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Course Material

**One Year Advanced Diploma in International
Humanitarian Law**

1.3 Limitations on Means and Methods of Warfare

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7 International Humanitarian Law and the Conduct of Hostilities

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1. Introduction

This chapter examines the principles and rules of international humanitarian law (IHL) that govern the conduct of hostilities by states and other participants during an armed conflict. The term ‘conduct of hostilities’ refers to the application of force in the course of such conflicts.¹ In particular, it encompasses the various methods (tactics) and the means (weapons) that are used during the hostilities.

Those aspects of IHL that address the conduct of hostilities can best be understood by reference to a normative typology consisting of foundational principles, general principles, and rules. Foundational principles underpin the law, but are not themselves of direct applicability to the conduct of hostilities. States negotiate and adopt IHL treaties based on their assessment of the optimal balance between these foundational principles. They do so by conducting an auto-assessment of their national interests in the context of the particular IHL-related issue under consideration. Customary IHL likewise emerges from these foundational principles. Such law crystallizes when sufficient state practice and expressions of *opinio juris* exist for the emergence of a new IHL norm binding on all states. The relevant practice and expressions are the product of states’ balancing of foundational principles consistent with their perceived national interests.

Foundational principles also underlie the interpretation and application of IHL. In cases in which the precise meaning of an IHL rule is unclear, or when its application in a particular circumstance is abstruse, states turn to these foundational principles, in addition to more doctrinal means of discerning international law, as a means of clarification in the circumstances. Although the process may be subliminal, states nevertheless inevitably consider these foundational principles in the process of ascertaining those interpretations and applications of IHL rules that best foster their particular interests.

Whereas foundational principles broadly inform IHL, general IHL principles are the sources of individual rules. They are the first product, in the form of binding ‘hard law’, to emerge from the process during which states balance the foundational principles. Although (p. 148) prescriptive in nature, general principles are seldom applied directly during an armed conflict. Instead, they frame and inform the individual rules.

Rules are the instruments by which states, the sole generators of IHL, agree to limit their freedom of action, and that of other participants, during an armed conflict. They specifically delineate conduct that is unlawful and articulate the requirements with which participants in the conflict must comply when conducting hostilities. A violation of IHL is typically a breach of a particular rule.

This chapter is in three main parts. To place the remaining discussion in context, it begins with an introduction to the two foundational principles underlying the IHL applicable to the conduct of hostilities—military necessity and humanity. The chapter then turns to the content of this body of law, the general principles and their derivative rules. It concludes with a brief examination of certain new technologies warfare and highlights the key legal issues they raise with respect to the conduct of hostilities.

2. Foundational Principles

The foundational principles of military necessity and humanity undergird IHL in the sense that every IHL general principle and rule on the conduct of hostilities reflects a balancing by states of these foundational principles as they create, interpret, and apply individual operative norms.² States engage in hostilities because they have determined that doing so is in their national interest. Therefore, they must ensure that law does not impede their ability to engage in those hostilities that they deem militarily necessary to achieve such interests, which run the continuum from territorial conquest to self-defence. Yet, states also find limitations on the conduct of warfare to be in their interest, whether to protect their population and members of their armed forces from the excesses of war or out of a commitment to humanitarian values. Thus, states continuously struggle to find the optimal balance between these two oft-competing goods when adopting new law. The same dynamic takes place whenever states are faced with the prospect of having to interpret a particular rule or determine how an extant norm should be applied on the battlefield.

Military necessity is often misconstrued as a principal that justifies departure from an IHL rule when merited by the military exigencies of a situation. Historically, this notion was referred to as *Kreigraison*. Yet, *Kreigraison* began to be questioned by distinguished commentators soon after the turn of the twentieth century.³ The International Military Tribunal at Nuremburg unambiguously rejected it in the aftermath of the Second World War.⁴ Today, and despite occasional, unfortunate, counter-normative relapses,⁵ *Kreigraison* has no place in the application of IHL.⁶

(p. 149) Instead, to the extent that military necessity justifies deviation from an IHL rule, the rule itself will expressly so indicate. For instance, the Fourth Geneva Convention of 1949 (GCIV) prohibits occupying powers from destroying certain property 'except where such destruction is rendered absolutely necessary by military operations'.⁷ Similarly, Additional Protocol I of 1977 to the Geneva Conventions of 1949 (API) sometimes permits 'scorched earth' tactics in territory under a party's control, the use of enemy 'matériel and buildings of military units permanently assigned to civil defence organizations', and restrictions on civil defence and relief personnel in situations of 'imperative military necessity'.⁸

Military necessity is also occasionally misconstrued as a rule of IHL with direct application to the conduct of hostilities. By this approach, activities that have not been prohibited by either treaty or customary IHL are impermissible if they are unnecessary from a military perspective. The approach conflates foundational principles with rules. When IHL limits actions that are not sufficiently militarily advantageous to justify the resulting consequences, it specifically provides for such in the respective rule. The archetypal example is the rule of proportionality (see section 3.A.1.B *Proportionality* below), which prohibits attacks against valid military objectives when the attacks can be expected to cause excessive collateral damage (see section 3.A.1.B *Proportionality* below).

A second foundational principle, humanity, seeks to ensure that the effects of armed conflict on civilians, civilian objects, other protected persons and objects, and even combatants, is minimized. The aforementioned rule of proportionality is a paradigmatic expression of the principle since it bars militarily necessary attacks when their humanitarian consequences would be too egregious in the circumstances. Other examples include the requirement that medical facilities being misused for military purposes, and therefore qualifying as military objectives, be warned before being attacked;⁹ the rule that wounded military personnel may not be attacked even when it is likely that they will be treated and returned to the battle;¹⁰ and the prohibition on direct attacks against civilians or civilian property even if such

attacks undercut the morale of the civilian population, thereby measurably enhancing the chances of victory.¹¹

The inherent balancing of IHL's foundational principles is reflected in the famous Martens Clause. First included in the Hague Convention II of 1899,¹² article 1(2) of API (p. 150) is its contemporary articulation: '[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'. The International Court of Justice (ICJ) has perceptively recognized that the Martens Clause captures IHL's balancing of military necessity and humanity. In its *Nuclear Weapons Advisory Opinion*, the Court noted that in conformity with the Martens Clause,

... humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.¹³

It must be cautioned that the balance between the foundational principles can shift over time, with changes in the nature of conflict, the weapons used, and the interests of individual states and the international community. For instance, during the conflict in Afghanistan from 2001, a major debate surfaced over whether it was lawful to target the drug infrastructure that partly funded Taliban activities. Although it might previously have been agreed that such operations violated the rules against attacking civilians and civilian objects, the criticality of the funding to the Taliban's war effort caused some states to question their application in this circumstance. More recently, in the Syria conflict since 2012, coalition forces have been mounting airstrikes against Islamic State in Syria (ISIS) oil production and transportation assets, to undercut the group's financial base. Although such strikes are consistent with IHL when directed against oil being employed by the organization for its own military operations, it is not evident that oil-related targets qualify as military objectives when oil profits finance the group in a general sense. Nevertheless, there has been little criticism of the airstrikes by states that are not participating in them. It is unclear whether that silence reflects the near-universal contempt in which the group is held; whether it is a rational manifestation of the reality that ISIS is effectively countered by denying it critical financing; or whether it constitutes a normative signal that interpretation of the concept of military objective is evolving as groups like ISIS and Al Qaeda metastasize.

3. General Principles and Specific Rules

In the *Nuclear Weapons* case, the ICJ identified two of the three general principles of IHL informing the normative landscape governing the conduct of hostilities:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian (p. 151) objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly

aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.¹⁴

Both ‘cardinal principles’ embody the balancing of the foundational principles discussed above. The first—distinction—limits military operations by carving out, based on humanitarian concerns, categories of persons and objects that may not be attacked and with respect to which various precautions must be taken to avoid harming them. The second—unnecessary suffering—restricts certain forms of harm suffered by those who participate in the hostilities to that which is for the effective conduct of hostilities. Most IHL rules governing the conduct of hostilities, set forth below, derive from these two general principles. A third general principle—chivalry—also serves as a basis for specific rules.

Before turning to the rules, it must be noted that those that follow are meant to reflect customary international law in both non-international armed conflict (NIAC) and international armed conflict (IAC). Further, the discussion draws largely on API, which is the most comprehensive of the treaties dealing with the conduct of hostilities. Although the instrument does not bind non-party states like the US and Israel, most conduct-of-hostilities provisions contained therein are generally considered to reflect customary IHL norms. Where that is not the case, the deviation will be highlighted. Additionally, while the instrument is applicable only to IAC, there is wide consensus that most of its provisions with respect to the conduct of hostilities apply *mutatis mutandi* to NIAC, and bind non-state-organized armed groups participating in those conflicts.¹⁵ Except as otherwise noted, the discussion will therefore generally adopt the stance taken by the International Committee of the Red Cross (ICRC) in its Customary International Humanitarian Law Study (CIHL Study) with respect to both the customary nature of the rules and their applicability in NIACs.

A. Distinction

Article 48 of API provides that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and (p. 152) combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

This articulation of the principle of distinction is universally accepted as an accurate reflection of the analogous customary IHL principle.¹⁶ The principle is violated by conducting indiscriminate attacks, including direct attacks on unlawful targets. Additionally, when mounting attacks against lawful military objectives, an attacker must exercise constant care to ensure that harm to protected persons and objects is minimized.

Some dissonance exists, as is discussed below in section 1.B ‘Proportionality’, with regard to the precise scope of the terms appearing in article 48. For the purposes of this chapter, and except as otherwise apparent from the text, the term ‘combatant’ is used to broadly refer to those who are not civilians and therefore are usually subject to attack—members of the armed forces and organized armed groups, as well as civilians directly participating in hostilities. Additionally, although the term ‘military objective’ is defined in API with reference only to objects or locations that may be attacked, unless otherwise noted it will be used here in a wider sense to refer to lawful targets, including persons who may be attacked.¹⁷

1. Indiscriminate attacks

Indiscriminate attacks are those that fail to take adequate cognizance of the required distinction between lawful targets and persons and objects that enjoy protection under IHL. They are engaged in by employing either tactics or weapons that are indiscriminate.

A. Indiscriminate tactics

The tactic of directly attacking a protected person or object is self-evidently indiscriminate and accordingly is absolutely prohibited.¹⁸ ISIS attacks against elements of the Iraqi and Syrian population are paradigmatic. It is also indiscriminate to conduct an attack in a fashion that is 'of a nature to strike military objectives and civilians or civilian objects without distinction'.¹⁹ This is most often done when an attacker fails to 'aim' at a military objective (as distinct from aiming at an unlawful one). Examples include simply releasing bombs over enemy territory or shelling a populated area, even when done in the hope of incidentally striking a military objective.

A more nuanced prohibition on indiscriminate attacks is that of treating 'as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects'.²⁰ It is sometimes mistakenly concluded that area targeting, including so-called 'carpet bombing', is consequently unlawful. However, an area attack is only prohibited when it is possible for the attacker to more discriminately mount the operation. Consider a situation in which military objectives are located in a populated area. If an attacker possesses the (p. 153) means to conduct individual attacks against the targets, it must do so rather than targeting the entire zone in which they are located. This is most likely to be the case when the attacker fields precision munitions and advanced intelligence, surveillance, and reconnaissance (ISR) assets. Should the attacker not possess the capability to precisely locate and separately strike the targets, it may attack the entire area, but only consistent with the principle of proportionality and the requirement to take precautions in attack that are described below in section 1.H 'Precautions in attack'.

The principle of distinction is also the source of a number of additional rules regarding particular tactics. These include prohibitions or limitations on starvation, sieges, and reprisals against civilians, civilian objects, and other protected persons and objects. Some such methods of warfare are the subject of chapter 8 'Specifically Protected Persons and Objects'.

B. Proportionality

The aforementioned forms of indiscriminate attack are relatively straightforward in terms of interpretation and application. More problematic is the rule of proportionality. By that rule, an attack is indiscriminate if it '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'.²¹ Of all the rules regarding the conduct of hostilities, it is the vaguest and, therefore, the most difficult to apply by those in the field or during *post factum* assessments of an attack's lawfulness.

To fully understand the rule, it is necessary to parse the text. First, an assessment of the proportionality of an attack is never to be made on the basis of the eventual results. Rather, as indicated by the terms 'expected' and 'anticipated', the evaluation must focus on the attacker's reasonable expectations with respect to collateral damage and military gain when planning, deciding on, or executing the attack. For any number of reasons, an attack may result in more civilian casualties and damage to civilian property, or less military gain, than the attacker believed was likely to eventuate. To take a simple example, when civilians have unexpectedly moved into the target area, or the target has departed the location,

unknown to the attacker, the attack will be assessed against the reasonableness of the attacker's *ex ante* understanding of the situation.

