The definition has been used consistently in subsequent treaties, namely in Art. 2(4) of Protocol II⁵⁷, Art. 2(6) of the Amended Protocol II⁵⁸ and Art. 1(3) of Protocol III⁵⁹ to the Convention on Certain Conventional Weapons, as well as in Art. 1(f) of the Second Protocol to the Hague Convention for the Protection of Cultural Property⁶⁰. Numerous military manuals contain this definition of military objectives. The definition is crucial for the implementation of the principle of distinction, which requires that the Parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must direct their operations only against military objectives.⁶¹

Based on its collection of State practice and *opinio iuris*⁶² the ICRC like many others, including international tribunals, consider that the definition reflects customary international law in both international and non-international armed conflicts. This is certainly an important point of departure. However, while we may agree on the customary nature and the general

⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁵⁷ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980.

⁵⁸ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996).

⁵⁹ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980.

⁶⁰ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999

⁶¹ Art. 48 AP I.

⁶² Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Volume II. Practice (2 Parts), Cambridge University Press, 2005, pp. 181-232.

formulation of the definition, this does not mean that there is no disagreement on certain interpretations of the definition's elements. Controversies thus relate mainly to its application in certain specific situations.

Article 52(2) AP I contains a generic definition rather than a specific list of military objects. It adopts a two-pronged test for the assessment of each attack: the object to be attacked must by its nature, location, purpose or use contribute effectively to the military action of the enemy and its destruction, capture or neutralization must offer a definite military advantage for the other side in the circumstances ruling at the time. Both conditions must be met cumulatively.

The definition of military objectives, read together with the principle of distinction, the prohibition of indiscriminate attacks, the obligation to minimize civilian casualties, as well as the principle of proportionality, clearly rejects interpretations advanced formerly in doctrines of "total warfare", which included as military objectives *"any objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight"*.

The elements of the two-pronged test in Art. 52 (2) AP I have been subject to much debate. Partly, States have attempted to bring more clarity by making declarations upon signature or ratification. Military manuals provide also important explanations.

By referring to objects, the definition relates to material and tangible things. Thus, victory, public will, or morale cannot be legitimate objects of attack.

The words *"nature, location, purpose or use"* in the first prong are quite encompassing. They recognise that objects can contribute in a variety of ways to military action.

There has been some debate on the concrete implications of the term "purpose". It is generally submitted that the criterion of 'purpose' is concerned with the intended future use of an object. However, what does *"intended future use"* encompass? Clearly, if the mere possibility that an object might be converted into some military use would be sufficient, then almost no limits in target selection would exist. As a limiting factor it has been suggested that *"purpose is predicated on intentions known to the adversary, and not on those figured out hypothetically in contingency plans based on a 'worst case scenario'"*.

Still on the first prong, according to the definition the object must "effectively" contribute to the military action of the enemy. The generally accepted view is that *"to qualify as a military objective, there must exist a proximate nexus to military action (or 'war-fighting')."* However, it is argued that there is no need for a direct connection with specific combat operations.

Let me move to the second prong of the definition. By referring to “*definite military advantage*” the drafters excluded advantages, which are only hypothetical and speculative. The military advantage must be concrete and perceptible. It must also be related to a finite event, to a concrete situation on the ground and cannot be confused with the entire war. The adjective “military” limits lawful targets to those, which serve a military, rather than, for example, a political or economic purpose. Forcing a change in the negotiating attitudes of an adverse Party can therefore not be deemed a proper military advantage.

The criteria must be fulfilled “*in the circumstances ruling at the time*”, not at some hypothetical future time. Thus, Art. 52 AP I has a clear temporal dimension, which works both ways. An object, which is normally used for civilian purposes, may turn into a military objective once it is used for military purposes. An object, which has been used militarily, may become (again) a civilian object when the military use is abandoned. Thus, timely and reliable information of the military situation is an important element in the target selection and essential for the implementation of the principle of distinction.

Without these elementary restrictions, the limitation of lawful attacks to military objectives could be too easily undermined and the principle of distinction rendered void.

Albeit the above-mentioned clarifications, due to the general formulation, the contours of notions like “*effective contribution to military action*” and “*definite military advantage*” are not always absolutely clear, and may sometimes invite quite expansive interpretations to the detriment of the civilian population.

Some selected challenges in interpretation with regard to specific target groups

Military action vs war-sustaining

The *US Commander's Handbook on the Law of Naval Operations* substitutes the words military action by the formulation “*war-fighting or war-sustaining*”. While there is no problem in using the term “*war-fighting*”, the situation is less clear with regard to “*war-sustaining*”. The discussion largely concerns the question to what extent economic targets, but possibly also psychological targets, can be the object of an attack. Hays Parks in his presentation to this Round Table takes the view that military action also includes “*war sustaining*” and describes the debate as academic. But is that so? In my view, the criterion of war-sustaining has been rightly criticized as too lax. This concern may be illustrated by the example provided in the

"Annotation to the Commander's Handbook".⁶³ Reference is made there to the destruction of raw cotton within Confederate territory by Union Forces during the American Civil War. The justification was that sale of cotton provided funds for almost all Confederate arms and ammunition. The connection between military action and exports, required to finance the war effort, does however seem too remote. As Prof. Dinstein states: "*Had raw cotton been acknowledged as a valid military objective, almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort.*"⁶⁴ To elaborate on this: doesn't the concept of war-sustaining bear the risk that attacks could be aimed directly at the economic capacity of the adversary? What about attacks against the stock market, taxation authorities, etc.? This questioning should not be misunderstood. I believe that it is correct to say that economic targets may be military objectives under certain circumstances, but there must be then a proximate nexus to military action or war-fighting. In any case, in order to assess whether we are quarrelling merely on semantics or whether there is more to it, one need to discuss concrete cases and see whether both approaches come to the same conclusions.

Dual-use objects

A particular problem arises with regard to objects that serve both civilian and military purposes, such as airports, oil refining facilities or electricity generating plants, objects, which are sometimes called dual-use objects. It should be stressed that "dual-use" is not a legal term. The special feature of an attack against such objects is that it inevitably affects the civilian population. Looking at the structure of Art. 52 AP I, there is no intermediate category. The negative definition of civilian objects means that military objectives and civilian objects are mutually exclusive. The nature of any object must be assessed under the definition of military objectives provided for in Additional Protocol I. Thus, it may be held that even a secondary military use may turn such an object into a military objective.

However, an attack on such an object may nevertheless be unlawful if the effects on the civilian use of the object in question violate the rule of proportionality, i.e. if the attack may be expected to cause excessive incidental civilian damages or casualties, or if the methods or means of the attack are not chosen with a view to avoiding or at least minimizing incidental civilian casualties or damage. In making the proportionality assessment, the civilian part of the object affected by the attack, including foreseeable reverberating effects, must be counted

⁶³ A.R. Thomas/James C. Duncan (eds.), "Annotated Supplement to The Commander's Handbook on the Law of Naval Operations", *International Law Studies*, Vol. 73, 1999, p. 403.

⁶⁴ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, p. 87.

among the incidental civilian damage in addition to the possible civilian damage to civilian property in the vicinity.

Objects normally used for civilian purposes

There is considerable debate as to when traditionally civilian objects may make an effective contribution to military action and become legitimate military targets. One contentious example of past armed conflicts has been the case of TV and radio stations. While it should be without doubt that TV and radio stations become military objectives if they are used for military communications or to transmit military orders, this should not be the case if they serve as a mere propaganda instrument or as a line of communication between the regime and its population. It would be more than doubtful whether the latter use could legitimately be considered an "*effective contribution to military action*". The unpredictability of a population's actions in regard to its government in a time of national crises makes it impossible to conclude that destroying media facilities will provide a "definite" advantage. Also the military nature of such claimed advantage is doubtful. As Marco Sassoli and Lindsey Cameron have pointed out targeting media or broadcasting stations in order to prevent the regime under attack from communicating with its civilian citizens, defending its reasons for fighting and disseminating propaganda is tantamount to attacking the public will to maintain the conflict.⁶⁵

Those who justify attacks on these grounds sometimes introduce distinctions based on whether the regime that uses the media facilities fights an unjust war. Such arguments clearly run counter the basic tenet that the application of the *ius in bello* is independent of considerations stemming from *ius ad bellum*. Any attempts to conflate the two should be rejected, not just because each Party to an armed conflict will claim that its use of force is justified under the rules of *ius ad bellum*, but more importantly the victims of both sides deserve the same protection.

⁶⁵ Marco Sassòli, Lindsey Cameron, "The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*", in: Natalino Ronzitti, Gabriella Venturini (eds), *Current Issues in International Humanitarian Law of Air Warfare*, Utrecht, 2006, p. 54.

New approaches which may be seen as widening the definition

Some voices in essentially military writing suggest the necessity of influencing the public will in order to bring hostilities to a quicker end and therefore see the political, economic, social or psychological importance of objects as possible determining factors. Certain theorists advocating effects-based targeting are even willing to accept that civilian private property which is not essential for the civilian survival be directly attacked and also include psychological targets.⁶⁶ However, if such an approach would be followed, the assessment of whether an object is a lawful target would invite boundless interpretations and be highly speculative. The thinking is based on an at least unproven premise – that attacking civilian objects will shorten conflicts by influencing public will; history shows rather that attacks that made life more difficult for civilians during the Second World War and other conflicts had the effect of crystallizing support for the existing regimes.⁶⁷ By the same token, interpretations that accept attacks on the morale of the civilian population as a means of influencing the enemy's determination to fight would lead to unlimited warfare, and should be rejected. The step from causing mere hardship to the civilian population, which is an inevitable consequence of all armed conflicts, to causing substantial damage to, for example, civilian infrastructure, would be very small indeed and could lead belligerents to slowly give up any form of restraint in the choice of targets. Such theories in fact seem to give up the criterion of “*effective contribution to military action*”. No alternative limiting criteria are proposed that would guarantee a minimum of humanity in an armed conflict and that could be objectively assessed – without too many speculations about causalities and future impacts on the enemy.

Is there a potential for further clarification?

The current definitional approach favours a flexible definition. Art. 52(2) AP I is a valuable guide, but not always easy to interpret, particularly for those who have to decide about an attack and on the means and methods to be used. Despite the challenges of interpretation created by such an approach, this approach remains the best possible. It allows taking into account that the battlefield situation may change, e.g. objects used for military purposes at a certain point may not be used for such purposes at a later point in time. The

⁶⁶ Charles P. Dunlap, “The End of Innocence: Rethinking Non-combatancy in the Post-Kosovo Era”, *Strategic Review*, 2000, p. 9.

⁶⁷ Marco Sassòli, Lindsey Cameron, *ibid.*, p. 60 et seq.

definition is adaptable enough to remain relevant in changing conflict environments. However, it heightens the importance of a good faith implementation.

In the light of the fairly general wording of the definition of military objectives, there seems to be a *prima facie* necessity to attempt to work for further clarification – at least to reach agreement on the main parameters that must be taken into account when applying the two-pronged test. Also the many discussions on the legitimacy of certain attacks in past and current armed conflicts seem to argue in favour of a need to further clarify. When looking at particular attacks in order to extrapolate more general guidance, it will be crucial that everyone argues on the basis of the same facts.

Should the generic definition be completed / clarified by a list of objects that may be military objectives? Many attempts have been made in the past. Obviously, examples can add clarity to generic definitions. But it must always be kept in mind that such a list, if agreement could be reached, would necessarily not be exhaustive. In addition, the mere fact that an object is on the list, such as lines of communication, does not mean that it is necessarily a military objective. It must still be shown that the object makes an effective contribution to military action and its destruction/capture/neutralization offer a definite military advantage.

To conclude, the definition is fine, but there may be potential for interpretive clarification.

METHODS AND MEANS OF WARFARE

Human Shielding from the Attacker's Perspective

Michael N. SCHMITT

Stockton Professor of International Law, United States Naval War College

Although an increasingly prevalent feature of 21st century warfare, human shielding, labelled “*counter-targeting*” in military parlance, hardly represents a new tactic on the battlefield. On the contrary, shields were employed in the American Civil War, the Boer War, both World Wars, the Gulf War of 1990-91, and operations in the Balkans (including the use of captured UN military personnel). More recently, the Iraq Army and Iraqi insurgents have used human shields during *Operation Enduring Freedom*, Hamas has done so in the Occupied Territories, and Hezbollah adopted the practice during *Operation Change Direction*, the 2006 Israeli incursion into Lebanon.

In great part, the dramatic asymmetry characterizing many of today's conflicts engenders human shielding. Confronted with overwhelming technological superiority, weaker Parties have turned to shielding as a method of warfare designed to counter attacks against which they cannot effectively defend using the weaponry and forces at their disposal. The tactic presumes that the prospect of killing civilian shields will sometimes deter an attacker from striking military objectives.

This presumptive deterrence can manifest itself in one of three ways (or a combination thereof). First, the attacking side may refrain from attack due to moral concerns about harming civilians who, in some cases, may have been forced to act as shields. Second, the attacker may abandon a planned attack because of possible negative communicative consequences. After all, images and accounts of dead and injured civilians transmitted throughout the globalised media (which is often silent as to the resulting military advantage) can make it appear as if the attacker has mounted inhumane operations. In many cases, this is

the very objective of the party employing shields. It seeks a weakening of support for the enemy's war effort (or the generation of opposition thereto) on the part of the international community, other States (including coalition partners), non-governmental organizations, and individuals, as well as enhanced support for its own position. In this regard, even a tactical event that results in civilian casualties poses the risk of strategic consequences. Third, at a certain point, the number of civilians likely to be injured or killed in an attack against a military objective may be excessive relative to the military advantage anticipated from the attack, such that the principle of proportionality, discussed below, bars attack as a matter of law. Using the law in a manner intended to impede the enemy's operations (at the tactical, operational or strategic levels) has been called lawfare. Importantly, lawfare not only includes instances in which the intended operation would in fact be unlawful, but also those in which the attacker's operations might be perceived as unlawful.

This contribution to the Round Table analyses the International Humanitarian Law (IHL) applicable to those who face human shields -- the "attackers." It is undisputed that the use of human shields violates IHL. With respect to international armed conflict, Additional Protocol I (API), Article 51.7 provides:

*"The presence or movement of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."*⁶⁸

Pursuant to the Statute of the International Criminal Court, Article 8(2)(b)(xxiii), *"utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations"* constitutes a war crime in international armed conflicts.⁶⁹ The International Committee of the Red Cross' International Customary International Humanitarian Law study, Rule 97, provides that *"[t]he use of human shields is prohibited"*, asserting that the norm applies in both international and non-international armed

⁶⁸ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 51.7, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I]. See also, Article 12.4 of AP I, which provides that *"under no circumstances shall medical units be used in an attempt to shield military objectives from attack"*; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 28, 6 U.S.T. 3516, 3518-20, 75 U.N.T.S. 287, providing *"the presence of a protected person may not be used to render certain points or areas immune from military operation."*

⁶⁹ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9*, 37 I.L.M. 1002 (1998).

conflict.⁷⁰ The *San Remo Manual on the Law of Non-International Armed Conflict*, paragraph 2.3.8, is in concordance regarding non-international armed conflict: “*The use of civilians (as well as captured enemy personnel) to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary’s operations.*”⁷¹

In 2005, the Israeli Supreme Court addressed shields in Adalah (the “Early Warning” case). The Court specifically found unlawful the Israeli use of Palestinian civilians as “shields” to walk through buildings suspected of being booby-trapped, enter areas before soldiers, and accompany Israeli forces to prevent attacks. Although the Israeli Defence Force forbade the practices prior to the litigation, the Court nevertheless confirmed their illegality.⁷² It also condemned the use of civilians to convey warnings to surrender to wanted persons in places besieged by the Army, even when the civilians were not “forced” to issue the warning.⁷³

That treaty and customary law forbid the use of human shields is unquestionable. However, the sole provision applicable to the attacker’s obligations in shielding situations is AP I, Article 51.8: “*Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.*” The customary nature of the provision is uncertain. In light of the paucity of express norms, the traditional IHL applicable to attacks in general governs the attacker’s reaction thereto. These include the notion of direct participation, the principle of proportionality and the requirement to take precautions in attack, all discussed *infra*.

When analysing the obligations shouldered by an attacker faced with shielding of a military objective, it is useful to distinguish between voluntary and involuntary shields. The former elect to shield, whereas the latter are either compelled to do so or the Party facing attacks takes advantage of their presence. For the purposes of simplicity, the following examination will focus on international armed conflict; however, the analysis would apply equally in non-international armed conflict.

Voluntary Shielding

⁷⁰ Jean-Marie Henckaerts & Louise Doswald-Beck (eds.), *ICRC, Customary International Humanitarian Law*, 2005, Rule 97 [hereinafter CIHLS].

⁷¹ Michael N. Schmitt, Charles H.B Garraway and Yoram Dinstein, *The San Remo Manual on the Law on Non-International Armed Conflict*, International Institute of Humanitarian Law, 2006, reprinted in *Israel Yearbook on Human Rights*, Vol.36, 2006 (Special Supplement).

⁷² HCJ 3799/02 Adalah v. GOC Central Command [June 23, 2005], para. 21.

⁷³ *Id.*, para. 25.

Voluntary shielding has occurred in a number of ways during recent conflicts. At times, officials or other influential individuals have encouraged the civilian population to “protect” potential sites of attack. For instance, Iraqi officials urged Iraqis to engage in shielding during *Operation Desert Fox*, the 1998 air assault against Iraq in response to its expulsion of UN weapons inspectors. At other times, individuals have engaged in shielding *sua sponte*. Prior to the commencement of *Operation Iraqi Freedom* in 2003, for example, foreign peace activists travelled to Iraq to act as shields, although they generally withdrew before the air campaign began.