Second, the rule of proportionality is often misinterpreted as consisting of a balancing of expected collateral damage and anticipated military advantage. Such an approach ignores the fact that the rule only prohibits an attack when the expected collateral damage is 'excessive' relative to the anticipated military advantage. No accepted definition of the term 'excessive' exists, but it is clear that it does not involve a strict mathematical comparison. A useful definition is that set forth in the *Harvard Air and Missile Warfare Manual*. There, an international group of experts agreed that an attack results in excessive collateral damage 'when there is a significant imbalance between the military advantage anticipated, on the one hand, and the expected collateral damage to civilians and civilian objects, on the other'.²² Operationally speaking, an attack causes excessive collateral damage when a (p. 154) reasonable commander in same or similar circumstances would hesitate to launch it despite the anticipated military advantage his forces would attain.

'Excessive' should not to be equated with 'extensive'. The ICRC has averred that:

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular, it conflicts with Article 48 (*Basic rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.²³

However, the assertion mischaracterizes the notion of excessiveness. It is not the degree of collateral damage that the rule of proportionality is meant to address, but rather the relationship between collateral damage and military advantage. This is the plain meaning of the rule and is borne out by state practice. There may be circumstances in which heavy civilian casualties are likely to result, but in which the military advantage that is anticipated is very high. Examples are a strike against a senior enemy leader, or one that would effectively neutralize enemy operations, for instance by targeting the oil reserves on which the enemy forces rely. Indeed, in its *Nuclear Weapon Advisory Opinion*, the ICJ was unwilling to express an opinion as to whether the use of nuclear weapons would be unlawful in situations where the survival of the state is at stake.²⁴ By the same token, an attack may violate the rule of proportionality when only slight collateral damage is expected if the anticipated military advantage is low enough. For example, it is arguably disproportionate to attack a single low-level soldier far from the battlefield when harm would befall even a few civilians.

It is sometimes questioned whether the collateral damage to be included in a proportionality analysis extends beyond that which is directly caused by the attack to indirect damage, sometimes referred to as reverberating or knock-on effects. By way of illustration, injury or damage caused by a weapon's blast or fragmentation effects are direct effects. If an attack on an electrical generating station results in denial of electricity to the civilian population, and the lack of electricity causes damage to civilian equipment or harm to individuals (as in the case of affecting heating during a severe winter), the results are indirect. The prevailing view is that all effects that are foreseeable by the attacker are included in the analysis.²⁵

Collateral damage does not include such effects as fear, irritation, or inconvenience on the part of the civilian population. Nor would it necessarily extend to disruption of services unless such disruption, as in the case of electricity above, had tangible effects. This is clear

from the textual reference to 'loss of civilian life, injury to civilians, or damage to civilian objects'.

Only advantages that are military in nature qualify for the purposes of the rule. Military advantage may result from the effect of an attack on the campaign and not just from the direct effects of the attack. Consider an attack that is a ruse intended to convince the enemy that the attacker's forces will strike somewhere other than the planned point of thrust for (p. 155) the overall operation. The destruction of the target may have little military advantage in the direct sense, but it could prove invaluable in terms of tricking the enemy into orienting its forces in a disadvantageous manner. Military advantage is not, however, advantage that is purely political, psychological, or economic in nature. There must be some relatively direct nexus to military operations, whether those operations are those of the attacker or the enemy. In particular, an effect on the morale of the civilian population does not amount to military advantage in the proportionality sense. Take airstrikes against military objectives located in the enemy's capital. Although the fact that the strikes could be conducted with impunity may affect the enemy population's support for the conflict, only the destruction of the targets themselves, and the attendant military contribution to the attacker's campaign, qualify as military advantage.

As noted in the rule, only 'concrete and direct' military advantage is considered when making proportionality determinations. Although the phrase is somewhat vague, it is clear that the military advantage sought must be identifiable, clearly discernible, and 'relatively close[ly]' related to the attack. Advantages that are 'hardly perceptible and those which would only appear in the long term should be disregarded'.²⁶ No particular quantum of advantage need accrue to the attacker, but the advantage sought may not be speculative.

The rule of proportionality applies to all those who exercise a degree of control over an attack. In particular, it extends to attack planners, commanders who authorize the attack, and individuals who conduct the operation. For instance, a pilot executing an air attack is obliged to consider any facts that come to his or her attention that might affect proportionality, irrespective of whether the attack has been previously approved by the unit commander. The paradigmatic example is that of a pilot who upon arriving at the target area unexpectedly finds civilians in the vicinity of the intended strike. The pilot must factor those civilians into his proportionality calculations when deciding whether to carry out the mission. However, those who execute a strike may, in assessing proportionality, consider the fact that the mission was planned and approved by those with access to intelligence and other information that may be unavailable to them.

C. Indiscriminate weapons

The prohibition on indiscriminate attacks includes those employing weapons that are inherently indiscriminate; that is, incapable of distinguishing lawful targets from those which protected by IHL.²⁷ A weapon can be indiscriminate in two ways. First, some weapons cannot be reliably aimed at a military objective. The classic example is the German V2 rocket used to target the UK during the Second World War. Although such rockets could generally be fired at large areas in the UK, their guidance system was so rudimentary that they were incapable of being aimed at distinct targets, even in situations in which there was a concentration of military objectives in a particular area. Similarly, during that conflict the Japanese used balloon-borne bombs against the US and Canada. Since they were dependent on air currents, the weapons were indiscriminate.

This prohibition applies to the weapon itself, not any particular use of it. For instance, during the 1991 Gulf War, Iraqi forces launched many Scud missiles. Although fairly imprecise, Scuds were capable of being directed at large military objectives, as illustrated by (p. 156) the successful use of them against the large US military installation at Dhahran.²⁸ Thus, they were not indiscriminate per se. Yet, the Iraqis sometimes used Scuds indiscriminately by firing them into population centres.²⁹ This illustrates the importance of

distinguishing between weapons that are unlawful because there is no likely situation in which their use would be discriminate and weapons that are discriminate but used indiscriminately.

Note that the prohibition on indiscriminate weapons is temporally relative. As technology improves, normative expectations with respect to precision heighten. For example, air attacks during the Second World War regularly employed bombs that were, by contemporary standards, highly inaccurate and would be considered indiscriminate in light of the technology available today for aerial attacks. It is reasonable to believe that many of today's weapons will be considered indiscriminate in the future.

Weapons are also indiscriminate when, albeit sufficiently precise, they have effects that are uncontrollable and therefore likely to harm the civilian population or civilian objects. Biological weapons that employ contagions that may be passed easily into the civilian population are indiscriminate on this basis because, although it is possible to direct them at combatants (for instance, by introducing them into a water supply or air-conditioning systems on a military installation), the attacker would be unable to limit their spread to civilians. Thus, they are unlawful even if their use had not otherwise been banned. Similarly, weapons releasing highly persistent airborne chemicals are indiscriminate given the likelihood that the chemicals would reach the civilian population by wind.

D. Direct attacks against protected persons

As noted, attacks that are directed at civilians, civilian objects, and other protected persons and objects fall within the ambit of indiscriminate attacks. In this regard, the general principle of distinction set forth in article 48 of API has been operationalized in a number of specific rules.

Pursuant to article 51(2), which undeniably reflects customary law, '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack'.³⁰ Although qualification as a civilian is the subject of chapter 5, it is useful to briefly summarize the concept here. API defines a civilian as 'any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the [1949] Third [Geneva] Convention and in Article 43 of this Protocol'.³¹ These categories refer respectively to members of the regular armed forces, including militia or volunteer corps like the reserves, that are part of the armed forces; members of a militia and other volunteer groups, including resistance movements, that belong to a party to the conflict and meet the conditions of being under responsible command, wearing attire or emblems that allow them to be distinguished from the civilian population, carrying their weapons openly, and, as a group, conducting their operations in accordance with IHL; members of the regular armed forces who (p. 157) have professed allegiance to a government or authority that is not recognized by the opposing party; and members of a *levée en masse*.³² Article 43 of API provides that the armed forces 'consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party', but adds that such armed forces must be subject to a disciplinary system that enforces compliance with IHL. Taken together for the purposes of the conduct of hostilities, civilians are those individuals who are not members of a party's armed forces or an organized armed group.³³

With regard to a NIAC, civilians are individuals who are not members of the state's security forces involved in the conflict, members of dissident armed forces that are in rebellion, or members of non-state armed groups engaged in the hostilities. Thus, in such conflicts,

civilians are those persons who are not members of a group that is involved in the hostilities.

In light of the widespread appearance on contemporary battlefields of groups that are not affiliated with the armed forces of a party to the conflict, the ICRC sponsored a project between 2003 and 2008 to assess the phenomenon. The result was promulgation of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities*.³⁴ Although the document has been the source of some controversy in other regards,³⁵ general agreement now exists with its conclusion that members of 'organized armed groups' are not to be considered civilians for targeting purposes.³⁶ Rather, they should be assimilated to members of the armed forces. Thus, direct targeting of their members is not barred by the prohibition on targeting civilians and any harm that befalls them during an attack against other lawful targets is not considered in either the proportionality analysis (section B 'Proportionality' above) or the requirement to take precautions in attack (section H 'Precautions in attack' below). Prominent examples of such groups include Al Qaeda, the Taliban, and ISIS.

Although consensus exists that organized armed groups may be targeted, a persistent controversy surrounds whether any members of the group continue to benefit from the prohibition on targeting civilians. There are two schools of thought. The ICRC has opined that only those members with a 'continuous combat function' are targetable.³⁷ Other members are treated as civilians with respect to the conduct of hostilities. This view is based in part on the argument that it is often difficult to distinguish members of an armed group (p. 158) from the general population and that therefore it is sensible to extend targetability only to those who are directly involved in the hostilities.³⁸ The alternative view is that, like members of the armed forces, all members of an organized armed group may be attacked. From the perspective of those taking this approach, it is inconsistent for group members who do not perform a combat function to benefit from the protection from attack, while members of the armed forces such as military cooks do not.

There is one situation in which civilians may be directly attacked during both an IAC and a NIAC. API, article 53(3) and Additional Protocol II (APII), article 13(1), deprive civilians of protection from attack 'for such time' as they 'directly participate in hostilities'.³⁹ By extension, these provisions also exclude such persons from consideration in the proportionality analysis and precautions in attack requirements. It is generally accepted that both provisions generally mirror customary law.⁴⁰

Direct participation by civilians must be distinguished from the notion of organized armed groups discussed above. Applicability of the rules regarding direct participation does not extend to members of such groups unless, by the ICRC approach, the member of the group does not perform a continuous combat function. Rather, they apply only to individuals lacking any direct affiliation with an organized group. For instance, a civilian who implants improvised explosive devices for a fee, as was common in Iraq, is a direct participant, whereas one who does so while a member of an organized group is targetable by virtue of membership in the group.

During the *Interpretive Guidance* deliberations, the ICRC suggested, and the majority of the experts agreed, that an act of direct participation consists of three cumulative constitutive elements. First, the act in question must be 'likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm)'.⁴¹ Second, 'there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation)'. Finally, 'the act must be specifically

designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)’.

Certain acts evidently qualify as direct participation in the hostilities. For example, a civilian who launches an attack is a direct participant, as is one who provides tactical-level intelligence by messaging enemy forces when military vehicles are entering an area where they may be attacked. Other acts are clearly not direct participation, despite the fact that they in some way foster the war effort. Civilians who cook for the armed group of which they are not members are, for instance, not direct participants, nor are civilian intelligence analysts operating at the strategic level.

Some cases remain unclear. A number of experts took the position that assembling an improvised explosive device (IED) satisfies the three criteria, whereas the ICRC is of the (p. 159) view that such activity is indirect because the second constitutive element is not met.⁴² Similarly, as will be discussed, the ICRC asserted that voluntary human shields are not generally directly participating in hostilities, whereas a strong view was expressed by certain of the experts that doing so qualifies.⁴³

A further point of contention surrounds the rules depriving civilians of protection for ‘such time’ as they directly participate in hostilities. The *Interpretive Guidance* states that the period includes ‘measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution’.⁴⁴ Recall the aforementioned case of the IED. A civilian engaging in such activity is directly participating as he prepares the device immediately prior to departing, during its transportation to the point where it is implanted, while he is implanting the device, and during travel home. Otherwise, as a civilian, he is immune from attack.