Three approaches to voluntary shielding appear in the literature and in academic and professional discourse. The first represents the most restrictive. This approach treats voluntary shields as civilians who are fully entitled to all the IHL protections civilians enjoy. They are immune from attack pursuant to API, Article 51.1, universally accepted as customary in nature. Moreover, they factor fully into the proportionality analysis that Articles 51.5(b) and 57.2(b) require. Both provisions reflect customary law.⁷⁴ The principle requires attackers to refrain from any attack “*which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*” In other words, there would be no difference in determining excessiveness as between voluntary shields, on the one hand, and civilians who simply happened to be in the target area and were likely to be harmed incidentally, on the other.

A similar treatment of the shields would apply to the precautions required of attackers under Article 57 and customary law. By these requirements, they must employ alternative means (weapons) and methods (tactics) of warfare, and select other targets, if doing so would result in fewer incidental civilian injuries or death (assuming a similar military advantage was attainable). In that this first approach unqualifiedly characterizes voluntary shields as civilians, efforts to minimize harm to them would be required, even in the absence of “innocent” civilians who might also be spared by the precautions in attack.

The approach, albeit prevalent, poses a major dilemma. By the proportionality principle, the Party using the shields can absolutely immunize a target from attack...as a matter of law. It is simply a matter of gathering enough human shields in the target area to render the resulting harm to them “excessive.”

⁷⁴ CIHLS, *supra* note 3, rule 14.

A second approach to voluntary shields, one adopted by the Israeli Supreme Court in its landmark “targeted killings” judgement,⁷⁵ avoids this result by treating them as direct participants in hostilities. By API, Article 51.3, civilians lose protection from attack “*unless and for such time as they take a direct part in hostilities.*” The norm is customary in nature, although significant disagreement exists over both the acts that rise to the level of direct participation and the duration of the loss of protection.⁷⁶

Advocates of the first (full civilian) approach argue that shielding does not amount to direct participation in that it fails to meet the requisite qualitative threshold. Specifically, they assert that shields are neither defending the military objective in the sense of posing a threat to the attacker, nor physically impeding attack, for instance by intentionally blocking passage of enemy forces across a bridge. In their view, simply causing the attacker moral pause or constituting a legal restriction is insufficient.

Such arguments are illogical. A civilian who takes up arms against an attacker may well be less effective in deterring or defending against attack than one who shields. After all, an attacker can still strike a target that is being defended, whereas it may not do so as a matter of law once a sufficient number of shields have gathered such that attack would be disproportionate. Even beyond the law, the technology fielded by asymmetrically advantaged military forces has increasingly rendered defensive systems ineffective, while the “CNN effect” generated by images of civilian casualties has enhanced the effectiveness of shields in precluding attack. Therefore, from an operational perspective, treating voluntary shields as direct participants makes much sense. Any distinction between physical impediments to attack and legal, moral or communicative ones simply flies in the face of the realities attendant in contemporary warfare.

The characterization also finds root in the balance between military necessity and humanitarian considerations that underpins all International Humanitarian Law. Noted as early as the 1868 St. Petersburg Declaration, IHL “*fix[es] the technical limits at which the necessities of war ought to yield to the requirements of hostilities.*”⁷⁷ In other words, IHL takes cognizance of the military’s need to fight effectively by tempering humanitarian norms with military common sense. This must be the case, for it is States, through either *lex scripta* or

⁷⁵ HCJ 796/02, The Public Committee against Torture v. Israel, Judgement (Dec. 13, 2006)

⁷⁶ CIHLS, *supra* note __, rule 6.

⁷⁷ St. Petersburg Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297.

practice maturing into custom, which create IHL. States would never accept humanitarian norms that deprived them of their ability to engage successfully in warfare.

In that shielding leverages IHL's humanitarian concerns for military gain, it wildly skews this delicate balance. Existing positive norms take account of the balance; as treaty law, they reflect State consensus on how the balance is to be set...and maintained. Yet, when the evolving nature of conflict reveals a lack of normative clarity, black letter rules must be interpreted in the manner that best reflects the foundational balance underlying IHL. Article 31 of the Vienna Convention on the Law of Treaties bolsters this approach by requiring interpretation in accordance with the "*object and purpose*" of a treaty.⁷⁸ All IHL treaties reflect the object and purpose of maintaining the military necessity-humanitarian considerations without which no such treaty would be possible.

Styling voluntary shields as direct participants may concern some that they may, as a consequence, be directly targeted. While this is true as a matter of law, in practical terms doing so would serve little practical purpose. Quite aside from the negative publicity any such action would generate, attacking shields would violate the military principle of "*economy of force*." That principle suggests that commanders should preserve their assets for use against the most lucrative targets; killing shields would serve little military purpose.

Since voluntary shields lose their protection from attack, they self-evidently do not factor into a proportionality analysis as incidental injury. Similarly, they would not be considered in assessing whether alternative weapons, tactics or targets could minimize incidental injury and death of civilians pursuant to the precautions in attack requirements.

A third approach to voluntary shields discounts them in proportionality calculations and precautions in attack analyses. As this approach applies most notably to treatment of involuntary shields, discussion thereof shall occur in that context.

Involuntary Shields

In examining the IHL applicable to involuntary shields, it is first necessary to determine whether they qualify as such. The presence of civilians on the battlefield is a common incident of modern warfare, particularly in light of the modern weaponry that makes strikes throughout the enemy's territory possible from the outset of a conflict. Such civilians enjoy the full protection of IHL.

However, when a Party intentionally takes advantage of said protections as a form of counter-targeting without the acquiescence, or perhaps even knowledge, of the civilians in

⁷⁸ Vienna Convention on the Law of Treaties Art. 31, May 23, 1969, 1155 U.N.T.S. 331.

question, the act qualifies as human shielding which, in the opinion of many experts, merits different treatment. As with voluntary shielding, there are three possibilities.

An extreme view urges that the involuntary shields should not be considered at all in the proportionality and precautions in attack analyses because an enemy violating IHL should not be allowed to benefit from its malfeasance. However, IHL contains scant precedent for allowing a Party to support the loss by a civilian of his or her protected status due to the unlawful action of the enemy. The sole possible exception is the law of reprisal, which permits a Party facing IHL violations to resort to IHL violations in order to force its opponent back into compliance. Even this exception is highly controversial; AP I in particular dramatically curtails its use for States Party.⁷⁹

A polar opposite approach treats involuntary shields as civilians entitled to the full benefits of their IHL protections. The underlying premise of the approach is that the relevant IHL provisions operate in favour of individual civilians, not the Parties to the conflict. Therefore, neither Party should be allowed to deprive them of their protections. It is this very premise on which the shielding prohibitions are based.

AP I, Article 51.8, set forth above, provides further support for treating involuntary shields as fully entitled civilians. By the article, a violation of the provisions on the protection of civilians, including the prohibition on shields, does not release the opposing side from its own obligations *vis-à-vis* civilians. Thus, so the argument goes, involuntary shields should factor fully into proportionality and precautions in attack assessments.

A third approach retains the characterization of shields as civilians who retain immunity from attack, but suggests that they should be discounted when calculating incidental injury for proportionality (and precautions) purposes. The UK Manual of the Law of Armed Conflict adopts this position for British Forces.⁸⁰ Specifically, paragraph 2.7.2 provides that:

"[e]ven where human shields are being used, the proportionality rule must be considered. However, if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives."

Para 5.22.1 is even more unequivocal: *"The enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected."*

⁷⁹ See, e.g., API, *supra* note, Art.s 20, 51.6, 52.1, 53(c), 54.4, 55.2, 56.4.

⁸⁰ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004.

The approach has found advocates in academia. Most notably, Professor Yoram Dinstein has argued that in the face of involuntary shielding,

*“the principle of proportionality remains prevalent. However, even if that is the case, the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher”*⁸¹

Major General APV Rogers takes a similar approach when commenting on how a tribunal considering the practice might respond. In his opinion, it would

*“be entitled to take all the circumstances into account and attach such weight as it considers proper to such matters as the defender’s...deliberate use of civilians or civilian objects as a cover for military operations...or use of hostages or involuntary ‘human shields.’ It is submitted that the proportionality approach by tribunals should help redress the balance [between the rights and duties of attackers and defenders] which otherwise would be tilted in favour of the unscrupulous.”*⁸²

Those opposed to this position reply that there is no precedent in IHL for discounting civilian value in a proportionality analysis. In fact, a somewhat analogous situation, workers in a munitions factory, is well-discussed in the literature. Although virtually all commentators agree that the worker is a civilian who is not directly participating in hostilities, many take the view that he or she is not entitled to the full benefits of civilian status while at work. General Rogers, for example, cites *“use of civilians in war support activities”* as one of the factors a tribunal would consider when making affected proportionality assessments,⁸³ while Professor Dinstein has stated that industrial plant workers *“enjoy no immunity while at work. If the industrial plants are important enough..., civilian casualties – even in large numbers – would usually come under the rubric of an acceptable collateral damage.”*⁸⁴ Perhaps most persuasively, the Michael Bothe, Karl Partsch and Waldemar Solf 1982 Commentary on the Additional Protocols states that *“it is doubtful that incidental injury to persons serving the armed forces within a military objective will weigh as heavily in the application of the rule of proportionality as that part of the civilian population which is not so closely linked to military operations.”*⁸⁵

⁸¹ Yoram Dinstein, *The Conduct of Armed Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, p.131.

⁸² A.P.V. Rogers, *Law on the Battlefield*, 2nd ed., 2004, p.129

⁸³ *Id.* at 131.

⁸⁴ Dinstein, *supra* note, at 124.

⁸⁵ Michael Bothe, Karl J. Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts*, 1982, p.295

Discounting the value of involuntary shields does not violate Article 51.8's proviso that a violation of the norms safeguarding civilians does not release the other side from obedience thereto. Advocates of this third approach zealously maintain that the involuntary shields qualify as civilians (vice direct participants or unlawful combatants) and that the principle of proportionality applies to the attack. They merely suggest how to apply the principle.

In a sense, the military necessity-humanitarian considerations balance underpinning IHL has been adjusted. For that reason, the approach cannot be dismissed as merely *lex ferenda*. Further, and as noted, treaties must be interpreted in light of their objective and purpose and international law generally should be interpreted mindful of the context in which it applies.

Yet, formal interpretive nuances aside, how does one apply the approach in practice? In other words, how can it be operationalized? Assessing proportionality is already one of the most complex and difficult decisions made by warfighters, one that eludes easy quantification. Suggesting that some civilians are less valued than others renders an elusive determination only more so.

Perhaps a slightly modified approach might prove useful. Involuntary shields would count fully as civilians in the proportionality analysis. However, as is very frequently the case, the proportionality of a strike may be unclear. By this modified version of approach three, an attacker facing such uncertainty would be entitled to conclude the strike would be proportionate, i.e., that the injury to civilians would not be excessive. It is important to point out that the "presumption" would not apply in the event the attack is expected to be clearly proportionate or disproportionate. Such an approach preserves the rule of proportionality in its entirety, while rebalancing the disequilibrium in the military necessity-humanitarian considerations dichotomy caused by human shielding. It is a methodology for resolving uncertainty, not a devaluation of civilians, or the protections to which they are entitled.

An obvious practical problem with this approach lies in determining when it applies, i.e., distinguishing instances in which the enemy is intentionally exploiting the presence of civilians to its advantage (shielding) from those in which civilians are only coincidentally present. Many times, it is a simple matter to determine whether the civilians are being used as shields. For instance, during the Gulf War of 1990-91, Iraqi security forces seized foreigners, including children, and held them as shields. Or during the hostilities in Bosnia in 1995, the Serbs used captured and handcuffed UN peacekeepers as shields against NATO air

attacks.⁸⁶ More recently, it has become commonplace for Iraqi insurgents in vehicles to pull up close to civilian vehicles whenever they spot US helicopters.

Yet, the intent to use shields is often not demonstrable. In such cases, a presumption against discounting (or the modified version thereof) value in the proportionality calculation should attach. That is, absent evidence from which a reasonable warfighter in same or similar circumstances would conclude the civilians were being employed as shields, they are to be treated as ordinary civilians who find themselves at risk due to hostilities. Article 50.1 of AP I, which imposes a presumption in favour of civilian status (vice combatant) in “case of doubt,” imposes an analogous presumption *vis-à-vis* status.

Discerning readers may protest that the modified discounted value approach runs counter to the presumption of civilian status in that it devalues civilians. Technically, it does not. A presumption of civilian status in cases of doubt as to whether an individual is a civilian or combatant still attaches. Nor does the approach assign lesser value to some civilians than others.

In fairness, though, there is arguably a diminishment in *de facto* protection for civilians; after all, attackers are entitled to resolve uncertainty as to proportionality in favour of an attack being proportionate...thereby placing the shields at risk. But what must be remembered is that IHL offers no mechanism for resolving doubt of this nature, as it does in the case of civilian status. In the absence of an express presumption, applicative interpretation must factor in the military necessity-humanitarian considerations dynamic.

Thus far, analysis of the attacker’s obligations when facing human shielding has distinguished between voluntary and involuntary shields. In many cases it is a simple matter to distinguish between the two situations. Situations involving civilians who have responded to a leader’s public call to shield or shielding that has been preannounced by, for instance, peace activists are illustrative. However, many times the situation will prove ambiguous.

Of course, if one adopts the approaches to involuntary and voluntary shields that call for full civilian protections, the distinction makes no difference. The same is true if one applies the discounted value approach to both types of shields. However, embracing either the voluntary shield as a direct participant or the discounted value approach only as to voluntary shields would necessitate a means of distinguishing the two categories.

As noted, API, Article 50.1, imposes a presumption in favour of civilian, and against combatant, status. Since neither combatants nor civilians who directly participate in hostilities, enjoy immunity from attack, in cases of doubt it is reasonable to analogously apply

⁸⁶ UNSCR 998 (1995).

a similar presumption against characterizing a civilian as a voluntary shield who is directly participating. Further, since a status distinction is involved (rather than a methodology for resolving doubt in the proportionality calculation), a similar presumption of involuntariness should attach when those who would apply the discounted value mechanism only to voluntary shields encounter doubt as to the intent of the shields. In such cases, the appropriate IHL standard is whether a reasonable warfighter in same or similar circumstances would hesitate to act based on the degree of doubt he or she harboured.

As to resolving doubt, recall that AP I, Art. 57.2a(1), requires an attacker to do “*everything feasible*” to verify that the objective to be attacked is not a civilian. Since the reason this is done is to ensure the individuals concerned receive the full protection to which they are entitled under IHL, it makes sense that those who would distinguish an attacker’s treatment of involuntary and voluntary shields should shoulder a similar obligation to discern whether the shields are acting voluntarily or not.

Closing Remarks

Clearly, the normative regime pertaining to human shields is characterized by discordance.

Do voluntary and involuntary shields merit different treatment in proportionality calculations and precautions in attack requirements?

If so, are voluntary shields direct participants in hostilities?

Does it matter how they are shielding (physically shielding as distinguished from affecting the proportionality assessment or causing moral pause)?

Do voluntary or involuntary shields (or both) “count” differently in the proportionality analysis?

If so, how can the approach be operationalized?

What are the standards for resolving doubt as to Status as a voluntary or involuntary shield; and Status as an involuntary shield or merely someone caught up in the hostilities?

Such quandaries have moved from the ivory tower onto the battlefield itself. For many reasons, especially the prevalence of asymmetrical warfare in 21st century conflict, the resort to use of human shields has become a tragically commonplace tactic. It is essential that the IHL community address the issue promptly and in an organized fashion; failure to do so will only leave civilians at risk and military forces without the definitive guidance they deserve.

The Principle of the Prohibition of Superfluous Injury or Unnecessary Suffering

Théo BOUTROUCHE

Faculty of Law, University of Geneva

I would first like to thank very sincerely the organizers of this Round Table for having invited me and for giving me the opportunity to speak today before such a distinguished audience. It is a great opportunity for me to be able to talk about the principle of the prohibition of superfluous injury or unnecessary suffering (*“l’interdiction des maux superflus”* in French). But given the time constraints, it is a difficult challenge as well to grasp a prohibition that was once qualified by Antonio Cassese as *“one of the most unclear and controversial rules of warfare”*.

Introductory remarks on the principle of the prohibition of superfluous injury or unnecessary suffering in International Humanitarian Law (IHL)

The prohibition of superfluous injury or unnecessary suffering is at the heart of The Hague Law regulating the conduct of hostilities and is a well-established principle both in treaty law and in customary law. It also applies in non international armed conflicts. When discussing the principles of IHL, this prohibition is often referred to in parallel with the principle of distinction. The International Court of Justice (ICJ) qualified the two principles as *“intransgressible principles of international customary law”* or as *“cardinal principles ... constituting the fabric of humanitarian law”*. Paradoxically, its definition and content have always been controversial and remain partly unsettled.

The wording of this principle encapsulates one of the core pillars of IHL - the principle of military necessity as a limitation to military action, i.e. avoiding what is not necessary. Consequently, the prohibition of 'unnecessary suffering' is sometimes used as a concept explaining every rule of IHL or as a rule protecting directly the civilians. However, as a legal principle, the prohibition of superfluous injury or unnecessary suffering refers mainly to the effects of a weapon on combatants.

Indeed the rationale behind the protection of combatants is different from the one on which the protection of civilians is founded. Whereas civilians cannot be targeted, combatants are legitimate military targets that can be lawfully killed under IHL. This is a critical element to bear in mind when trying to define this principle. On the other hand, the recognition of limits to the lawful infliction of death, injury or suffering against legitimate targets illustrates ultimately the humanitarian and moral essence of IHL, as underlined by Hugo Slim in his presentation: *Protecting and valuing the human person, irrespective of the military threat posed by the combatant*.