Some of the experts were of the view that this is an overly restrictive standard. By it, an individual may be engaged in a regular pattern of implanting IEDs, but nevertheless only be attackable as a matter of law during the cited period. This is problematic as intelligence may have identified the individual, but not know when he is next going to engage in the activity. If in a location where practically he cannot be detained, the ICRC’s approach would in many cases effectively deprive his intended targets of any way to prevent an attack almost certain to occur. These experts argued that civilians who directly participate in the hostilities should be treated as engaging in a continuous course of conduct during which they are targetable.⁴⁵ Moreover, they urged that with respect to an individual act of direct participation, targetability extends as far upstream and downstream as a definitive causal link can be established.⁴⁶ Thus, an individual who builds and implants an IED is targetable from the point when he begins to plan the operation and acquire the necessary materials until such time as he desists in any further acts.

An issue of continuing controversy related to direct participation surrounds human shields.⁴⁷ Contemporary conflict has unfortunately witnessed many examples of this tactic. Clearly, the use of human shields is a violation of IHL.⁴⁸ The question is, however, how individuals who are shielding military objectives should be treated with respect to the prohibition on attacking civilians, as well as the rule of proportionality and requirement to take precautions in attack. There are numerous schools of thought. In order to outline them, it is necessary to distinguish between individuals who voluntarily shield military objectives and those who do so involuntarily, in the sense of being forced to remain at a location that is likely to be attacked.

General consensus exists that involuntary human shields are to be treated as civilians for the purposes of conduct of hostilities rules. Thus, they are immune from attack. Yet, there are three camps within this general consensus. Until recently, the US took a minority position on the matter. As noted in the original *Department of Defense [DoD] Law of War (p. 160) Manual*: ‘If the proportionality rule were interpreted to permit the use of human shields to prohibit attacks, such an interpretation would perversely encourage the use of

human shields and allow violations by the defending force to increase the legal obligations on the attacking force.⁴⁹

The approach recognized that if involuntary human shields affect the proportionality analysis, the enemy can effectively gather enough of them in the target area so as to alter the proportionality analysis. This is because the target becomes immune from attack since the expected collateral damage is likely to be excessive relative to the anticipated value of striking the target. Therefore, all an attacker need do in shielding situations is to attempt to minimize the harm to them, consistent with the requirement to take precautions in attack.

A more nuanced, but also minority, approach is that adopted by the UK and reflected in its *Manual of the Law of Armed Conflict*. While taking the view that involuntary shields retain their status as civilians, the British *Manual* provides that '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.'⁵⁰ In other words, the value of the shields is somehow discounted when performing a proportionality analysis, although it is unclear how this would operate in practice. Again, the underlying logic is that the enemy should not be permitted to benefit from its unlawful behaviour, at least not to the extent that it would if the human shields were fully considered in the proportionality analysis. It is this approach that the US now appears to have embraced.⁵¹

The third approach, and that of the ICRC, is that involuntary human shields count fully in both the proportionality calculation and with regard to the requirement to take precautions in attack. Its proponents find no basis in any rule of IHL for relaxing the normative significance of their status as civilians. Moreover, they suggest that the previous approaches run counter to the object and purpose of IHL. Although reflecting a balancing of military advantage and humanitarian concerns, IHL generally does not seek a 'fair fight'. Rather, it strives to foster humanitarianism in the face of the reality of warfare. This purpose would be frustrated if belligerents were entitled to deprive civilians of the legal protections to which they are otherwise entitled in a situation to which those civilians have in no way contributed.

Voluntary human shields are an even more controversial matter. There are three views. The first is presumably reflected in the British *Manual* extract above, which does not distinguish involuntary from voluntary human shields; they count as civilians in the proportionality analysis, but their use by the enemy may be considered in making that calculus. By a second view, articulated in the *Interpretive Guidance*, voluntary human shields count fully as civilians in the proportionality analysis and precautions in attack requirements. The one exception is a situation in which 'civilians voluntarily and deliberately position ... themselves to create a physical obstacle to military operations'.⁵² The ICRC notes that '[t]his scenario may become particularly relevant in ground operations, such as in urban environments, where civilians may attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops'.⁵³ It goes on to argue that 'in operations involving more powerful weaponry, such as artillery or air attacks, the (p. 161) presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective'. Instead, the effect of civilians in the target area is to alter the proportionality analysis such that the rule of proportionality may preclude attack. The ICRC points out that this is solely a legal obstacle to direct attack and that therefore the behaviour does not amount to direct participation.⁵⁴

A third view, which would seem to be that of the US, is that voluntary human shields qualify as direct participants in the hostilities. The December 2016 version of *DoD Law of War Manual*, notes that civilian human shields, 'provided they are not taking a direct part in hostilities', are to be considered civilians in the proportionality analysis.⁵⁵ This infers that voluntary shielding renders those engaging in it as direct participants who are not included

in proportionality calculations or considered with respect to the taking of feasible precautions in attack. That said, the reality of contemporary warfare is that the presence of human shields, whether rendering an attack disproportionate or not, has great influence upon any decision to attack; after all, this is the very reason that the civilians voluntarily shield military objectives. It must be cautioned with respect to this view that if there is doubt as to whether the individual concerned is a voluntary or involuntary shield, the person must be considered to be the latter.⁵⁶

E. Direct attacks against protected objects

The principle of distinction has also been operationalized through a prohibition on attacking civilian objects. That prohibition, which undeniably reflects customary international law, is reflected in article 52(1) of API: '[c]ivilian objects shall not be the object of attack or of reprisals'.⁵⁷ The article defines civilian objects in the negative as those that are not 'military objectives', which requires resort to the definition of military objects found in article 52(2):

... objects which by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

It is universally agreed that this definition accurately restates customary international law.⁵⁸ Although the definition itself brooks no debate, its application does in certain circumstances and with respect to particular categories of objects.

To qualify as a military objective, and thus to lie beyond the prohibition on attacking civilian objects, an object must fall into one of the four enumerated categories. The term 'nature' refers to an object's 'inherent characteristic or attribute which contributes to military action'.⁵⁹ This category includes, for instance, weaponry, military equipment, and military (p. 162) bases. An object becomes a military objective by 'purpose' once the enemy intends to use that object for military ends in the future.⁶⁰ There is no requirement that it be used militarily at the time; the sole condition is that the attacker reasonably concludes that the object is to be converted to military use. The classic cases are civilian transportation, such as trains or ships that have been designated for future military use, or facilities that are in the process of being converted, as in a civilian airfield at which military equipment is being installed to facilitate later use by combat aircraft. 'Location' denotes 'selected areas that have special importance to military operations'.⁶¹ For instance, a force trying to stop the enemy's retreat may destroy or otherwise obstruct mountain passes in order to trap the enemy.

Other than objects that are military by nature, what were originally civilian objects are most likely to become military objectives through the 'use' criterion. 'Use' refers to the fact that the enemy is currently employing the object to further its operations or hinder its enemy's.⁶² Contemporary examples include insurgents' use of apartments to store weapons, basements where IEDs are assembled, minarets or church steeples that serve as look-out posts, civilian vehicles that have been commandeered, and civilian communications networks on which enemy forces rely.

Any use for military ends, no matter how slight, transforms a civilian object into a military objective. Thus, an apartment used once for a meeting of insurgents is a military objective while the meeting takes place (and also by purpose once the decision is made to meet there again). So-called 'dual-use' objects that are used for both military and civilian purposes are military objectives even if their civilian use far outweighs that of the military use. For example, a civilian train transporting a few military personnel qualifies irrespective of what percentage of its passengers are civilian, as does a dual-use airfield that serves military

aircraft, despite the fact that it is primarily devoted to civilian flight operations. Of course, in such cases, the proportionality rule may operate to preclude attack.

When a 'dual-use' object consists of clearly distinct parts, only that aspect being used for military purposes constitutes a military objective. Consider two apartment towers connected by a raised walkway. A weapons storage facility is located in one. Only that part of the building qualifies as a military objective. The remainder retains civilian object status; it may not be directly attacked and any damage to it will be factored into the proportionality analysis and the requirement to take precautions in attack.

A persistent debate in this regard relates to civilian apartment buildings in which only a single apartment is being used by the enemy.⁶³ The question is whether an attacker that has the precision weapons to allow it to strike that apartment must treat damage to other parts of the building as collateral damage. There are two views. By the first, the use converts the entire building into a military objective on the basis that it is an integral whole. Thus, at least as a matter of law, there is no need to consider expected collateral damage or to attempt to minimize harm to the parts of the building other than the apartment.

The other view takes the position that only the apartment qualifies as a military objective if the attacker's available weaponry (and other factors contributing to precision attack) permit limiting the strike to the apartment. The rest of the building is civilian in (p. 163) nature and therefore the rule of proportionality treats harm to it as collateral damage. The proponents of the view acknowledge it imposes relative obligations, but stress that the military necessity/humanitarian considerations balance discussed above such an interpretation.

While there is no threshold of use to qualify as a military objective, the object concerned may only be attacked for such time that it is so being used. This is an important caveat in contemporary warfare against non-state groups because insurgents often operate from among the civilian population and use civilian homes in which to hide or from which to operate. To avoid the ISR (intelligence, surveillance, reconnaissance) assets of advanced militaries, they are on the move constantly. In such circumstances, it is especially important for the attacker to have a reasonable basis for concluding that the place to be attacked is still being used at the time of the attack. In this regard, a civilian object that is repeatedly, although not constantly, used for military purposes comprises a military objective throughout the period of usage. For instance, an apartment serving as a safe house for insurgents does not cease to be a military objective because no one is using it on the night of the proposed strike. Similarly, civilian communications networks relied upon by the enemy for command-and-control purposes qualify as military objectives even though they may not be being used at the moment of attack.

The most persistent and significant debate regarding qualification as a military object surrounds the US view that so-called 'war-sustaining' objects are military objectives. There is consensus that 'war-fighting' objects, like weapons systems and command-and-control assets, qualify. Similarly, 'war-supporting' objects are military objectives. Such objects, as with a plant producing military equipment, directly support the war effort.

War-sustaining objects are 'economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability'.⁶⁴ A contemporary example is oil, the revenue from which finances a state's war effort. The US *DoD Law of War Manual* notes that '[a]lthough terms such as "war-fighting", "war-supporting", and "war-sustaining" are not explicitly reflected in the treaty definitions of military objective, the US has interpreted the military objective definition to include these concepts'.⁶⁵ This view has been an outlier among IHL experts.

The longstanding debate has heated up in recent conflicts. For instance, in 2008 NATO considered striking drug-related targets in Afghanistan because the Taliban relied on proceeds, often in the form of taxes or 'protection' levies on poppy growers, to fund its operations.⁶⁶ Eventually, NATO grounded its counter-drug campaign on legal bases other than qualification as military objectives. In 2015, the issue again surfaced when ISIS began using oil revenue from territory it controls as an important source of financing. Clearly, if ISIS uses the oil produced to fuel its combat operations, it qualifies as a military objective. But air campaigns have been mounted by a number of states against targets related to oil production and sale in an effort to deprive the group of funding for its campaign. It would be difficult to describe such targets as other than war-sustaining. This raises the question of whether states are rethinking how best to interpret the notion of military objectives in light (p. 164) of the difficulty of countering such groups and the ensuing shift in the balance between military necessity and humanitarian considerations.

Whether by nature, location, purpose, or use, qualification as a military objective requires satisfaction of two cumulative criteria. First, the object concerned must make an 'effective contribution' to the adversary's military action. Second, an attack on it must, in the circumstances, offer the attacker a 'definite military advantage'. An effective contribution is one that in fact contributes to the enemy's military action. The contribution need not be great, but the object must be of a kind that is militarily useful to the enemy in the circumstances. A definite military advantage is one that is more than 'potential or indeterminate',⁶⁷ although the advantage may manifest at the tactical or operational levels of war (that is, in battlefield operations or the campaign overall).⁶⁸

The distinction between the two criteria is subtle but important. Effective contribution is about whether the object concerned helps the enemy militarily, whereas definite military advantage has to do with how its 'total or partial destruction, capture or neutralization' will benefit the attacker in the situation at hand. For instance, bridges that are crossed by the military during an armed conflict make an effective contribution to military action. However, if bridges far from the front are attacked in the waning days of the conflict as the enemy is retreating and obviously about to surrender, any purported military advantage to dropping them is somewhat speculative.