As far as one can clearly trace back its origins, the first formulation of what is meant by unnecessary suffering appears in the context of the prohibition of a specific weapon: the St Petersburg Declaration on Explosive Projectiles Under 400 Grammes Weight. The Hague Conferences of 1899 and 1907 constitute a turning point by codifying for the first time the principle and shaping more precisely the normative framework to regulate weapons. There are two complementary approaches, one based on general principles prohibiting certain effects, and one based on specific limitations or bans of particular weapons. Art. 23 e) of the 1907 The Hague Regulations concerning the Laws and Customs of War on Land exemplified this architecture. Finally, Article 35 (2) of Additional Protocol I provided for the most elaborated formulation of this principle. Whereas it was developed as only applicable to means of warfare (weapons), Article 35 (2) extended its application to methods of warfare (the way weapons are used). The ICRC Customary Law Study concluded that the actual customary norm covers both means and methods of warfare. State practice regarding the exact scope of this extension and the type of methods that could be banned on the basis on the general prohibition still remain unclear though.

This contribution will focus on the issue of the definition and content of the principle with regard mainly to means of warfare. It will first build upon the commonly accepted core definition of this principle that imposes a balance between the effects of a weapon and its military advantage or utility. Secondly, it will seek to go beyond this mere formulation to elaborate a more precise definition. I will proceed by using examples of particular weapons.

Finally, I will conclude by briefly stressing the role this principle can play to face contemporary challenges.

The commonly accepted definition of means of warfare that cause superfluous injury or unnecessary suffering

As one criterion to assess the legality of weapons, the prohibition of superfluous injury or unnecessary suffering calls for a workable test to conclude whether or not the law is violated with regard to a particular weapon. At first sight State practice appears too fragmented to come up with a commonly agreed test. The terms of the rule seem really complicated to reconcile through a legal definition. Especially if one considers the close link between this prohibition and the notion of excessive cruelty. It implies a subjective evaluation of the effects of a weapon as well as the difficult task of weighing those effects with its military utility. However, this is not the only rule of IHL to be facing this kind of challenge. As shown earlier during this Round Table, the principle of proportionality also proves to be difficult to apply in the context of the definition of indiscriminate attacks. Finally, the prohibition of unnecessary suffering calls for the use of standards pertaining to different disciplines such as medicine or ballistics, outside the legal sphere.

Concretely, how to determine what injury and suffering are superfluous or unnecessary? The words superfluous and unnecessary imply a relationship: unnecessary or necessary *vis-à-vis* a particular benchmark. There have been two main ways of interpreting the standard of reference to evaluate this necessity:

The first one, sometimes called the 'humanitarian' or 'medical' interpretation, is founded on the nature and/or the quantity of the effects of the weapon. It would imply the existence of a threshold beyond which any weapon, whatever its military utility, causes unnecessary effects. Sometimes this threshold is defined with reference to the injury or suffering inflicted on a person to put them *hors de combat*. The SIrUS Project initiated by the ICRC was partly based on this approach despite a slightly different method. The focus was on describing the effects of commonly used conventional weapons with a view to gathering data. After having identified a series of main effects of conventional weapons, such as the mortality rate, the authors of the Project used the findings to conclude that weapons that were producing effects above one of those effects were to be considered as causing superfluous injury or unnecessary suffering. It was criticized for not taking into account the other key element of the test, the military side.

The second interpretation lies in a comparison between the effects of the weapon and its military utility. It is the definition recognized by State practice. Although it seems to run against the humanitarian spirit of the rule by using the military purpose of a weapon as the yardstick, integrating military considerations within legal rules is the very nature of IHL. However, striking a balance between those two elements as a test to define superfluous injury and unnecessary suffering appears to bring more questions than answers.

Defining the effects to be taken into account: what are the suffering and the injury?

This prohibition focuses on the nature and/or the quantity of the effects of a weapon. It is a very difficult issue to grasp in terms of definition. Thus the difference with the protection of civilians should be stressed. Civilians are protected from any type of harmful effect. Sometimes confusion may occur. During the debate over the legality of anti-personnel landmines, reference has been made to the nature of the injury caused by landmines, mainly amputation, when discussing the effects on civilians.

The prohibition of superfluous injury or unnecessary suffering leads to an apparent incongruity in IHL: while it would be lawful to kill a combatant, it is unlawful to inflict a certain type of injury or suffering? There is a crucial distinction to make in order to solve this contradiction. Death as a result of the use of a particular weapon can be a possibility but there is no certainty about this effect. On the other hand, specific injury or even death can be a systematic effect of a weapon, flowing from its nature, whichever way the arm is used. A bullet of a rifle may kill whereas poison will render death inevitable. The debate over the legality of anti-personnel blinding laser weapons has been partly flawed by disregarding such distinction.

Two main issues will be briefly addressed with regard to the definition of suffering and injury.

The first one relates to the effects themselves. The words injury and/or suffering as codified in Article 35 (2) are at the heart of one of the most famous language debates in IHL. The St. Petersburg Declaration used the word 'suffering' which remained in the 1907 Hague Regulations despite its drawbacks to serve as a benchmark. The French words '*maux superflus*' were already used in The Hague Regulation allowing for a wider notion including injury. The corresponding English translation makes use of both terms - injury and suffering - as the closest equivalent for "*maux*". Further, the development of knowledge of the effects of weapons helped to shape the type of suffering to consider. State practice now recognizes both physical and psychological suffering as relevant effects. The question of death as an effect of

weapons is a complex one in the context of superfluous injury or unnecessary suffering. The St. Petersburg Declaration Preamble prohibited two effects: '*aggravating suffering*' and rendering death inevitable. The reference to the latter disappeared in subsequent IHL instruments. Some argued that it was not necessary anymore considering the fact that the prohibition of poison was codified. The two propositions are, however, not synonymous. The core issue is whether or not the prohibition of weapons rendering death inevitable is separate from the rule prohibiting superfluous injury or unnecessary suffering. This has been a point of contention in the case on the legality of nuclear weapons before the ICJ. State practice shows that it is more an effect that falls under the general prohibition of superfluous injury or unnecessary suffering rather than an autonomous rule.

The second issue is the causation link as a requirement between the relevant effects and the weapon. It refers to another difference of translation: the English expression '*calculated to cause*' was used in the 1907 Hague Regulations and is still used in certain State declarations. This expression could restrict the scope of the prohibition as it implies that the weapon needs to be designed, intended, to cause such effects. The broader and more objective link based on the expression weapons '*of a nature to cause*' seems to be commonly accepted by States. The question remains to determine what the '*nature*' of a weapon means. Specific regulations on weapons, such as the 1980 Protocol I on non detectable fragments, used the criterion of the "*primary effect*". This would make the legal review dependent on technological aspects and could lead to odd legal niceties (another example is the debate of the qualification of white phosphorus as a chemical weapon under the 1993 Convention). But it is very important to be aware of those aspects to understand some controversies such as the debate over the legality of high velocity projectiles which may or may not have the same effects as dum dum bullets. Some States define the "*nature*" by reference to the normal and foreseeable use of the weapon (Belgium). This raises the question of the type of tests used to identify weapons effects. This issue of the effects is closely related to the other term of the equation, the military utility of the weapon.

The content of the 'military utility' of a weapon

As terrible as the effects of a weapon may be (even with mere conventional weapons injuring by mechanism of blast and/or fragmentation), they need to be compared to the military utility of the weapon in order to assess their lawfulness. Such a test seems to be opening a Pandora's box. The greater the military utility of a weapon, the easier it would seem to justify the injury and the suffering. This element of relativity is even more

troublesome when considering the various expressions used to describe the military side of the test in State practice: “military utility”, “military advantage”, “military objective”, “military necessity”. As far as the prohibition of superfluous injury or unnecessary suffering is concerned, there are still limits in the interpretation of “military necessity”.

The main limit is the necessary link between the military advantage and the use of the weapon itself. In this context, military necessity is not a broad concept that would change for each and every circumstance of use of the weapon. Further, it cannot serve as a justification to violate the prohibition of unnecessary suffering. However, the military purpose of a weapon is a complex notion to grasp. In that context the distinction between anti-personnel and anti-material weapons plays an important role in framing its interpretation and clarifying its content.

For anti-personnel weapons the easiest case is the example of bullets used against combatants. From the St. Petersburg Declaration onwards, the legal benchmark has been to assess what is necessary to ‘disable’ a soldier or put him ‘*hors de combat*’. Additional Protocol I defines the terms ‘*hors de combat*’ (Art. 41 §2 c): “*a person is hors de combat if he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself*”. Explosive bullets under 400 grammes in 1868 or expanding bullets in 1899 have been deemed to cause more harm than necessary to achieve this ‘individual’ goal. The specious argument based on a distinction between civilized soldiers and savages to justify the use of dum dum bullets against the latter was dismissed in 1899.

The situation is more complicated when one changes the scale or the context. First of all, when considering troops instead of individual soldiers, weapons can have an anti-personnel purpose but cause greater harm than necessary to put one soldier *hors de combat*. Second, the evolution of the military utility of a weapon may change the result of the equation. When explosive bullets of less than 400 grammes turned out to be very efficient against aircraft, they became anti material weapons. Their effect could not be solely assessed under the criterion of putting someone *hors de combat*. State practice restricted the scope of the rule to anti-personnel use (See ICRC Customary Law study, rule 78). Finally, one may refer to the issue of high velocity projectiles: even if it were proven that they have the same effect as expanding bullets, the failure to ban them might be due to a more complex military utility than when 1899 The Hague Declaration was discussed.

Anti-material weapons can cause terrible anti-personnel effects but they are secondary compared to the military purpose of the weapon: for example, the destruction of a tank. When weighed against the military element, those anti-personnel effects are justified.

Given the complexity and various elements of what the military utility of a weapon is, it is hardly surprising that most of the treaties prohibiting or limiting the use of specific means of warfare cover anti-personnel weapons with an individual purpose. It is the easiest case to reach a consensus on the application of the test balancing both elements.

The test to be applied: is it merely an issue of disproportion?

The general formulation of the prohibition that imposes to strike a balance between humanitarian effects of a weapon and its military utility leaves open the question of the nature of the relationship between the two elements. In other words it is the question of the proper test to assess the lawfulness of a weapon.

Some have stressed that superfluous injury and unnecessary suffering should be determined by State practice or by reference to specific weapons that are already considered to cause such effects. This would mean that there is no specific legal test to be applied. A close look at State practice shows that these are only factors among others that States take into account to implement this prohibition.

The superfluous or unnecessary character of an injury or a suffering calls for a comparison that States identify either as an absence of necessity (see the Military Manual of Canada) or as an issue of proportionality (see the New British Military Manual). Beyond the theoretical debate on the distinction between those two concepts, the question lies in its concrete application: does it mean that for the purpose of weighing the two elements of the prohibition, two tests are required?

The issue of necessity is often assimilated to the question of the availability of other weapons to achieve the same goal. This is definitely an element to take into consideration to assess the unnecessary nature of an effect. Some legal implications are interesting to stress. For example Rule 85 in the *ICRC Customary Law Study* is partly based on State practice referring to the prohibition of superfluous injury or unnecessary suffering. This rule prohibits the anti-personnel use of incendiary weapons unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. The same holds for the debate over the use of white phosphorus in Falludja in Iraq where it has been argued that there was no other way to get the Iraqi insurgents out of the trenches. On the other hand, the test to determine what injury or suffering are superfluous cannot be reduced to the question of available alternative weapons. It would mean that whatever injury is caused, even clearly disproportionate, it could be justified by the fact that there is no other weapon.

An interesting way of looking at the necessity/proportionality issue is to make a parallel with others branches of international law. Under *jus ad bellum*, for example, the conditions for an action in self-defence to be lawful implies first to verify whether the use of force *per se* was necessary and then to assess the proportionality of the type of measures that have been adopted. This would then be a test at two levels. State practice shows examples of this articulation in the context of the prohibition. Suffering or injury having no military purpose will be unlawful. When there is a military purpose, it is necessary to apply a test of proportionality. It is, however, difficult to conclude that those two tests are always distinguished. What is beyond doubt is that when applying the proportionality review, the effects of the weapon need to be clearly excessive to be qualified as unlawful.

Concluding remarks on the contemporary role of the prohibition

First of all, although State practice seems to be fragmented, it is possible to come up with an elaborate definition of superfluous injury and unnecessary suffering. There are obviously issues of application to specific weapons when the results of the equation are in dispute. There could be a need for interpretative guidance similar to the one initiated for the notion of direct participation in hostilities.

Second, the prohibition of superfluous injury or unnecessary suffering remains an essential legal yardstick to discuss the legality of means and methods of warfare as a translation into law of moral ban of cruel weapons.

Finally, the contemporary role of the prohibition of superfluous injury or unnecessary suffering is not restricted to the international forum of diplomatic conferences. It serves as legal criterion to review the legality of weapons at the State level, particularly under Article 36 of the Additional Protocol I. But this prohibition also has a critical role to play at a more operational level. Not only does it restrict, for the high rank military planners or decision makers, the ways or methods in which weapons can be used in order not to cause the prohibited effects, but it also plays a role for the soldier him/herself, on the battlefield, as it bans the modification of weapons for the purpose of increasing or causing suffering beyond that required by military necessity.

Mines, Cluster Bombs, Explosive Remnants of War (ERW)

Knut DÖRMANN, Head of the Legal Division, ICRC

The issues being addressed in this group reflect an area of international law which has developed perhaps more rapidly than any other in the past ten to twelve years. This area of International Humanitarian Law (IHL) covers weapons which go on killing, injuring and impacting societies long after the weapons have ceased to fulfil any military purpose.

My introduction will include a short appraisal of the current state of implementation of the Convention on the Prohibition of Anti-Personnel Mines and will make the case for new rules on cluster munitions. As many of you know some seventy States have committed themselves to concluding a treaty in 2008 which will prohibit those cluster munitions deemed to cause unacceptable harm to civilians, and States Parties to the Convention on Certain Conventional Weapons will decide in November if and how to address this issue within that framework.

Anti-personnel landmines

This year marks the 10th anniversary of the adoption of the Convention on the Prohibition of Anti-Personnel Mines, the Ottawa Convention. It counts today 155 States Parties. This instrument provides a comprehensive framework through its prohibition on all use of anti-personnel mines, its clearance and stockpile commitments and provisions for victim assistance. In this respect, it is a unique instrument which for the first time bans a

weapon in widespread use and requires States to take measures for the care, rehabilitation and reintegration of the victims of that weapon.

Implementation in the past ten years of the Ottawa Convention has been an important success. First, there has been a major decrease in the use of anti-personnel mines (AP mines) around the globe and even if 40 countries stay outside of the Ottawa Convention, evidence is that the use of this weapon has been truly stigmatized. Secondly, there has been a significant decrease in the production of AP mines and the international trade has virtually ceased, with even many non-States Parties having export moratoria in place (including China, India, Pakistan, Russia and the USA). Thirdly, over 39 million AP mines have been destroyed by States Parties. Perhaps, the most significant achievement of the Ottawa Convention is its success in reducing death and injury on the ground. The ICRC and our National Societies have observed that, where the Convention's norms are being fully applied, the annual number of new mine victims has fallen dramatically and in some cases by more than 60%. (e.g. Yemen, Cambodia, Bosnia-Herzegovina).

A number of major challenges remain. One of the most important is the fulfilment of mine clearance obligations⁸⁷, which requires States Parties to completely clear all areas containing AP mines under their jurisdiction or control within 10 years after the entry into force of the Convention for that States Party. More than half of the States Parties that have a deadline in 2009 or 2010 (i.e. 14 out of 27 States Parties) have indicated that they will definitely or probably have to ask for an extension of their clearance deadlines. It is most worrying that some of these States have not yet identified the full extent of mined areas in their country. Although extensions are permitted, it is crucial for the credibility of the Convention that mine affected States, and States Parties in a position to assist them, make meaningful efforts to achieve mine clearance within their Convention deadlines, so as to minimise the number of extensions needed.

Other ongoing challenges include the fulfilment by States Parties of the requirement to provide adequate medical and physical rehabilitation assistance to mine victims and the adherence by States which still remain outside the Convention's norms. In this regard it is particularly encouraging that this year's Meeting of States Parties is being held for the first time in the Middle East, at the Dead Sea in Jordan, and that the most recent ratifications have come from Kuwait and Iraq.

Cluster Munitions

⁸⁷ Article 5 of the Convention.

The problems associated with cluster munitions are not new. The use of these weapons in conflicts over the last 40 years has shown that a large proportion of these weapons have problems of accuracy and reliability. The impact of unexploded submunitions on civilians can be seen in places such as Laos, Afghanistan, Ethiopia, Serbia, Iraq and most recently Lebanon. While mainly used by military forces, reports also indicate that armed non-State actors have begun to have access to these weapons - raising concerns about the implications of their proliferation and highlighting the increasing costs of inaction.

The concerns arise from the impact that cluster munitions have on civilian populations. Cluster munitions have long term and deadly consequences for civilians both after conflicts when their submunitions fail to explode as intended and become explosive remnants of war and during conflicts when they function as designed. Failure rates are often between 15 and 40 percent of all munitions used. Since cluster munitions spread enormous numbers of explosive submunitions over very large areas, accuracy is often highly dependent on wind, weather conditions and reliability of complex delivery systems, there is a serious risk of civilian casualties where military objectives and civilians are co-located in a target area. The last forty years provide clear evidence of the impact of these weapons on civilian populations and war affected countries. Few conventional weapons have such characteristics.

No IHL treaty currently has specific rules for cluster munitions. Like other weapons used in armed conflict, however, their use is regulated by the general rules of IHL that govern the conduct of hostilities. The history and effects of cluster munition use in recent decades raises important questions about whether the general rules are sufficiently specific and about how rigorously fundamental rules of IHL are being applied to cluster munitions and, in our view, demonstrates the need for new rules.