While most experts agree that the criteria are cumulative, disagreement exists over qualification as a military objective by nature. Some experts are of the view that the destruction, capture, or neutralization of any objects that fall into this category always offers a definite military advantage. In particular, because the 'fog and friction of war' make it difficult to predict outcomes, weakening enemy military capacity necessarily yields a definite military advantage. Troops in retreat, for instance, may be rallied; equipment located far from the field of battle may be transported there, and so forth. Other experts counter that the definite military advantage issue must nevertheless be considered in every case, even though the likely result may be that the attack will yield such an advantage. The example most commonly cited to illustrate the point is 'the Highway of Death' incident during the first Gulf War. Iraqi forces were in disarray and fleeing north to Baghdad when they were caught on an open highway by Coalition air forces. They were serially destroyed. At the time, many critics of the action suggested the war was essentially over and that the troops posed no threat. Those on the other side of the debate dismissed the criticism by noting that, as military forces, they were targetable until such time as they surrendered or were otherwise *hors de combat*.

F. Doubt as to status

Whether a person or object considered for attack qualifies as a lawful target is often subject to a degree of doubt.⁶⁹ For instance, in many conflict zones civilians carry weapons not to (p. 165) take part in the hostilities, but rather to protect themselves, their families, and their property. Given the chronic failure of insurgents to properly identify themselves as fighters, this can create confusion for an attacker. Similarly, airborne ISR assets may

identify a building that armed men of fighting age regularly enter and exit late at night. Or communications intelligence assets may have intercepted a phone conversation involving the leader of an insurgent group three hours before an attack can be mounted against a building from which the call has been made.

IHL provides for two presumptions in cases of doubt as to status. With respect to individuals, article 50(1) of API provides, '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.⁷⁰ Obviously, this standard cannot require absolute certainty, for doubt is a pervasive reality of warfare. To ensure it will not be interpreted in this manner, a number of states issued understandings when ratifying API to the effect that the presumption does not override a commander's duty to protect his forces.⁷¹

The point is that if a reasonable commander would hesitate to attack because of doubt as to whether an individual is a combatant, member of an organized armed group, or direct participant in hostilities, then the rule attaches. As noted by the ICRC:

... it is fair to conclude that when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious.⁷²

The presumption with regard to objects is analogous. Article 52(3) of API stipulates that:

[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military actions, it shall be presumed not to be so used.

As with individuals, when an attacker is uncertain about the status of a potential target to such a degree that the attacker hesitates to attack in the circumstances, the attack may not go forward. Textually, this presumption attaches only to those objects normally dedicated to civilian purposes. Therefore, it would not apply to, for example, a civilian airfield which is capable of launching and recovering military aircraft and had occasionally done so during peacetime. Despite this limitation, the ICRC's cautionary warning that '[i]t cannot automatically be assumed that any object that appears dubious may be subject to lawful attack' is, as in the case of persons, a fair reflection of the rule's application in practice.⁷³

Since the determination is to be made in light of the attendant circumstances, the requisite certainty can vary. For instance, if the target is of extremely high military advantage, the amount of doubt that would cause a reasonable attacker to hesitate, thereby activating the presumption, would be lower than in cases where the potential target appears to (p. 166) be a low-level fighter. This again reflects the inherent balancing between military advantage and humanitarian considerations that permeates this body of law.

Although most experts believe the presumptions reflect customary international law, a position advocated by the ICRC, the US has contested that assertion in its *Law of War Manual*:

Under customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases. Attacks, however, may not be directed against civilians or civilian objects based on merely hypothetical or speculative considerations regarding their possible current status as a military objective. In assessing whether a person or object that normally does not have any military purpose or use is a military objective, commanders and other decision-makers must make the decision in good faith based

on the information available to them in light of the circumstances ruling at the time.⁷⁴

The US position is based on concerns that the presumptions might create a bar too high to rebut when confronted with the realities of war. Moreover, the presumptions could ‘encourage a defender to ignore its obligation to separate military objectives from civilians and civilian objects’ and ‘unprivileged belligerents may seek to take advantage of a legal presumption of civilian status’.⁷⁵ As a result, the US concludes that such presumptions ‘likely would increase the risk of harm to the civilian population and tend to undermine respect for the law of war’.⁷⁶

Perhaps the two sides are closer than might appear at first glance. First, the gap between the US view—that a determination as to targetability cannot be based on hypothetical or speculative considerations—and the ICRC’s—that a party may not attack any person or object that appears dubious—is narrow. Second, applied in practice, most operators would apply the presumption anyway, if only to avoid the negative blow-back from civilian casualties that has come to haunt contemporary military operations. Third, the US acknowledges the legal requirement of an attacker to do all that is feasible to verify the target (see below). Therefore, refusal to accept the customary status of the presumptions does little to relieve US operations of any undue burden.

G. Special protections

In addition to the rules regarding the protection of civilians and civilian objects, IHL contains a number of ‘special protections’ with respect to certain persons or objects. As to persons, they extend, inter alia, to members of the armed forces who are *hors de combat*; medical, religious, civil defence, and humanitarian relief personnel; civilian journalists; and peacekeeping personnel, unless they have become a party to the conflict.⁷⁷ Objects enjoying special protection include medical facilities and units; specially established areas for civilian protection and care of the wounded and sick; humanitarian relief facilities, supplies, and (p. 167) transports; peacekeeping equipment and facilities; cultural property; works and installations containing dangerous forces, such as dams, dykes, and nuclear electrical generating stations (by treaty); the natural environment (by treaty); and objects indispensable to the survival of the civilian population.⁷⁸

Special protections operate in one of three ways. First, they may extend protection to persons or objects that do not otherwise enjoy protected civilian or civilian object status. Military personnel who are *hors de combat* by virtue of wounds or surrender, as well as those who serve as chaplains or perform medical duties, exemplify this form of special protection. Second, special protection may simply serve to emphasize the protected status of certain especially vulnerable groups, such as civilian correspondents, that already enjoy protected civilian status. Finally, special protections may limit the right to take action against certain objects that have lost their protected civilian status, or have been placed at greater risk by the hostilities. Examples include the requirement to warn before attacking a medical facility that is being used for military purposes, and the API limits on attacking dams, dykes, and nuclear electrical generating stations. As special protections are the subject of chapter 8, they will not be examined further here.