Firstly, there are questions as to whether cluster munitions can be used in populated areas in accordance with the rule of distinction and the prohibition of indiscriminate attacks. These rules are intended to ensure that attacks are directed at specific military objectives and are not of a nature to strike military objects and civilians or civilian objects without distinction.

The fact that most cluster munitions are designed to disperse large numbers of submunitions (up to 650 in some models) over very wide areas and that the vast majority of submunitions are free-falling raise serious questions as to whether such weapons can be used in populated areas in accordance with these rules. The wide area effects of these weapons and the large number of unguided submunitions released would appear to make it difficult, if not

impossible, to distinguish between military objectives and civilians in a populated target area. Can these submunitions be aimed at a specific military target?

Secondly, there are also concerns arising under **the rule of proportionality**. It is clear that implementing this rule must include an evaluation of the foreseeable incidental consequences for civilians during the attack (immediate death and injury) and consideration of the foreseeable effects of submunitions that become explosive remnants of war (ERW).⁸⁸

The principal issue in this regard is what is foreseeable? Is it credible to argue today that the short, mid or long-term consequences of cluster munition contamination are unforeseeable, particularly when these weapons are used in or near populated areas? As is known from past conflicts, civilians present in a target area will predictably need to gather food and water, seek medical care and conduct other daily activities which put them at risk from unexploded submunitions. And it is foreseeable that clearance will take months or years, even in the rare cases when adequate resources are available.

Thirdly, there is the rule on feasible precautions, i.e. feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects. The main issue here is how the rule on feasible precautions in attack is implemented in light of the known characteristics and foreseeable effects of cluster munitions. Implementing the rule would require, for example, that a party consider the accuracy or inaccuracy of the cluster munition and its targeting system, the size of the dispersal pattern, the amount of ERW likely to occur, the presence of civilians and their proximity to military objectives, and the use of alternative munitions and tactics. It could also require that submunitions must not be used in populated areas and that alternative weapons are considered. Yet, given this range of precautions which can and should be taken, why do high levels of civilian casualties from cluster munitions remain an ongoing and predictable feature of virtually all conflicts in which they are used? Such a consistent history of high human costs may raise questions on the extent to which the various aspects of this rule are being applied in relation to cluster munitions.

An important step to reduce the post-conflict impact of cluster submunitions and other explosive remnants of war was taken in 2003 when the Protocol on Explosive Remnants of War was adopted. The Protocol provides an important framework for reducing the post-conflict dangers caused by all forms of unexploded or abandoned ordnance.

⁸⁸ See also Final Declaration of the Third CCW Review Conference, CCW/CONF.III/11 (Part II): "Noting the foreseeable effects of explosive remnants of war on civilian populations as a factor to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack".

However, the Protocol does not contain legally-binding measures to prevent the steady increase in the global burden of explosive remnants of war. The scale of the problem is growing far more rapidly than clearance operations can remedy it. One of the greatest contributors to this burden, when they are used, is cluster munitions. The Protocol also does not address the high risk of indiscriminate effects from a cluster munitions attack when the submunitions do detonate as intended, particularly if the attack is in a populated area.

The ICRC believes that the specific characteristics of cluster munitions, the unfortunate history of their use and their severe and long-lasting costs to victims, communities and even whole societies fully justify strong action at both the national and international levels. In light of the specific characteristics of these weapons and their history of death, injury and suffering, the ICRC supports and calls for the development of a new IHL treaty which would (1) prohibit the use and transfer of inaccurate and unreliable cluster munitions, (2) require the elimination of current stocks of these weapons and (3) provide for victim assistance, clearance of cluster munitions and activities to minimize the impact of these weapons on civilian populations.

Weapons causing post-conflict Effects on Civilians

Ronald BETTAUER

Deputy Legal Adviser, U.S. Department of State

I am pleased to be here today. My intention is to start a discussion among those in the room, not merely to make a few comments and take questions.

I would like to address briefly: (1) Protocol V to the Convention on Certain Conventional Weapons (“CCW”), on explosive remnants of war (“ERW”); (2) anti-vehicle mines (“AVM” or “MOTAPM”); and (3) cluster munitions.

As you likely know, the U.S. Government’s position on issues addressed by Knut Dörmann is different than the positions he set out. I will try to point out where this is so to the extent time permits.

Before starting, let me make clear that we do not share the views expressed by Knut on anti-personnel mines. For the United States, the relevant instrument is the Amended Mine Protocol (“APII”) of the CCW (requirements concerning (1) the detectability of such mines and equipping such mines with effective self-destruction or self-neutralization mechanisms and back-up self-deactivation features; (2) recording information on minefields; and (3) the removal of such mines, among other provisions). Protocol V deals with ERW other than that already covered by APII.

Protocol V

First, let me address how Protocol V addresses the ERW problem.

The period immediately following the conflict is when civilians are most likely to interact with ERW. Rapid and effective implementation of Protocol V's provisions will provide substantial protection to the civilian population. Protocol V requires that each Party mark and clear, remove, or destroy ERW in affected territories under its control. The Party that used the munitions which have become ERW on territory it does not control is obligated to assist "*to the extent feasible.*" Users of munitions are obligated to record and retain information on use / abandonment of munitions "*to the extent feasible and as far as practicable.*" They are also to transmit such information to the Party in control of the territory. The Parties to an armed conflict are obligated to take steps, to the extent feasible, in the territory under their control, to protect civilians and civilian objects, as well as humanitarian missions and organizations, from ERW. In addition, Protocol V contains provisions on cooperation and assistance as well as non-binding guidelines on a variety of topics, including recording and release of information on ERWs, risk education in affected areas, and measures to increase the reliability / functioning rate of munitions.

The First Conference of Parties on Protocol V will consider guidelines and informal mechanisms aimed at facilitating rapid and effective implementation of these provisions, including: (1) the establishment of a database on ERW incorporating information from national reports and subsequent updates on locations of ERW, status of clearance efforts and measures taken to provide warning; (2) measures for recording, retaining, and transmitting information called for under the Protocol; and (3) an informal mechanism for consultations to connect countries needing assistance with ERW with countries able to provide that assistance.

Although not yet a State Party to Protocol V, I note that the United States is committed to reducing the humanitarian impact of ERW and looks forward to these discussions. The United States has provided more than \$1 billion in assistance to 52 countries since 1993 for clearance of ERW, more than any other country or international organization.

Anti-Vehicle Mines

I now turn briefly to AVM, also an important area.

There was intensive work from 2002 to 2006 to develop a protocol on anti-vehicle landmines. Non-detectable, long-lived anti-vehicle mines can pose threats to civilians and civilian vehicles long after a conflict is over. The irresponsible use of such anti-vehicle mines poses a serious humanitarian problem that is not adequately addressed by existing instruments. Although the number of civilian casualties associated with

anti-vehicle mines is less than those associated with anti-personnel mines, there are major humanitarian effects in terms of denial of assistance and post-conflict reconstruction.

In 2005 and 2006 there was near unanimous agreement on a text, but a few States blocked consensus last November at the Third CCW Review Conference. In the face of that, we and 24 other countries stated our intention to follow the policies set out in a Declaration on Anti-Vehicle Mines. The declaration is in Document WP.16 and can be found on the Geneva UN CCW website⁸⁹, and the agreed steps to be taken as a matter of policy are as follows:

- Not to use any anti-vehicle mine outside of a perimeter-marked area if that mine is not detectable.
- Not to use any anti-vehicle mine outside of a perimeter-marked area that does not incorporate a self-destruction or self-neutralization mechanism.
- To prevent the transfer of any anti-vehicle mine unless the mine meets the detectability and active life standards and unless the transfer is to a State that has also adopted this policy.

The November 2007 meeting of CCW States Parties reserved up to 2 days to discuss AVM. Speaking for the United States, if positions were to change and consensus appeared to be possible, we would be prepared to return to this matter.

Cluster Munitions

Finally, let me turn to cluster munitions. The U.S. views on cluster munitions were set forth in detail at the June CCW Group of Government Experts meeting; there is only time now to make some brief comments

First, the United States considers cluster munitions to be legitimate weapons when employed properly and in accordance with existing International Humanitarian Law. It is wrong to say such munitions are inherently unreliable; militaries want weapons that function as intended and will not be a hazard for civilians or themselves.

In certain situations, cluster munitions provide military capabilities that cannot be provided by other weapons systems. Cluster munitions provide advantages against a range of target-types. They allow commanders to attack multiple stationary or moving targets within specific areas, either engaging the enemy over broad areas that they are occupying or

⁸⁹[http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument)

narrowly engaging specific targets. There are different types of cluster munitions for different uses, and they are scalable to different target areas.

In many instances, cluster munitions result in much less collateral damage than unitary weapons would if used for the same mission. If the use of cluster munitions was restricted, certain missions would require our forces to fire many times more non-cluster projectiles to achieve the objectives.

Cluster munitions are well suited to attack area targets when time is of the essence. Because they can attack various types of targets quickly and simultaneously, they can also reduce the exposure of our forces to enemy fire. Their absence from the arsenal would also have serious logistics and cost implications. Cost and economy of force are certainly legitimate military considerations

We believe that the law of war already covers cluster munitions both during and after their use, and a study published under CCW auspices reached the same conclusion, noting that strict compliance with existing rules is key.⁹⁰ Unlike Knut, we believe these weapons can be used in accordance with the law,

The key applicable rules of the law of war are those of proportionality and distinction. The rule of proportionality requires that a military commander wishing to use cluster munitions assess whether a particular attack may be expected to cause loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof that would be excessive in relation to the concrete and direct military advantage anticipated. Of course, a commander needs to take into account what he knows about the reliability of the munitions he uses. He also is entitled to anticipate that his adversary will comply with its obligations concerning ERW, for example, those contained in Protocol V.

The rule of distinction requires that cluster munitions, like other weapons, only be used against military objectives. A commander may use cluster munitions only if he judges, in the particular circumstances, that the munition in question can be directed at a military objective and will not strike military objectives, civilians, and civilian objects without distinction. The presentations by our military experts at the June CCW meeting demonstrated that cluster munitions can be used consistent with this requirement.

Protocol V to the CCW, which I have already discussed, addresses the issue of unexploded cluster munitions primarily in the post-conflict stage. There is really no need to duplicate the measures in Protocol V in a separate instrument on cluster munitions.

⁹⁰ Timothy L.H. McCormack, Paramdeep B. Mtharu, and Sarah Finnin, *Report on States Parties' Responses to the Questionnaire, International Humanitarian Law & Explosive Remnants of War*, March 2006, p.49

I think Knut has painted a misleading picture of the humanitarian impact of cluster munitions. The impacts are limited in scope, scale and duration as compared to other ERW. There is no country - except one (Laos) - where cluster munitions constitutes the principal ERW threat. And we are unaware of any unmet request for assistance in clearing cluster munitions. By 2008, only Laos will have a need for assistance dedicated specifically to cluster munitions. I don't have time to go into the details that support these points, but you will find them carefully set out in Richard Kidd's remarks at the June CCW meeting.⁹¹

Despite this, due to the importance of the issue, concerns raised by other countries, and our own concerns about the humanitarian implications of these weapons, the United States has concluded that it makes sense to initiate negotiations on a new instrument on cluster munitions within the framework of the CCW. We have taken no position as to the outcome of the negotiations, but we do believe this issue is best addressed in the CCW framework, which is most likely to achieve a result that balances humanitarian concerns with military utility and is, therefore, likely to have a more substantial impact than a result that fails to garner the support of many military powers. In June, Government experts recommended that the November meeting of States Parties to the CCW decide how best to address cluster munitions in the framework of the CCW.

⁹¹ <http://www.ccw-treaty.com/press/0620CCWGGE.htm>

*Discussion on Means and Methods of Warfare likely to
cause Superfluous Injury and Unnecessary Suffering*

Erwin DAHINDEN,

Director of International Relations of the Swiss Armed Forces

Member of the IIHL Council

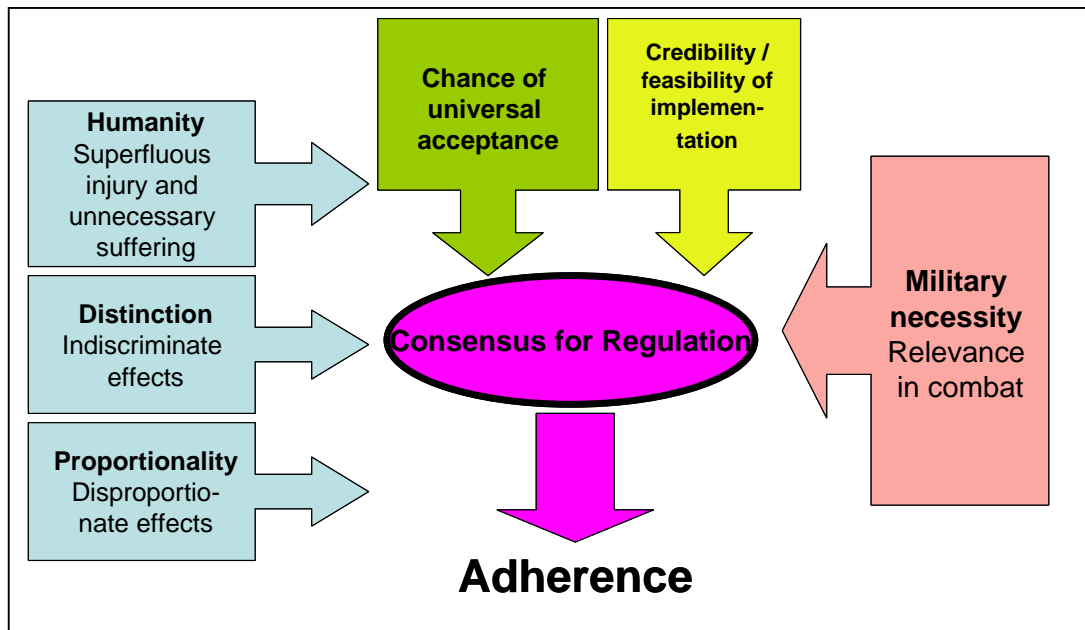
Interdiction of superfluous injury and unnecessary suffering is almost as old as internationally codified humanitarian law. Equally, since its emergence, the concept is widely discussed and it seems to be almost impossible to find consensus on its precise definition and extent.

What are the reasons and how can this interdiction materialize in international conventions regulating certain means and methods of warfare?

War will always cause unmeasured suffering, on combatants and on civilians affected by it. How much of this suffering can be justified by military necessity, and what should be considered as unnecessary or superfluous? In armed conflict, killing of combatants by combatants is considered licit in principle and is thus widely accepted as an exception to the general interdiction to destroy life. At the same time, the employment of certain weapons systems which would not even kill had been considered unlawful by the international community, because they caused injury which was not acceptable because of its inhuman long-term consequences. As an example, we mention blinding laser weapons.

While certain weapons undoubtedly have terrible effects on humans if they impact on a human body (e.g. artillery shrapnel), they remain acceptable because of their high military value. Suffering as sole criterion is therefore not enough, other factors play an important role when trying to define which suffering is unnecessary.

First of all, we should take into account all the factors influencing the preparedness of States to voluntarily limit their freedom of action to possess, transfer, produce or use certain weapons systems.



Graph 1. Overview of the factors influencing the possibility to reach consensus of a weapons regulation

As our viewgraph shows, humanitarian considerations are but one set of factors which influences States' decisions with regard to accepting new weapons law.

Limited military necessity, good chances for universal ratification, credibility and feasibility of implementation are compelling arguments to bring hesitant States aboard. On

the other hand, important military powers will be rather reluctant to sign up to a treaty which will significantly limit their military capabilities, especially if other comparable powers still abstain from doing so.

States, however, may come under pressure by the public opinion in cases where the humanitarian costs of a weapons system are extremely high and where the military value may be questioned. The best example of a successful public campaign is the ban of anti-personnel mines which was achieved once humanitarian consequences were successfully linked with convincing arguments showing the limited military value of the weapon in times of a mechanized battlefield with rapidly moving mobile elements.

Many other weapons regulations emerged of a lengthy and difficult process, where at the beginning just but a few States were motivated to go ahead. It is also a fact inherent to regulations of means and methods of warfare, particularly of weapons, that rapid technological change requires drafters of conventions focusing rather on general principles which bring measurable results. It will be impossible to regulate each and any weapon, and the day such an instrument would enter into force, the weapon it wanted to regulate would already have changed.

From an international law point of view it is important to note that binding legal instruments which are not ratified by important military powers will have a very limited effect on the ground, particularly in potential armed conflicts. They may even have negative effects on States inducing them not to ratify, because such treaties can not add to their own security. Victims will not really benefit from such a situation. It is, therefore, an illusion to believe in humanitarian progress achieved by drafting instruments which are likely not to find broad acceptance. Law which does not find acceptance is worse than no law, because it will create false expectations which will not stand the hard test of conflict reality. Such constructs rather weaken the legal system.

Conclusions

Humanitarian concerns alone will not be sufficient to bring progress in weapons law. They are by nature always balanced with concerns of military relevance of a weapons system. This need for a correct balance is founded in the right to self-defence against armed attack. States are - mostly by constitution - obliged to protect their own population against armed attacks, and the UN Charter entitles them to do so. Weapons law must therefore respect the need to be prepared for defence. On the other hand, sheer "paper solutions" of humanitarian problems for the sake of achieving just any result in a diplomatic conference, which will never

unfold practical results in the field, is detrimental to the humanitarian ideal. Paper solutions rather provide arguments for States to stay away from such a regulation.

International efforts to ban or to restrict the use of certain weapons will have best chances to become successful, and thus meaningful to victims of armed conflict, if the various stakeholders - military, scientific, humanitarian and political - are able to find common ground in a proposed solution. The ban on blinding laser weapons may be mentioned here: it has shown that the regulation of a certain weapons system which is of particular use for non-State actors or terrorist organizations can have good chances to bring concrete results, while technically immature proposals such as the ban of depleted uranium are not likely to bring progress in humanitarian terms. They may, unfortunately, through over-mediatisation conceal real needs and divert international efforts from true issues.

Last but not least, timeliness of an initiative to regulate an issue can play an important role. The flexibility of the military to become engaged in new regulations could be further improved by better respecting the timeframes of armament procurement cycles. It will be much more difficult to achieve consensus for restriction or technical adaptation of a weapons system once it has been largely introduced and was purchased in important numbers, because this would involve high costs. This may be a potential argument in the discussions around cluster ammunition, which would be worth taking into account when considering improved technical standards of those systems, before a great number of States have included them in their arsenals.

THE CONDUCT OF HOSTILITIES AND
SPECIAL PROTECTION REGIMES

The Conduct of Hostilities and their Impact on Humanitarian Assistance

Arne DAHL

Judge Advocate General of the Norwegian Armed Forces

Ladies and Gentlemen,

Forty years ago, in 1967, I visited Leningrad, now St. Petersburg, as an eighteen year old high-school student. We were taken to a place that made a lasting impression on me. This was the Piskarevskaya cemetery which is a communal grave for 450.000 human beings who starved to death during the 900 days siege of Leningrad from 8 September 1941 until 18 January 1944.

The siege of Leningrad was not a theme at Nuremberg, and the starvation of the inhabitants was not considered a war crime. On the contrary, an American Military Tribunal found in the *High Command* Case that an order issued by Field Marshal von Leeb to German artillery to fire on Russian civilians attempting to flee through the German lines during this siege, was not unlawful.⁹² I have not heard of any attempt to bring relief through the German lines, apart from the supplies that the Russians could bring in themselves over lake Ladoga. If efforts were made by the ICRC, neutral Sweden or anyone else, I assume that any request was lawfully refused by the besiegers.

⁹² Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, p. 134. He refers to *High Command* case (USA v. *von Leeb et al.*) (American Military Tribunal, Nuremberg, 1948), 11 NMT 462, 563.

Let this be a background when we ask ourselves: have there been any developments in international law since 1945, that could bring some hope to others, who might otherwise face a similar fate as the inhabitants of Leningrad suffered between 1941 and 1944?

Different situations

In an analysis, we first of all have to distinguish between situations. We have sieges, as that of Leningrad, being static situations affecting a limited area, which is a military objective that may or may not contain civilians. We have naval blockades covering a coastline or a port, which may resemble a siege and is likely to affect a large area and its civilian population. And we have a third category of situations, which is deprivation of food as a more general consequence of hostilities when peasants have not been able to harvest the crops for security reasons, crops and cattle have been taken by warriors, nomads have been denied access to pastures or wells by warring factions, all of them situations that do not necessarily entail siege of a military objective or an effective blockade.

Different legal regimes

Secondly, we have to distinguish between different applicable legal regimes. What we are discussing, is first and foremost a question of International Humanitarian Law. Starvation of civilians and the duty to permit humanitarian relief has, however, also an International Human Rights aspect, as well as International Criminal Law and *ius ad bellum* aspects.

Development of the Law

Leningrad was not the only city or area under siege or blockade during that war, and the ICRC had abundant experience as basis for its initiative with regard to rules that could meet such situations, when the Geneva Conventions of 1949 were to be negotiated.

It has never been doubted that starvation of soldiers defending a military objective, such as a fortress, is a lawful method. The difficulties arise when civilians become victims.

The basic problem with food, as opposed to medical supplies, is that while medical supplies are basically for the benefit of those who are disabled by wounds or sickness, food is a necessity for the fighting soldier, rivalled in importance only by ammunition, fuel and water. Allowing consignments of medical supplies to enemy soldiers, does not make a big difference in the military situation, whereas consignments of foodstuffs to besieged enemy soldiers, is likely to be of great help to them. If the blockading or besieging power is to be

expected to permit such consignments, there has to be some way of ensuring that the foodstuffs will go to the civilians, not to the combatants.

Geneva Convention IV

According to the Fourth Geneva Convention Art. 23, States are obligated to allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. States shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation to allow free passage for such consignments is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or

(c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

Pictet points out, quite logically, in his commentary that the Power allowing free passage may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers. Provisions can also be laid down regarding technical arrangements. The Power authorizing free passage is entitled to check the consignments and arrange for their forwarding at prescribed times and on prescribed routes.

Additional Protocol I

The rules are further developed in AP I Art. 70, where the obligation to allow free passage applies to relief consignments to the civilian population in general, that is to say, not only to children, expectant mothers and maternity cases. It is laid down that offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. However, priority shall be given to the persons who according to the Fourth Convention and the Protocol shall be given preferential treatment or special protection, such as children, expectant mothers, maternity cases and nursing mothers.

Such consignments shall, according to Paragraph 2, be allowed and facilitated even if such assistance is destined for the civilian population of the adverse Party.

The principles of control and supervision are codified in Paragraph 3 of Art. 70, where it says that the Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

- (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
- (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
- (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

Customary Law

The duty to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need is today considered customary law.⁹³

Relief personnel

In accordance with AP I Art. 71, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments. Such personnel shall be respected and protected. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph I in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted. Relief personnel in their turn shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

ICRC

The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also

⁹³ ICRC, *Customary Law Study*, Rule 55, 2005

carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned, in conformity with *inter alia* the basic principles of the Red Cross.⁹⁴ Equivalent assistance shall, as far as possible, also be granted to other humanitarian organizations referred to in the Geneva Conventions and the First Additional Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol. (AP I Article 81).

Customary Law – relief personnel and objects

Respect for and protection of humanitarian relief personnel and objects used for humanitarian relief operations is a duty under customary law.⁹⁵ The same applies to the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions.⁹⁶

Internal armed conflict

As this audience is well aware, the development of International Law applicable to non-international armed conflict has for various reasons lagged behind the Law of International Armed Conflict. For many years, there were hardly any other rules than Common Article 3 to the 1949 Geneva Conventions that applied.

In Article 18 of the 1977 Additional Protocol II some brief provisions are given regarding relief organisations and relief operations. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population, which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction, shall be undertaken subject to the consent of the High Contracting Party concerned.

⁹⁴ humanity, impartiality, neutrality, independence, voluntary service, unity, universality.

⁹⁵ ICRC, *Customary Law Study*, Rules 31 and 32, 2005

⁹⁶ ICRC, *Customary Law Study*, Rule 56, 2005

Customary Law – internal conflict

It is considered a duty under customary law to give such consent and to facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control, in internal as well as international armed conflict.⁹⁷

The 2006 Sanremo *Manual on the Law of Non-International Armed Conflict* gives the following explanation: “humanitarian assistance consists of any material or service essential to the health and safety of civilians and others who have ceased to take an active (direct) part in the hostilities. Examples include food, water, medical supplies, shelter, and clothing. The need for humanitarian assistance may arise from the effects of hostilities, other violence, natural or man-made disasters, or any other cause.

Those in control of an area, which humanitarian assistance operation transit or occur, may set technical conditions for such operations. They are entitled to verify that the assistance effort conforms to the conditions and purpose of its delivery. Such steps should not unduly impede or delay the provision of humanitarian assistance. Diverting humanitarian assistance to other purposes (particularly for political, military, or criminal reasons) is forbidden unless the diversion is urgently necessary in the interest of the persons who require it. Recipients may not be taking an active (direct part) in hostilities.”⁹⁸

Interpretation and practical implementation

The rules that have been discussed so far should be understood with the general prohibition of using starvation of the civilian population as a method of warfare as a background.⁹⁹ The application seems fairly straightforward when you have a conflict covering large tracts of land, maybe without fixed frontlines. But when the situation narrows down to a siege-like situation, one will have to ask whether the protection of the civilians can be absolute.

One practical solution could be that the civilians concerned must be allowed to leave the area. If this is not practical because of the distances involved or other factors, one may have to resort to a proportionality evaluation: are we talking about siege or blockade of areas that serve mainly military purposes, which would be legal even though civilians were there, and siege of areas that are of a predominantly civilian nature? It is when we have substantial

⁹⁷ ICRC, *Customary Law Study*, Rule 55, 2005

⁹⁸ San Remo Manual, explanation to Rule 5.1, 2006

⁹⁹ 1977 AP I Article 54 (1), 1977 AP II Article 14, ICRC, *Customary Law Study*, Rule 53, 2005

numbers of civilians present, that the right to humanitarian assistance comes into the foreground.

International Human Rights Law

It has been submitted that the right to adequate food, laid down in Article 25 of the Universal Declaration of Human Rights and in Article 11 of the 1966 Covenant on Economic, Social and Cultural Rights, is relevant for the conduct of hostilities.¹⁰⁰ These provisions do not allow for any derogation in case of war or other emergency. Does this mean that they apply fully also in armed conflict, or will they share fate with the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights? As we know, the International Court of Justice observed in its 1996 advisory opinion on the legality of nuclear weapons that in principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

The right to adequate food may, however, have an independent application with regard to the scorched earth tactic. This is prohibited according to Art. 54 paragraph 2 of AP I if in this manner objects which are indispensable to the survival of the civilian population are removed, destroyed or rendered useless. There is, however, an opening in paragraph 5 for derogation from the prohibition on one's own national territory, where required by imperative military necessity, even if the civilian population is exposed to starvation.

If one considers International Humanitarian Law (IHL), at least with regard to International Armed Conflict, as rules regulating the treatment of your opponent, one could say that paragraph 5 has nothing to do in Article 54 of the AP I. It goes without saying that when there is no specific prohibition, such as the human shield rule, it is not a concern of IHL how you treat your own civilians, and paragraph 5 is therefore superfluous. Without paragraph 5, the right to food as a human right could have filled in the vacuum, prohibiting such tactics if one's own population is exposed to starvation.

Article 25 of the Universal Declaration of Human Rights and Article 11 of the 1966 Covenant on Economic, Social and Cultural Rights do not seem to have been in the mind of the negotiators of the 1977 Additional Protocol. Possibly, the human right to adequate food

¹⁰⁰ Uwe Kracht, in *Human Rights and Criminal Justice for the Downtrodden*, Morten Bergsmo (ed.), Martinus Nijhoff Publishers, 2003, p. 261.

will have to yield to IHL as *lex specialis* or *lex posterior*, or it may be that future jurisprudence or other developments will decide the matter in favour of the right to adequate food.

International Criminal Law

Under the 1998 Rome Statute of the ICC, intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions, is a war crime in international armed conflict (Article 8 (2) (b) (xxv)). The Statute does not include any corresponding provision for non-international armed conflicts.

The deprivation of civilians of food could, however, amount to a crime against humanity under Article 7 (2) (b) of the Rome Statute, irrespective of the nature of the conflict or whether there is any armed conflict at all. The crime against humanity of "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

The ICRC *Customary Law Study* has identified a number of acts as war crimes, enumerating and explaining them in the commentary to Rule 156. Here is included as applicable to both international and non-international armed conflict, the use of starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies.¹⁰¹ This finding will, of course, not enter the crime into the Rome Statute, but could be a basis for amendment of the Statute in 2009. It can, however, be used as a basis for national courts to assert universal jurisdiction over such acts.

Ius ad bellum – responsibility to protect

Although the legal protection of civilians in armed conflict is not perfect with regard to the right to receive humanitarian assistance, the lack of willingness to apply the law seems to be a greater problem than any defects in the law. International criminal law backs up the substantive rules in International Humanitarian and Human Rights Law, but it will itself on occasion need to be backed up by military intervention.

Based on the "responsibility to protect" concept, the United Nations has on several occasions reaffirmed its commitment with regard to the protection of civilians in armed conflict, and in Security Council Resolution 1674 (2006) followed up the endorsement of this concept at the 2005 World Summit by:

¹⁰¹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Volume I, Cambridge University Press, 2005, pp. 580 and 599.

- *Reaffirming its practise of ensuring that the mandates of United Nations peacekeeping, political and peacebuilding missions include, where appropriate and on a case-by-case basis, provisions regarding (i) the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation, (ii) the facilitation of the provision of humanitarian assistance, and (iii) the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons...(16) and*

- Urging all those concerned as set forth in International Humanitarian Law, including the Geneva Conventions and the Hague Regulations, to allow full and unimpeded access by humanitarian personnel to civilians in need of assistance in situations of armed conflict, and to make available, as far as possible, all necessary facilities for their operations... (22).

In Security Council Resolution 1769 (2007) the UN has provided a chapter VII mandate for the UNAMID, which is to be established in Darfur in the near future, showing that its commitment does not amount only to empty words. Although the Resolution was passed with the support of the Government of Sudan, for which that government deserves respect, it nevertheless points towards willingness to, and legitimacy of, using internationally sanctioned force to avert humanitarian disaster.

In the European Middle Ages, the knights' right to carry weapons was justified by the duty to fight for justice and defend the defenceless. May this be the ideal of the soldiers of tomorrow, as it already has become for UN peacekeepers.

Thank you for your attention.

IMPLEMENTING THE LAW ON
THE CONDUCT OF HOSTILITIES

Implementation of the Law on the Conduct of Hostilities by Armed Forces: a View from the Inside

Charles GARRAWAY

Lt. Colonel (ret.), Member IIHL, United Kingdom

It is now four years since I retired from the military but I have the good fortune to continue working in the field of International Humanitarian Law (IHL). This has kept me in close touch with my erstwhile colleagues and so I think that, whilst I may no longer be an 'insider' in the true sense of the word, I have a reasonably good idea of some of the issues that they face in today's world. Being now on the 'outside', I can perhaps take a wider view of some of these issues and also I am freer to speak! I will limit my remarks to the British military and particularly the British Army which is the organization that I know best. However, I believe that my comments may well be of more general application.

I thought long and hard about how to structure this presentation. My instructions indicated that I should look at specific measures of implementation required by the armed forces. However, precautions in attack have been exhaustively dealt with as have many of the issues of weaponry that would be dealt with in any assessment of the affect of Article 36 of Additional Protocol I, dealing with weapons reviews. It is an under-implemented article and certainly does deserve more consideration but I decided, with apologies to the organisers, to

go slightly off piste! This followed the debates on the first day and particularly the thoughtful presentation of Jelena Pejic on human rights and IHL. She illustrated some of the uncertainties that there are now and the fault lines that may be appearing between the two legal regimes, particularly in relation to the use of force. This is perhaps the area of most crucial importance to the soldier on the ground and this uncertainty is having some serious effects within the armed forces. I thought that perhaps a worm's eye view of some of these effects, particularly in so far as they in turn affect implementation and enforcement might be helpful.

When I joined the Army in the mid 1970s, we were still in the middle of the Cold War. The world was a totally different place both in terms of the threat we faced and also in the nature of the operations that the British military were required to carry out. There were, however, seeds of the changes that were to come. The British Army was deployed in Northern Ireland engaged in what we called 'aid to the civil power'. There, on the streets of Northern Ireland, we faced opponents who, whilst claiming to be belligerents fighting a 'war', were not quite so keen to follow the rules. For the soldier, the 'rules' were essentially domestic. The British Government was not prepared to acknowledge that 'The Troubles' were any more than internal disturbances and tensions. Thus domestic law applied. International law was limited in application and then it was primarily human rights bodies that played the leading role. Enforcement was carried out by domestic courts and soldiers became used to being subject to the jurisdiction of the local Northern Ireland courts. The soldiers might not have liked this but at least they were familiar with the legal system and knew where they stood. As a result, specific to mission training carried out before troops deployed could be conducted within a clear and well understood legal regime. Of course there were grey areas - there always will be. If the law was always clear cut, there would be no need for lawyers! However, the fundamental basis was comparatively clear.

Now things have changed. The British Army is an 'expeditionary force' and deployed all over the world. It is involved in Afghanistan in what has been described as the heaviest fighting conducted by the British Army since Korea. It is taking casualties in Iraq and has found itself in operations in recent years in Africa and the Balkans. The difference is that in these modern conflicts, the legal regime is often far from clear. For example, what is the nature of the conflict - or conflicts - in Afghanistan? Are British forces involved in a 'Northern Ireland type' mission supporting the Afghan Government or is this an extension of the original international armed conflict that started in 2001 and arguably, despite the views of the ICRC, never ceased! If the former, how do you conduct hostilities of the intensity that we

are seeing today within a domestic law environment? Even if one accepts, as I think one must, that in parts of Afghanistan the violence amounts to an 'armed conflict' what are the applicable rules that govern the use of force? What is the relationship between local law, Human Rights Law and International Humanitarian Law, the law of armed conflict (LOAC)? Answers to these questions are necessary if implementation is to be achieved. Trainers need guidance which they can then pass on to the soldiers themselves.

However, I want to concentrate today on one particular aspect of implementation, namely enforcement. [Eric David] will be dealing later with national and international criminal jurisdictions. I do not intend to trespass on his territory but I do want to look at some of the problems that the increased use of criminal sanctions to control the conduct of hostilities has caused on the ground.

The use of criminal sanctions to control military operations is not new to the British military. I have already referred to the Northern Ireland experience. However, here we are faced with a multiplicity of legal regimes and enforcement agencies. "*Nullum crimen sine leg*" is a fundamental principle of criminal law. In our domestic law, this principle is respected in that most of the criminal law is now in statutory form. Even in common law jurisdictions, the idea of crimes 'at common law' is dying out, largely under the influence of Human Rights Law which demands specificity. However, I would suggest that we seem to be moving in precisely the opposite direction in relation to the use of criminal sanctions in relation to the conduct of hostilities. Treaty law is by nature different from domestic statutory law. It was once said that a treaty was a disagreement reduced to writing and those of us in this room who have been involved in treaty negotiations will know just how true that is! However, it is these treaty texts that produce the criminal offences for which our Service personnel are liable. It was to gain some specificity that the US demanded at Rome that 'Elements of Crimes' should be drafted and whilst many thought at the time that this was an unnecessary and wasteful exercise, it in fact proved singularly useful in throwing up areas of disagreement. None more so than on the famous Article 8(2)(b)(iv) - the proportionality offence - where there is even disagreement on what the elements mean! Where does all this leave the soldier? The answer is that he - and his commanders - is becoming increasingly nervous. I have said to many courses here in Sanremo that the law must be clear because it is the ordinary soldier, sailor and airman that has to apply it. At present, I would suggest that the application of the law to modern day conflicts is far from clear and that is bringing the law into disrepute.

The problem is not so much though in the law itself but in the contexts in which it has to be applied. LOAC has traditionally been divided into the law relating to international

armed conflict and that relating to non-international armed conflict with internal violence below the threshold of armed conflict being left to human rights and domestic law. But the boundaries between these various regimes, always difficult to ascertain, are now completely blurred. Let's look again at Afghanistan. There were always at least two conflicts going on in Afghanistan. First there was an internal armed conflict between the *de iure* Government and the *de facto* Government of the Taliban. Then there was the intervention by the US led coalition against the Taliban - usually classified as an international armed conflict. The Taliban were driven into the border regions but did that international armed conflict ever cease? The ICRC decreed that, when Hamid Karzai became the acknowledged Government in Afghanistan, the international armed conflict ceased and it became a non-international one. But what had changed? The Taliban never were the *de iure* Government of Afghanistan and the cloak of legitimacy had merely passed from the Northern Alliance to Karzai. Furthermore, the writ of the Kabul Government never ran to the border areas which remained under Taliban control. Surely, it is theoretical, to say the least, to argue that a Taliban soldier captured one day in Tora Bora is entitled to PW status but the next day is not, simply because of a political decision made well away from the conflict zone. It becomes even more complicated if we are introducing human rights concepts into non-international armed conflict as a result of the lack of combatant status, requiring that the use of lethal force is used only as a last resort and efforts must be made to capture people first.

This problem over legal regimes is seen at its most acute when it is necessary to draft Rules of Engagement (ROE). ROE are, of course, not the law in themselves but they need to reflect the law. There is a fundamental difference between what I will call 'combat' ROE and 'non-combat' ROE. The former, based upon LOAC, are fundamentally status based. Is the person in front of me a combatant or otherwise taking a direct part in hostilities? If they are, they can be engaged with lethal force, regardless of the immediate threat that they pose to me. On the other hand, non combat rules are threat based, I may engage only with such forces as is necessary to suppress the immediate threat with which I am faced. If that is lethal force, so be it but if there is a lesser way then I must use it. There is a fundamental difference between the two concepts but there is a growing blurring of the distinction. We have already seen in Nils Melzer's presentation on "Direct Participation in Hostilities" the suggestion that civilians who take a direct part in hostilities should be subject to a threat based response and captured if possible. But on the modern battlefield it may simply not be possible to distinguish between the lawful and unlawful belligerent, the combatant and the civilian who has taken up arms. To expect the soldier to make that distinction is ridiculous. It is the first step to what

some have already suggested, introducing the threat based human rights rules into LOAC. Whilst it sounds reasonable, it is in fact nonsense and would put the lawful combatant at serious risk. Whilst he is often required to fight today, as described by Israel's former Chief Justice Barak, with one hand tied behind his back, it would go too far to tie both. Soldiers have the right to life as well!

The difficulty again here is in identifying the type of conflict in which the service person is engaged. We may agree that in international armed conflict, status based rules apply (though as I have pointed out there are now arguments even about that). We may also agree that in situations of internal violence and disturbances, threat based rules should apply. But the vast majority of conflicts in which armed forces now find themselves are between those two extremes. In Iraq today and Afghanistan, the nature of the conflict (or conflicts) is a matter of dispute. It is further disputed what is the law that applies to those conflicts and what should be the basis for any rules of engagement. Let me give you an example. On the fourth day of the last Iraq war, when fighting was still going on around Basra, troops opened fire on a person who advanced on a checkpoint throwing items at the soldiers. Fire was only opened after the checkpoint commander had got down and moved towards the individual but then found his own weapon jammed leaving him defenceless before the advancing thrower (the objects turned out to be stones). There was a formal investigation by both military and civil authorities at the end of which – some three years later – the soldiers were told that there would be no charges. The public reason given was that the soldiers claimed to have been acting in defence of the commander and there was no evidence to contradict that version of events. That implies a threat based response and it may indeed have been that they were on self defence rules of engagement. If so, that analysis is a reasonable one if the proposed charge was one of disobeying a lawful order. But it was not. They were under investigation for murder! But this was an international armed conflict and if LOAC applied surely the test for murder, either as a war crime or under domestic law, was whether they thought the person was a combatant or taking a direct part in hostilities. If either of those, they were entitled to engage with lethal force. It might be argued that if the person was a civilian not taking a direct part in hostilities, then a threat based decision was suitable but it is stretching imagination to try to think of an example of a civilian who by his deliberate actions is posing a direct threat to you but who does not qualify as taking a direct part in hostilities. Even Nils' excellent paper would have difficulty there!

This brings me to my third point, the need for support for Service personnel in such cases. These soldiers faced three years of investigation under the allegation of murder, an

offence that carries a mandatory life sentence. The charges were not proceeded with but the damage was done. There have been other high profile cases of investigations failing to lead to any charges or ending in acquittals. Those investigated have become so disillusioned by the process that they have left the Army. These include two full Colonels who have publicly castigated the way that they were treated.

Am I saying that there should be no investigations? Not at all. I firmly believe that any allegation should be investigated and I say so speaking as someone who has himself been accused of and investigated for war crimes. It is not a pleasant experience but a necessary one. However, it needs to be sensitively handled. There is a growing feeling within the military that the presumption of innocence in such cases has been abandoned. In Northern Ireland, soldiers accused of operational crimes were removed from theatre back to their regimental depots where they had full support. Defence was at public expense and though the case was heard usually in a civil court before a judge alone, the soldier felt that he had institutional backing.

Now things have changed. The reports that are coming out are that soldiers feel abandoned by the system. Military commanders are under pressure to distance themselves from cases to avoid any hint of 'command influence' and soldiers feel abandoned. Legal aid is still usually available but is not automatic and there is an increasing distrust in the justice system whether military or civilian. In military cases, the Service personnel feel that they are being made political scapegoats and if civil trial is recommended, the serviceman asks – quite fairly – how a civilian jury with no military background or experience can be expected to sit in judgement on what may have been a split second decision in the heat of battle. The law is increasingly being seen as a political weapon – not as a neutral monitor.

These views can and must be overcome. The first Geneva Convention was launched to relieve the suffering of combatants on the battlefield. LOAC was the soldier's friend. As the law moved to the regulation of the conduct of hostilities, the majority of rules remained reflective of military common sense. Fighting by the rules not only made legal sense; it made military sense as well. Frankly, they still do.

However, soldiers today are increasingly viewing the law – and lawyers – as their enemy. Charles Dunlap invented the term 'lawfare' – a concept that has been taken up by others particularly in the United States, the use of law as a political weapon in conflict. That is at the strategic level. However, soldiers are beginning to view 'lawfare' as a tactical weapon as well and not one that helps them. The 20th Century was a violent time but what it did mean was that, certainly until the last quarter, the majority of the population of the United Kingdom

had been affected by war. Many of those who formed 'civil society' had military experience and had some understanding of how militaries operate. That is no longer so. Go into any bar in England and you will find virtually nobody who has military experience - indeed in Garrison towns, many bars bar 'squaddies' from their premises! There is a growing divide between civil society and the military who serve them. This is not good news. Some sections of civil society see military personnel as 'embryo war criminals'. They take the view that the death of ANY civilian in war is avoidable and therefore has to be a crime for which someone is responsible. Even my old friend Eric David took the line at a Conference that whilst he accepted the principle of proportionality when planning an attack, the commander was responsible for all civilian deaths that followed an attack even if they were proportionate. On that basis, every commander is a war criminal. Similarly, some take the view, mixing *ius ad bellum* and *ius in bello* that if a war is illegal, every soldier is a war criminal by definition! The problem is that if you treat soldiers as war criminals, they will increasingly act as such. They see the bad guys 'getting away with it' whilst they are held accountable for everything and anything.

Again, I am not saying that there should be no investigations. Far from it. However, what I am saying is that we should restore the public presumption of innocence. We ask a lot of our Service personnel. On our Remembrance Day, we intone the quote from a cemetery "*When you go home tell them of us and say for your tomorrow we gave our today*". In human rights terms, we ask them to lay their right to life on the line so that we may continue to live in peace. We ask them to comply with rules in doing so, rules that may sometime increase the risk that they already take, but which are there for a reason. Enforceability of these rules is important and soldiers, being a disciplined force, can understand that. However, they must be clear and credible and enforced in a manner appropriate to the circumstances.

At the moment, there is a danger that the soldier will not see the law as clear - even his legal officers can't agree on it! As a result, it will soon lose its credibility with commanders. In those circumstances, enforcement will become seen as a battle between military 'realists' and civilian 'idealists', another form of lawfare. That would put at risk the whole carefully constructed edifice of LOAC and do nobody any good at all.

Compensation for the Victims of Chemical Warfare in Iraq and Iran

Liesbeth ZEGVELD

Leiden University, Netherlands

The case against Van Anraat

It has been two decades after the end of the Iran-Iraq War. Yet, Iranian and Kurdish victims of Iraq's chemical weapons still are seeking judicial redress.

On 9 May of this year, the Dutch businessman Frans van Anraat was convicted for complicity to war crimes. Van Anraat sold huge quantities of the chemical thiodiglycol (TDG) to the regime of Saddam Hussein. The material was crucial for the production of mustard gas. This gas was used by the Ba'athists in the war against Iran and in their attacks on Kurds in '87 and '88.

Van Anraat was convicted of violation of the 1925 Geneva Gas Protocol, as well as customary law prohibiting the use of chemical weapons and indiscriminatory attacks. These violations constituted not only a war crime committed by Van Anraat. They also constituted a tort against those who had suffered damage as a result of these crimes. 16 Victims of chemical attacks, both from Iran and Iraq, joined in the criminal case against Van Anraat. These victims submitted to the Dutch Court a claim for compensation for the damages they have suffered.

I will discuss a few matters that are outstanding in the case of the victims, who I represented in court. But let me first address the following question.

Compensation for violation of the law on conduct of hostilities

Is there any reason to assume that compensation for violation of the law on conduct of hostilities is different from compensation for violation of the Geneva Rules or International Humanitarian Law (IHL) in general? The answer seems to be no. Remedies are not affected by the origin of the obligation, Hague or Geneva law. Indeed, Article 3 of the fourth Hague Convention of 1907 was the first article to lay down the principle of compensation. This rule applies to all the regulations in the 1907 Convention: both the rules on the conduct of hostilities and the rules on protection of persons in the power of a Party to the conflict.

As a matter of principle, there is no reason why compensation should be different for violations of the law on conduct of hostilities as compared to other IHL rules. The principle is simple: a person who by an act contrary to law damages the right of another, is obliged to provide redress for the resulting damage. This principle is equally applicable to the Hague and Geneva Law.

However, the content of a particular substantive rule may affect the regime of compensation. Concepts of Hague Law such as military necessity, proportionality, distinction between civilians and combatants are likely to influence questions of evidence, burden of proof, and reparations. In general it can be said, I believe, that the law on conduct of hostilities is more complex than the Geneva Law and that this will have an impact on the matter of compensation.

There is little practice, however, to prove this assumption. At least when the focus is on legal cases brought by individual victims. Victims are generally denied the right to claim compensation and States are not considered liable to pay compensation. Factual findings as to the wrongdoings and illegality of conduct of hostilities are consequently also rare.

What about future perspectives? A recent development in the context of international Criminal Law widely opens the door for victims' claims. The International Criminal Court may award reparations to the benefit of individual victims. It may do so directly against a convicted person. The Statute of the ICC is the first embodiment of the right of victims to reparations.

This principle laid down in the ICC Statute has been derived from national criminal law systems. In civil jurisdictions, such as France, Germany and also the Netherlands, victims

can join in the criminal proceedings and raise a compensation claim based on tort under domestic law. The case against Van Anraat is an example.

The victims' claim filed against Van Anraat was awarded in first instance, but dismissed in appeal. Still it offers interesting thoughts about compensation cases for violations of Hague Law. I will discuss the following aspects of this case: the mass nature of the victims' claims; establishment of the facts and determination of the damages. Some are specific for compensation for violations of the law on the conduct of hostilities. Others may arise in any compensation case under IHL presented in national or international criminal courts.

Mass claim

The total number of victims of Iraq's chemical warfare is high: 20.000 in Iraq, 100.000 in Iran. In general the number of victims of violations of the law on conduct of hostilities is likely to be large, for example, when compared to the number of victims of violations of Geneva Law. The available data on civilian casualties rarely distinguish between victims from violations of The Hague Law and victims caused by violations of Geneva Law. However, clearly, also in the present conflict in Iraq, the victims from torture and other illegal treatment are far fewer in number, than the victims from indiscriminatory and direct attacks on civilians.

How does the mass nature of the violations affect the prospect of compensation claims by these victims in national or international criminal courts? The mass nature of the violations is one of the reasons why legal avenues for victims to claim compensation are often opposed. It is feared that thousands or millions of individuals will file a lawsuit. In the same line, it is claimed that the traditional method of individualised adjudication, when applied to mass claims, is undesirable. It would result in unacceptable delays and substantially increased costs for both claimants and respondents.

Also in the Van Anraat case, the Dutch Court feared that we would bring large numbers of victims to court. At one of the first sessions, the president said to me: Ms Zegveld, you are not going to take 5.000 victims with you to the court, are you? The Court's fear was understandable. The Dutch legal system is not equipped to deal with mass claims. Under Dutch law, there is no class action. Under the Dutch Code of Criminal Procedure each and every individual has to start his/her own case, representing only him- or herself. We did not take 5000 victims to court, but only 16. We did so for practical reasons and so as not to put off the Court. This decision meant that the other victims were left with empty hands.

How does the ICC handle the mass nature of the crimes coming before it? Of course the ICC is still to begin. No victim has yet requested for reparations since no trial has yet started. The cases are still before the Pre-Trial Chamber. But, since the start of the proceedings, victims have systematically filed applications for participation. A few hundred are already involved. Potentially, the group of victims the ICC will be facing is even larger. Indeed, it is an outspoken aim of the ICC to reach as many victims as possible. Under the Rules, the Registrar has an obligation to give publicity “as widely as possible and by all possible means” to the reparation proceedings before the ICC to victims.

The ICC’s approach towards the mass nature of victims’ claims is mixed. In principle, it takes an individualistic approach. Rule 85 states that a victim is a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court. The Rules thus address victims as individuals, rather than as groups or as members of groups. The Statute, like Dutch law, does thus not provide for class actions.

At the same time, the Statute also offers mechanisms meant to assist the ICC in handling large numbers of victims. During the drafting of the Statute, many delegations were concerned that the potential numbers of victims might make their participation practically impossible. So they provided for collective reparations. And also they drafted the Rules so as to leave a wide margin of appreciation to the ICC. So it is left in the hands of the ICC to determine the modalities for victims to exercise their rights to participate.

However, so far I can see little awareness of the ICC of the potential problem of great numbers of victims wishing to participate. I do not have the time to give you some examples. Yet, when examining the decisions both of trial and appeal chambers dealing with victims, the conclusion can only be that, so far, the judges have not interpreted the articles in a way so as to narrow down the participation of the victims.

What if – in the case against Van Anraat – many more victims would have made it to the Dutch Court? For sure, the Court could not have refused them. But there would have been the potential of blowing up the system, each of them being entitled to make a statement to clarify his or her claim, each of them being entitled to question witnesses in court.

There exists little precedent for how many victims should be dealt with by a single court. Easy answers are therefore not available. Perhaps it is not the principle of large numbers of victims participating that is the problem, but rather the modalities of their participation that need to be resolved. That may be. Time will tell.

Fact finding

Compensation cases brought by civilians and combatants seem to be the most difficult. They seem to allow for less clear establishment of conduct in violation of International Humanitarian Law, compared to, for example, cases of prisoners of war and civilian detainees. The reason is that the circumstances on the battlefield involving civilians and combatants are likely to be more hazy. Accurate and reliable information is often difficult to obtain.

A tremendous advantage of compensation cases that are linked to criminal proceedings is that the facts proving the crimes are to be provided through the criminal proceedings. So it is up to the prosecutor to find the facts. Of course the prosecutor, both at the national courts and the ICC, faces his own problems in establishing the facts. This will in turn affect the victim's claim because, if the prosecution is not successful the victims will lose the opportunity to have their requests for reparations dealt with by the Court.

In the case against Van Anraat, the prosecutor, and thereby the victims, could benefit from a UN investigation team that was set up to investigate allegations of chemical weapons use in the Iran-Iraq War. The UN team issued seven reports between 1984 and 1988. One of the findings of the investigation team was that the chemical weapons were *"without any doubt used against Iranian forces by Iraqi forces, also causing injuries to civilians in Iran"*. It also established that various kinds of agents had been used. *"Predominantly mustard-gas."* It is also on the basis of these UN reports that Van Anraat has been convicted for selling materials that served for the production of mustard gas used by Iraq.

A practical problem regarding fact finding is lapse of time. In some instances the UN team went to the spot almost immediately after the attacks. In other instances, there was a delay of about two weeks between the dates of the alleged attacks and the arrival of the mission at the site of the attacks. The investigation team pointed out that:

"the intervals between the alleged attacks and our actual arrival in the areas to collect samples for chemical analysis resulted in the degradation and evaporation of chemical agents."

It stressed that:

"[I]n order to facilitate such analysis it is important that sampling be done as quickly as possible."

In sum, the Van Anraat case was concerned with a conflict that has been one of the rare cases where fact finding was done. In the majority of armed conflicts, the parties cannot agree on such missions. Legal actions brought – or considered to be brought – will then suffer from a lack of written records.

Otherwise, the victims in this case greatly benefited from the criminal proceedings against Van Anraat. Their case was built on the indictment and it was for the prosecutor to prove the allegations in the indictment.

Damage

While the facts proving criminal behaviour are for the prosecutor to deliver, this is different for the damage suffered by the victims. In principle, it is for the victims to prove the scope of their injuries and losses. However, this burden of proof resting on the victims, turned out to be not that heavy in this particular case. For several reasons.

In the first place, in this kind of compensation proceedings, that are linked to a criminal case, the victims' claims are awarded on the basis of fairness. Under Dutch law, victims are thus not required to provide definite proof of their injuries.

Also the ICC applies a relaxed standard of proof for reparation claims. It requires victims to provide "*relevant supporting documentation*" for their reparation claim only "*to the extent possible*". In case of lack of sufficient evidence, the ICC shall have to adopt measures to fill the evidence gap. It may either follow the road taken by Dutch domestic court and award the claims on the basis of equity. Another option for the ICC is to collect itself the necessary evidence. This could involve requesting the cooperation of States or international organizations.

A second reason why chemical war victims didn't have a heavy burden proving the scope of their damage, was because their injuries were not disputed. To a large extent, they were still clearly visible. The victims of mustard gas still had scars of the blisters that resulted from second degree burns. Some instances displayed respiratory problems. Some suffered from sight deterioration over the years, a few ending up blind. Many of the victims had been examined by medical doctors in Iran and Europe over the years. These doctors confirmed in this case that they displayed typical symptoms of exposure to mustard gas. Otherwise, the UN investigation team appeared useful in this respect too. It had investigated the injuries and recorded the evidence.

A third - and perhaps the most important reason - why the victims did not have a heavy burden proving the scope of their injuries, is that under the Dutch criminal code of the 80's (when the chemical attacks occurred), the victims could be granted not more than € 670 per person. Of course this is a symbolic amount in view of their injuries.

In the 90's, the law changed. The amount of compensation that can be claimed by victims is no longer restricted.

It should be noted that Dutch law does not provide for collective compensation. This is likely to raise problems in case of mass claims. When large groups of victims are involved, it may be difficult to quantify their damages exactly. It may be even more difficult to redress their damages individually. Collective awards may therefore be more suitable.

Another reason to grant a collective award, is that there are likely to be few resources available. Even the small amounts of € 670, when put together, mount up.

As I pointed out earlier, the ICC does provide for the possibility of collective reparations. Rule 97 provides: *“the Court may award reparations on an individualized basis or, when it deems it appropriate, on a collective basis or both.”* So, the beneficiaries of reparation orders may be either individual victims, groups of victims, or entire communities.

Conclusion

I shall come to my conclusion. The tort claims of the chemical warfare victims in the Van Anraat case are not directly based on IHL, or the Law on the Conduct of Hostilities for that matter. They are based on Dutch civil law. But the 1925 Gas Protocol, and the customary prohibition on the use of chemical weapons did constitute the substantive tort. So the Law on the Conduct of Hostilities was - indirectly - a source of rights enforceable by individual victims in a domestic court. So this case shows that individuals are no longer only victims of a violations of the law on conduct of hostilities. They can also present their claim to a tribunal.

This development - of compensation claims linked to criminal proceedings - is part of the growing emphasis on the role of victims by International Human Rights and Humanitarian Law.

At the same time, on the basis of this single case, and in the near absence of similar practice, it is impossible to extract general rules. We are still far from a coherent theory on different aspects of this kind of compensation cases. Recognition of a private remedy requires the development of a body of procedural rights afforded to victims, which allows them to join in criminal proceedings.

IHL does not provide any principles for determining how reparation is to be made for the injury caused by the wrongful acts. Nor does it give any methods for assessing the damage. Partly the relevant rules can therefore be derived from domestic law. An important question will be to what extent these domestic courts work in isolation, or whether they will draw from international sources such as human rights treaties.

Also the ICC Statute does not contain provisions on burden and standard of proof, causation, etc.. It is up to the ICC to establish – on a case-by-case basis - these procedural criteria in relation to reparation cases.

Ultimately what we need is a practical guide that can be used by both tribunals and victims.

Having stressed this important development for victims' compensation in International Criminal Law, it should be recalled that the victims of the chemical warfare in Iraq lost their case in appeal. The case is currently pending before the Supreme Court in the Netherlands. If the claims are not granted in the criminal case, they will be brought to a civil court. The reason why the appeals court rejected the compensation claims was that it considered them to be too complex to be decided by a criminal court. Complex aspects were deemed indeed not so much the facts or the damages. Difficult issues according to the Court were applicable law and statute of limitations. So the criminal proceedings offer a way out of some difficulties (like fact finding and establishing the damages). But serious obstacles remain. The victims' claims have an accessory nature. The Court to which these claims are presented, is in the first place a Court to try accused rather than a Court to provide reparations. It is therefore not equipped to deal with complex questions of civil law. Future success of these types of claims is therefore uncertain.

CONCLUSIONS OF THE ROUND TABLE

The Contemporary Challenges to the Law on the Conduct of Hostilities

Philip SPOERRI

Director for International Law and Cooperation within the Movement, ICRC

Introduction

The conduct of hostilities has been chosen as the theme of the XXXth Round Table on current issues of International Humanitarian Law, held on 6-8 September 2007, to mark the anniversary of the 1907 Hague Conventions and the 1977 Additional Protocols to the Geneva Conventions. The idea was to focus on both the historical roots and contemporary challenges of this law, on the evolution of the norms throughout the past century and on their current application. The program was dense and ambitious; but it was necessary to tackle many different issues to have an overview of the main challenges. The number of critical questions,

as well as burning issues on the matter, implied an analysis of a wide-range of key sections of the legal regime regulating the conduct of hostilities.

The program was also innovative in certain respects. The idea of case studies for example was tested for the first time in the Round Table, and proved to be workable even with a large group, as was the case. The division of participants in working groups, rarely done in the past, created an intellectually challenging environment and this method of work should be borne in mind in the future. It leads to a strong incentive for interaction and dialogue which is essential in the context of the Round Table. Overall, the approach was successful. The Round Table was also very fortunate to host exceptionally distinguished speakers and moderators. On this occasion, excellent presentations were delivered. These concluding remarks cannot offer an exhaustive summary of all the issues addressed in these presentations and of the interesting and fruitful discussions they generated. They will simply list and comment on the main points that were raised.

Session I: The historical and philosophical context

The objective of the first session was to place the law on the conduct of hostilities in its broader ethical context. First, the point was made that war is a moral context, in the sense that the violence of war must involve moral limits. In particular, restraint, proportion and distinction were mentioned as the key moral criteria applicable in any armed conflict. Second, securing the value of human persons constitutes the basis on which the humanitarian philosophy of war relies. This philosophy believes that every individual is valuable and deserving of "respect". This is the ultimate rationale leading to a minimum protection of combatants in the course of the fighting and which prohibits the infliction of superfluous injury or unnecessary suffering. It should also apply to the protection of civilians who do not, or no longer, participate in hostilities.

These philosophical bases paved the way for the formulation of general principles of International Humanitarian Law (IHL) which still apply today. In addition, they are as pertinent to "new" types of conflicts and "new" forms of waging war as they were to more traditional conflicts or forms of warfare. In other words, the general principles of IHL are timeless and remain relevant despite evolutions that may affect the conduct of warfare.

However, these general principles proved insufficient in ensuring adequate protection under IHL. A more detailed regulation turned out to be essential in order to soften the haziness floating around the generality of these principles. Additional Protocol I, therefore, filled an important gap by leading to the adoption of detailed rules. This instrument also

added an element of stability to the law by contributing to frame the interpretation and application of the rules. The main provisions of the Protocol were not challenged during the Round Table, strengthening existing treaty and customary law. The conclusion was more a call for further clarification of certain issues.

This call for clarification is even more important given that the face of war is changing. These changes were clearly highlighted throughout various interventions during the Round Table. Development of asymmetric warfare, combined with the possibility for non-State actors - even teenagers - to design a highly lethal weapon without a great deal of technical skills seems to be one of the main challenges. This challenge is even more stringent given that the threats stem from the very elements of globalization such as air transport and internet and raise the issue of the efficiency of the tools used to monitor situations of everyday life that may become significant threats. The most preoccupying question is clearly that these future "combatants" are now outside the system.

Session II: International Humanitarian Law and Human Rights Law

The second session of the Round Table was devoted to IHL and Human Rights Law which are both applicable to the use of force in armed conflict situations. In this respect, a consensus emerged to the fact that International Humanitarian Law is the *lex specialis*.

This general conclusion, however, does not solve the many issues that remain open regarding the eventual interplay between these two bodies of law in many specific situations, in particular in non-international armed conflicts. In that respect, it has even been suggested that a new specific IHL model, different from the simple "capture or kill" approach, could be envisaged. While no agreement was reached on this difficult issue, a call was made by Professor Françoise Hampson for an expert process to further deepen this question. The law applicable in the context of counter-terrorist operations - and in particular on the "fight against terrorism" - was also addressed along the same lines.

Session III: Definitions of "combatant", "armed forces", and "civilians"

Session III addressed the question of the definitions of "combatant", "armed forces" and "civilians" which is probably one of the most complex issues under IHL. Already in 1874 in Brussels, the definition of these three terms was a point of controversy and even if considerable progress has been made since, more work is needed to clarify the rules in this respect.

In international armed conflicts, treaty law provides relatively clear definitions of "combatant", "armed forces" and "civilians". However, questions arose as to eventual differences of view between States Parties or not Parties to Additional Protocol I. Further issues were raised in respect to organized armed groups operating within an international armed conflict, while not belonging to a Party to the conflict, i.e. are they civilians or "unlawful" combatants and what are the legal consequences of such determinations?

In non-international armed conflicts, there is no treaty-law definition of "armed forces" and "civilians" and the notion of "combatant" is not used at all. It is clear from practice that members of State armed forces are not civilians. But the question arose as to whether members of organized armed groups are civilians and whether they lose their protection only during specific acts of direct participation in hostilities (specific act approach) or for the entire duration of their membership in the group (membership approach). A compromise was proposed in the course of the Round Table which consisted in retaining a functional or restrictive membership approach according to which only an actual "fighter" would continuously lose protection against direct attack. All other persons would be civilians protected against direct attack unless and for such time as they directly participate in hostilities.

These issues were addressed - from a targeting point of view - during the ICRC expert process on clarification of the notion of direct participation in hostilities. It had been proposed to make a distinction between organized armed forces or groups of Parties to the conflict, and the civilian population. Civilians remain civilians regardless of whether they act lawfully or unlawfully, in accordance with or contrary to IHL. This reflects the functional criteria discussed by all speakers. The ICRC interpretative guidance proposes that civilians lose protection only during specific acts directly causing harm of a certain threshold (objective criterion). This stands in a certain tension with the claim made by some speakers who base loss of protection on subjective intent (voluntary/involuntary human shields), rather than direct/indirect causation of harm.

In the course of the discussions, it was emphasized that even when a civilian loses protection against direct attack, IHL imposes certain constraints. Thus, all feasible precautions have to be taken in identifying legitimate targets and, in case of doubt, a civilian must be presumed to be protected. Nevertheless, civilians having directly participated in hostilities remain subject to domestic prosecution, even after they regained protection against direct attack. The question was also raised as to what extent basic notions of humanity can require a "capture rather than kill" approach.

Concerning the notion of military objective, a wide consensus emerged to the effect that any attacks on civilian morale would be an undisputed violation of IHL. The demonstration made by Hays Parks of the military inefficiency of these attacks throughout history, as well as the powerful words of Yoram Dinstein during one of his interventions at the Round Table, were recalled to illustrate this purpose.

A consensus also emerged that there is no need to revise the definition of Article 52, paragraph 2, Additional Protocol I. The current definition is a flexible and valuable guide. It takes into consideration the fact that objects used for military purposes - at a certain point - may become civilian objects at a later stage and is therefore sufficiently adaptable to remain relevant in a changing environment. However, this definition is not always easy to interpret and there is probably a need for further clarification - at least for an agreement on the main parameter that must be taken into account when applying the two-pronged test.

Finally, throughout the discussions, it appears clearly that a distinction must be made between armed violence with a belligerent nexus, and violence or criminality unrelated to the surrounding context of hostilities.

Session IV: Case study: indiscriminate attacks, precautions, human shields

Session IV was meant to be an illustration of the difficulties that may arise practically when applying obligations set forth in relatively abstract terms.

The principle of proportionality was used as an example of how difficult it may be in practice to apply these principles in the context of an armed conflict. Beyond the explicit cases of clearly excessive damages to the civilian population or civilian objects, it may indeed be extremely difficult for members of the armed forces acting in good faith to identify the precise moment when collateral damages reach the threshold of a disproportionate attack. Of course, the emergence of international criminal tribunals and courts and the development of International Criminal Law may help in the future to better define, for example, the terms "excessive collateral damage". However, it seems clear that even if the law is adequate and new norms are not required, guidelines on how to apply concretely the principle could prove useful to ensure a proper application of the law.

Along the same lines, presentations and discussions on the precautions required in attack and against the effect of attack, as well as on the prohibition of the use of human shields, revealed that the concrete application of the treaty and customary rules regulating the matter was sometimes complicated. It was acknowledged that the constitution of groups of experts could help to "operationalize" these provisions.

Session V: Working groups on arms

Session V was devoted to means of warfare. Three working groups were organized respectively on biotechnology and weapons, "non-lethal" weapons and their legal implications, and on weapons causing post-conflict effects on civilians (mines, cluster bombs, explosive remnants of war). Summary reports of the debates within these three working groups were delivered.

Session VI: Environment and humanitarian assistance

Session VI dealt with humanitarian assistance and the protection of the environment in the context of an armed conflict. In relation to the first topic, the Round Table was an opportunity to recall that the consent of the State is essential in the event humanitarian assistance is carried out. Furthermore, Professors Von Heinegg and Dinstein recalled that it must be performed specifically by neutral organizations.

In relation to the protection of the environment, it was agreed that this topic had been on the back burner for quite some time now and that it deserved increased attention. Furthermore, Dr. Spieker held that Articles 35 and 55 of Additional Protocol I led to an inoperative regime in matters of protection of the environment.

Session VII: Air and missile warfare

Session VII was devoted to the theme of air and missile warfare. It was acknowledged that few areas of the law regulating the conduct of hostilities are not yet comprehensively codified and that air and missile warfare was certainly the main one. While the rules on aerial bombardment provided for in Additional Protocol I are absolutely essential, they do not cover all aspects of air and missile warfare. The efforts undertaken by a group of experts under the auspices of the Harvard Program on Humanitarian Policy and Research (HPCR) are therefore an important and useful step towards codification of these rules.

On this occasion, Yoram Dinstein explained that the Manual on International Humanitarian Law in Air and Missile Warfare (currently being drafted) will elaborate on the general legal framework, reiterating key principles and concepts. Given the rapid and constant evolution in matters of aerial techniques and strategies, the Manual's aim is to help bridge the current gap between positive law and current practice.

Session VIII: Implementation

The last session of the Round Table was devoted to the implementation of the Law on the Conduct of Hostilities. It was clear that there was a divergence between the needs expressed by the military of having at their disposal clear and concise rules and the concerns of the lawyers relating to the interpretation of the law. Colonel (ret.) Garraway identified as a major challenge the difficulty to agree on applicable law especially with respect to the situation in Afghanistan or in Iraq.

It was further emphasized that the domestic judicial system is too often inexistent or ineffective due precisely to the situation of armed conflict. Nevertheless, these last decades have witnessed vast developments in the field of International Criminal Law, with the establishment of the international *ad hoc* Tribunals and of the International Criminal Court. Thanks to case law, these international criminal Tribunals have already clarified certain concepts and rules of the conduct of hostilities. Some participants argued, however, that the system is still insufficiently developed. Françoise Hampson, for example, asked for the establishment of a civil accountability mechanism on the model of International Human Rights Law.

Conclusion

The Round Table concluded by emphasizing that what was needed was not new law but interpretative guidance on the application of the law. It addressed most of the challenges faced by the law on the conduct of hostilities and identified areas of the law where a clarification process by groups of experts could be useful. While it left many questions unanswered, it constituted a point of departure for new discussions.

Considerazioni finali

Giovanni Lorenzo FORCIERI

Sotto Segretario di Stato, Ministero di Difesa, Italia

Buon giorno. E' pr me un vero poter partecipare a questa Tavola Rotonda organizzata dall'Istituto Internazionale di Diritto Umanitario di Sanremo

Credo di poter trarre alcune considerazioni ora, avendo ascoltato, in parte, gli interventi della mattinata, le conclusioni, ed avendo letto il documento preparatorio che si è trattato di una riunione importante, positiva ed anche proficua.

In questi giorni abbiamo visto la partecipazione di esperti e di personalità provenienti da diversi Paesi e noi come Italia siamo orgogliosi di ospitare sul nostro territorio un Istituto che svolge un compito così importante che, in un mondo globalizzato dove le violenze si moltiplicano, è in qualche modo chiamato a confrontarsi sempre con situazioni nuove e con sfide nuove. Il Governo italiano che io qui rappresento seppur tenendo conto dei problemi e

delle difficoltà che oggi gravano sulla finanza pubblica in generale dei Paesi Europei ed in particolare del nostro Paese intende concretamente sostenere anche sul piano finanziario gli sforzi di trasformazione e di rilancio che verranno portati avanti dalla nuova leadership dell'Istituto anche sulla scorta delle raccomandazioni formulate dalla Commissione per il Futuro dell'Istituto, appositamente costituita e presieduta dal Sindaco di San Remo.

L'Istituto gode di buona salute ma non c'è dubbio che abbia ancora più bisogno di professionalità, di managerialità, di sforzi collettivi e sulla base della positiva esperienza del passato occorre costruire qualche cosa con lo sguardo rivolto verso il futuro. L'Istituto deve potersi aprire alla partecipazione di esperti di diversi continenti adottando anche criteri di rotazione nell'assegnazione degli incarichi apicali, esso deve poter sviluppare una importante e fiduciosa cooperazione con le competenti organizzazioni internazionali, a cominciare dal Comitato Internazionale della Croce Rossa, ma anche l'UE e la NATO sotto la cui responsabilità si svolgono ormai la maggioranza degli interventi di mantenimento della pace.

L'Italia è a tutti gli effetti il primo contribuente del bilancio dell'Istituto, essa è pronta, così come ha già indicato il mio collega Verneti nel suo intervento nei giorni scorsi, ad incrementare il suo apporto sia attraverso il contributo al bilancio ordinario sia attraverso il finanziamento di specifiche attività di formazione e di ricerca, non soltanto nel campo del diritto umanitario applicabile ai conflitti armati ma anche in quello del diritto dei rifugiati, con particolare riferimento al delicato nesso che esiste tra i fenomeni di migrazione e il diritto di asilo. Voi sapete che ci sono più candidati alla carica di presidente dell'Istituto tra cui un candidato italiano che io ho veramente il piacere e l'onore di conoscere da molto tempo e di averne verificato le qualità e le capacità. Io voglio assicurare che egli avrà tutto l'appoggio delle autorità italiane non soltanto, come mi auguro, nella sua fase di elezione ma, soprattutto, successivamente nella fase di attività dell'Istituto stesso.

Credo se mi consentite prima di fare alcune considerazioni su questa Tavola Rotonda di rivolgere un caloroso pensiero al prof. Patrignic che è recentemente scomparso. Io non ho intenzione di fare delle conclusioni perché non voglio assolutamente rubare il mestiere al presidente Veuthey e mi pare che già chi mi ha preceduto abbia in maniera molto compiuta sintetizzato il lavoro di questi giorni. Voglio fare però alcune riflessioni soprattutto sugli spunti di estremo interesse che questo convegno di esperti di diritto umanitario ha offerto alla politica. È stato affermato che l'evoluzione del diritto umanitario sta conoscendo oggi, dopo il 1989 ma soprattutto, ancora di più dopo l'11 settembre un dinamismo sempre più accelerato. La sorte e le condizioni di vita delle popolazioni civili che risiedono nei teatri delle crisi o delle operazioni militari diventano sempre più un fattore che pesa e conta politicamente e credo che

non potrebbe essere altrimenti in tutte le fasi in cui un intervento militare viene prima deciso, programmato e poi attuato.

A ciò si aggiunga il fatto che le decisioni e le operazioni maturano in contesti complessi con deliberazioni nazionali che vanno ad inserirsi in un quadro quasi sempre sopranazionale e molto spesso multilaterale altrettanto accade per la fase attuativa delle operazioni che implicano l'uso legittimo della forza. È quindi vero se noi affermiamo che il diritto umanitario cresce di importanza man mano che diventa radicato nella coscienza civile il valore della pace e della sicurezza per tutti, della pace e della sicurezza globale.

Credo sia fuori discussione insomma che oggi la tendenza ormai diffusa sia quella di considerare la guerra in quanto tale un disvalore o al massimo in qualche caso un male necessario. Il ricorso legittimo all'uso della forza quale necessità, strumento al quale fare ricorso ma sempre in termini assolutamente selettivi e assolutamente rigorosi, è un tema dei più attuali e la discussione che nei giorni scorsi è stata fatta circa l'uso legittimo della forza e la sua proporzionalità andrà ad arricchire quel patrimonio che alla fine diventa patrimonio comune di tutti e da cui noi possiamo attingere per le nostre decisioni.

Facevo riferimento prima al 1989 perché la caduta del muro di Berlino fa un po' da spartiacque tra la situazione precedente ed i decenni di riflessione che sono seguiti sul tema dell'uso della forza in riferimento a quella situazione e la situazione nuova che si era determinata. In materia di difesa e sicurezza oggi i concetti sono completamente ribaltati rispetto a quelli a cui per decenni siamo stati abituati a richiamarci. Le guerre asimmetriche delle formazioni terroristiche e le risposte militari che la Comunità Internazionale ha fin ora trovato sempre accanto all'iniziativa politica internazionale hanno offerto altra e nuova materia di riflessione teorica e di applicazione pratica. Naturalmente è anche finita l'era della guerra classica degli Stati fra eserciti regolari e tutto questo ha procurato, e imposto profonde e decisive trasformazioni. Noi stessi abbiamo compiuto come Paese una svolta di tipo prevalentemente professionale eliminando la leva. I militari di leva sono stati sostituiti non tanto con dei professionisti stabili ma prevalentemente con dei volontari che temporaneamente x un periodo da 1 a 3/4 anni svolgono una attività nelle nostre forze armate. È stata una trasformazione per noi epocale del nostro strumento militare soprattutto se si pensa che siamo impegnati in uno sforzo senza precedenti direi per quantità e rilievo politico internazionale a mantenere e a portare avanti gli impegni che in campo internazionale ci siamo assunti nei confronti della Comunità Internazionale nei vari scenari e teatri di crisi da quello dei Balcani e dell'Afghanistan, a quello più recentemente del Libano ed è proprio in tali teatri che noi verifichiamo la validità e l'importanza di quanto in questi giorni è stato discusso.

È stato osservato anche questa mattina che la formazione del personale militare in materia di diritto umanitario è compito dei singoli Stati e che ogni Stato agisce in maniera differente, è chiaro quindi che sarà difficile ribaltare completamente questa situazione ma credo che dovremmo comunque prendere atto del fatto che questo limita la capacità di applicare in modo omogeneo, al di là dell'adesione dei singoli stati agli strumenti internazionali, le norme scritte e consuetudinarie del diritto umanitario. Mi sembra però maturo, e questa è la prima riflessione che faccio, il tempo in cui anche questa responsabilità di formazione debba essere condivisa ad un livello sempre più alto, in particolare valorizzando le sedi multilaterali della NATO ed ancor più dell'Unione Europea. È soprattutto l'UE, infatti, che aumentando le proprie ambizioni di attore internazionale e di protagonista nella scena globale dovrebbe farsi carico di elaborare al suo interno una dottrina operativa valida per tutti i suoi membri, dottrina che io credo sarebbe esportabile anche a Paesi terzi o ad altre Organizzazioni Regionali. Io credo che anche questo potrebbe essere un modo concreto, anche se indiretto, di diffondere pacificamente valori quali il rispetto della vita umana e delle libertà sociali ed economiche che sono il primo strumento della stabilità e della pace nelle società avanzate sia economicamente che politicamente e istituzionalmente. Inoltre la formazione nel diritto umanitario e nei diritti umani devono costituire una componente essenziale della base morale ed istituzionale dell'addestramento dei militari di oggi chiamati non più e non solo a vincere le guerre ma a difendere e stabilizzare ambienti difficili e molto spesso ostili.

Un altro punto su cui vorrei soffermarmi, oggetto anche di una vostra sessione, concerne le normative nazionali e patrizie sul divieto di determinate categorie di armi; mi riferisco cioè a quelle che hanno una nocività molto forte nei confronti delle popolazioni civili ed in particolare alle mine antiuomo e alle cosiddette bombe a grappolo. Abbiamo esempi concreti del loro utilizzo in Afghanistan ed ancora più recentemente in Libano, sono armi che mettono a rischio concreto e per lunghissimo tempo la vita umana, l'economia, la possibilità di una esistenza dignitosa delle popolazioni che sono state teatro di operazioni ostili, ci sono terreni che non possono essere coltivati ed io vorrei rilevare in questo consesso come il nostro Paese, da questo punto di vista, disponga di una legislazione all'avanguardia sia in particolare per quanto riguarda la messa al bando della produzione, commercializzazione e uso delle mine anti-uomo che, molto recentemente, per l'equiparazione sostanzialmente delle bombe a grappolo alle mine antiuomo in modo che anche queste possano essere sottoposte a quei divieti che sono in essere per le mine.

Avendo discusso con i nostri militari so che questo comporta problemi di operatività e problemi anche tattici per quanto riguarda l'uso e la funzione delle nostre artiglierie ma io

credo che noi dovremmo essere fermi su questi principi, non possiamo infliggere a delle popolazioni il conflitto, la pena, i danni, i lutti del momento del conflitto e lasciare anche sul terreno un seguito che poi continua per anni.

Infine e poi chiudo veramente vorrei riflettere sulla influenza e sull'impatto che hanno i media nella rilevanza politica delle questioni concrete del diritto bellico e del diritto umanitario. Oggi non c'è un evento che non sia ripreso, filmato e trasmesso a livello globale o attraverso le televisioni o attraverso internet o molto più spesso attraverso entrambi. L'opinione pubblica viene a conoscenza indiretta e vive con partecipazione le sofferenze delle popolazioni dei Paesi e delle aree di crisi e di operazione militare; l'opinione pubblica globale giudica quotidianamente l'operato delle parti combattenti e spesso il canone di giudizio è proprio legato alla capacità o meno di interpretare in modo evolutivo il diritto umanitario, comportamenti contrari al diritto umanitario, l'ambasciatore iracheno prima faceva riferimento ad alcuni fatti specifici che sono avvenuti anche recentemente, provocano profondi turbamenti nella opinione pubblica e nel grado di consenso politico dell'azione intrapresa. A mio giudizio si può reagire a questa situazione in due modi: il primo modo è quello di condannare l'attività dei media, è quello di cercare di mettere in campo forme di comunicazione complicate e particolari che cerchino di contrastare la dimostrazione dei fatti; il secondo modo invece consiste nel far sì che questi fatti non vengano ripresi ed io credo che sia questa la strada che noi dobbiamo percorrere. Io infatti sono convinto che in un Paese democratico come l'Italia, dotato di forze armate che hanno nel loro DNA i valori della costituzione nulla abbia da temere da questa situazione di sovraesposizione mediatica delle operazioni di pace. È infatti sin dai tempi della prima missione in Libano nel 1980 che le nostre forze armate hanno inaugurato un modello che va sotto il nome del generale Angioni, un modello di relazione rispettoso e collaborativo fra militari e popolazioni civili che promuove le ragioni del dialogo e ne fa uno strumento di maggiore efficacia del intervento militare stesso, un modello che è stato e viene ancora studiato nelle accademie militari anche nord americane e che mi auguro sia sempre più diffusamente imitato, sviluppato e adottato.

Voglio ricordare l'attività dei carabinieri italiani che, ad esempio, durante le crisi balcaniche negli anni novanta hanno messo a punto il modello delle MSU, un modello volto a conciliare le funzioni militari con le funzioni di polizia nelle aree post-conflitto. Questo modello adesso è stato adottato nelle dottrine della NATO ed anche in quelle della difesa europea, possiamo quindi dire facilmente che la speciale sensibilità e l'approccio militare delle forze armate italiane anticipa e previene questioni di diritto internazionale umanitario e ne rappresenta per così dire una applicazione preventiva ed avanzata. Si quindi al controllo

dell'opinione pubblica, ad un'informazione garantita, pluralista e completa, a forze armate sinceramente democratiche che pertanto non devono averne timore ma anzi devono considerarlo come utile strumento che finisce per aumentare la consapevolezza della responsabilità internazionale di Paesi avanzati come il nostro e funge da stimolo e coscienza critica di tutti gli operatori a partire dai decisori politici.

Più informazione equivale a più libertà complessiva, nessuna vena d'ombra, nessuna censura, la massima apertura e al tempo stesso maggior valorizzazione e riconoscimento del ruolo delle forze armate nella odierna realtà della politica internazionale e nella progressiva costruzione del diritto umanitario.

Io credo che i lavori di questa mattina e dei giorni scorsi abbiano dato sicuramente un contributo importante allo sviluppo del diritto umanitario e di quei principi che noi tutti non solo rispettiamo ma che auspichiamo siano anche diffusi. Come è già stato detto non sarà certo una Tavola Rotonda seppur così importante, così significativa come questa che determinerà delle svolte ma io credo che le realtà si costruiscano a piccoli passi che messi assieme poi formano la montagna. Usciamo di qui avendo tanto materiale su cui riflettere e da digerire e io mi auguro che il prossimo anno, alla prossima Tavola Rotonda si possa prendere atto che le considerazioni fatte quest'anno hanno trovato, magari in alcune parti, una loro piena applicazione.

Grazie per la vostra attenzione.

Closing Remarks

Michel VEUTHEY

Acting President, IIHL

Monsieur le Secrétaire d'Etat, Excellences, Monsieur le Président du CICR, Monsieur le Maire, Chers Amis,

A la clôture de cette 30^{ème} Table Ronde marquant le 100^e de la Conférence de la Paix de La Haye et le 30^{ème} anniversaire des Protocoles additionnels aux Conventions de 1949, permettez-moi de vous remercier tous d'être venus à Sanremo pour contribuer au succès de cette Table Ronde. Je voudrais remercier encore le Comité d'organisation de cette 30^e Table Ronde, et en particulier son Président, le Dr. Rolph Jenny, Vice-Président de l'Institut et Président du Comité d'organisation de cette Table Ronde, ainsi que le CICR, en particulier le Dr. Philipp Spoerri, Directeur, et M. Jean-François Quéguigner, pour ce débat juridique de très haut niveau. Merci aussi au Secrétariat de l'Institut, qui, comme d'habitude, a fait des

miracles avec des moyens limités. Merci au Maire de Sanremo pour son accueil, merci au Président du Casino pour la très belle réception qu'il nous a offerte. Merci enfin aux interprètes.

Permettez-moi un appel en conclusion de ces débats si riches sur des sujets complexes : le droit humanitaire est, comme chacun le sait, constitué de règles écrites et coutumières. Ces règles écrites et coutumières, comme on l'a vu, peuvent donner lieu à interprétation, à discussion, à contradiction. Il est malheureusement parfois possible d'opposer la lettre à l'esprit de ces règles. Comme le rappelait souvent notre ancien Président, le Professeur Patnogie, ce dont nous avons aussi et avant tout besoin, c'est de règles simples, aisément compréhensibles, universellement applicables, qui rappellent l'esprit de ces règles complexes : tout être humain, même ennemi, a droit à être traité avec humanité.

Nous pouvons envisager plusieurs suites aux débats de ces trois jours :

- la suite la plus évidente est que cette Table Ronde puisse encore donner lieu à beaucoup de débats d'experts, militaires et juristes, sur la clarification des règles, tout comme sur les méthodes et mécanismes pour les mettre en œuvre. L'Institut sera certainement heureux d'accueillir ces échanges ;

- une autre suite sera de continuer à former tous ceux qui seraient amenés à mettre en œuvre ces règles ; là encore, l'Institut de Sanremo est prêt à contribuer à cette entreprise, qu'il assure depuis plus de trente ans, en collaboration avec les Gouvernements, les Académies militaires, les organisations internationales, le CICR, les Sociétés nationales de la Croix-Rouge et du Croissant Rouge, les universités (à commencer par celle de Nice avec laquelle nous avons un accord de coopération, que nous serions heureux d'étendre avec d'autres universités en Italie et ailleurs) ;

- une troisième suite serait de chercher ces règles simples, pratiques, communes, acceptables par toutes les parties en conflit, qui assurent leur compréhension et mise en œuvre dans les conflits contemporains par toutes les parties.

Que Sanremo puisse être un lieu de dialogue amenant experts juridiques et militaires à se retrouver, pas seulement entre eux mais aussi avec ceux qui peuvent influencer les parties en conflit à respecter le droit international humanitaire. J'entends par là les responsables spirituels et religieux, les médias, les formateurs, auxquels il sera parfois nécessaire d'ajouter des représentants des communautés locales ou des diasporas et d'acteurs économiques actifs dans la zone de conflit.

Que l' « esprit de Sanremo », qui a permis l'adoption des deux Protocoles additionnels à Genève en 1977, nous amène à élaborer des règles simples, compréhensibles et applicables par tous et pour tous, à même d'ancrer à nouveau les principes du droit humanitaire dans la conscience publique d'aujourd'hui, de montrer avec évidence que ce droit a ses fondements dans toutes les civilisations et protège la dignité de chaque être humain.

Sur ce, je vous adresse à tous mes vœux et meilleurs messages.

ACRONYMS

AP mines	Anti-personnel mines
AVM	Anti-vehicle mines
CAT	Campaign against Terrorism
CCW	Convention on Certain Conventional Weapons
CICR	Comité International de la Croix-Rouge
ERW	Explosive Remnants of War
GWOT	Global War on Terrorism
HRL	Human Rights Law
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IIHL	International Institute of Humanitarian Law
IHL	International Humanitarian Law
LOAC	Law of Armed Conflict
MOTAPM	Mines other than Anti-Personnel Mines
MSU	Multinational Specialised Units

NATO	North Atlantic Treaty Organization
POW	Prisoners of War
RAF	Royal Air Force
ROE	Rules of Engagement
UN	United Nations
UNAMID	United Nations-African Union Mission in Darfur