H. Precautions in attack

In addition to its various prohibitions, the principle of distinction is the basis for a requirement that ‘in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects’.⁷⁹ This general admonition is operationalized in a number of specific rules set forth in article 57 of API. A failure to take

the requisite precautions in attack is itself an IHL violation, irrespective of the degree to which an attack otherwise comports with the principle of distinction.

With respect to precautions in attack, the military necessity/humanitarian considerations balancing is expressed in terms of feasibility.⁸⁰ In light of humanitarian considerations, an attacker must do everything feasible to avoid harm to protected persons and objects, but given military necessity it can be expected to do no more than is sensible in the circumstances.

Although undefined in API, feasibility is generally considered to consist of measures that are 'practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations'.⁸¹ As noted in the ICRC *Commentary* to API, what is practicable or practically possible entails 'common sense and good faith'.⁸² Feasibility is essentially a reasonableness standard that requires attackers to take those measures to avoid collateral damage that a reasonable attacker would in the same (p. 168) or similar circumstances, in light of the information that is 'reasonably available at the relevant time and place'.⁸³

A variety of factors may affect the reasonableness of precautionary measures. Looming large are military considerations. Thus, an attacker is entitled to consider such matters as the need for precision munitions at a later stage in the campaign, competing demands for ISR assets, and the risk to one's own forces when assessing the feasibility of a particular measure. In this latter regard, there is some debate in IHL circles over the extent to which an attacker must place its forces at risk from enemy defences when conducting an attack. Although this debate has not been resolved as a matter of law, most disciplined military forces accept the premise that it is reasonable to shoulder some degree of risk in order to avoid harming protected persons and objects. The question is where does the feasibility line lie between risk-free attacks and those which are suicidal? Additionally, at least one state takes the position that the 'cost' of the weaponry can be a factor in the feasibility determination, although no other state has taken the same position openly.⁸⁴

The first of the specific precautions required by article 57 is that an attacker must 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects ... [nor] subject to special protection'.⁸⁵ Modern technology has dramatically expanded the options for attackers in this regard. In particular, unmanned aircraft fitted with ISR capabilities, and real-time communications links to those involved in the targeting process, have contributed to greater transparency of the target area, and resultantly an enhanced ability to ensure the intended target is indeed a lawful one.

An attacker is also required to select means and method of attack that minimize 'incidental loss of civilian life, injury to civilians and damage to civilian objects'.⁸⁶ By this rule, if an attacker can use a different weapon that will lessen harm to civilians or civilian objects, such as one that is more precise or less destructive—without sacrificing military advantage, for instance because the probability of achieving the desired destructive effect drops—then that weapon must be employed if feasible in the circumstances. The same applies to tactics. As an example, the angle of aerial attack that is most likely to avoid collateral damage, because of the location of civilian objects relative to the aim-point, must be selected so long as it does not lower the likelihood of achieving the desired effect on the target or increase risk to the aircraft. Similarly, if a bridge may be attacked at night when the presence of civilians thereon is likely to be low, and the timing does not affect likely success, the first option must be selected.

The same approach is obligatory with respect to the selection of targets.⁸⁷ In many cases, an attacker can select from among an array of potential targets to achieve a desired effect. Consider an attack designed to disrupt command and control for a particular period by denying electricity to an enemy communications node. Potential targets include the electrical generating plant, related substation or, using carbon filament bombs, electricity

lines. So long as an attack on each achieves the desired effect of interrupting the electricity during that period, and none of them presents a greater risk to an attacker, the attacker must select (p. 169) the option most likely to avoid causing collateral damage. It must be cautioned that some states reject the customary law status of the requirement, although that is a decidedly minority view.⁸⁸

To foster protection of protected persons and objects, IHL requires attackers to provide advanced warning of an attack that may affect the civilian population, unless circumstances do not permit.⁸⁹ Significant state practice of warning exists. Warnings can be specific to a particular operation, as with the Israeli practices of phoning the residence of a home to be attacked, messaging individuals at risk, or using the 'roof-knocking' technique.⁹⁰ However, the 'if circumstances permit' caveat is central to the requirement because warnings can allow the defender to put defensive measures in place or enable individuals who are targeted to escape. In such cases, general warnings may suffice. As an example, coalition forces dropped thousands of leaflets over Iraq in 2003, before launching their campaign, warning the civilian population to avoid military sites. In some cases, the circumstances render warnings infeasible altogether and they need not be issued.

The requirement to take precautions in attack is a relative one. Some states, for example, have sophisticated systems for verifying targets, a robust catalogue of weaponry, and the ability to strike targets with impunity (despite enemy defences) by employing effective countermeasures. Others come to the battlefield with limited means to effectively minimize civilian harm. Since the issue is feasibility, it is possible that a failure to employ feasible precautions by one state would not constitute the same for another.

The measures set forth above are known as 'active' precautions. Their counterpart consists of 'passive' precautions from the effects of attack that are required of the defender. Passive precautions oblige defenders, to 'the maximum extent feasible', to:

... endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; avoid locating military objectives within or near densely populated areas; [and] take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.⁹¹

Pursuant to article 51(7) of API, the failure of a defender to comply with this obligation does not affect the attacker's obligation to take active precautions, nor does it alter the operation of the rule of proportionality.

However, recall that some states are of the view that an enemy's use of human shields, whether voluntary or not, excuses an attacker from having to take the shields into consideration when conducting the proportionality analysis. This position was taken on the basis that the enemy should not be entitled to benefit from its own violation of the law of armed conflict. Presumably, the same logic applies with respect to passive precautions, such that an attacker facing an enemy that has volitionally failed to comply with the requirement need not take the resultant collateral damage to civilians and civilian objects into consideration when assessing proportionality.

(p. 170) B. Unnecessary Suffering

As noted, in its *Nuclear Weapons Advisory Opinion*, the ICJ labelled the principle of unnecessary suffering as one of the cardinal principles of IHL. The principle stretches back to the 1868 St Petersburg Declaration's prohibition on arms that 'uselessly aggravate the suffering of disabled men, or render their death inevitable'.⁹² It was subsequently reflected, albeit employing different terminology, in the Hague Regulations of 1907.⁹³ Article 35(2) of API is the contemporary articulation of the principle: '[i]t is prohibited to employ weapons,

projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering’.

Unnecessary suffering is a clear example of balancing the foundational principles of military necessity and humanitarian considerations, for it renders it unlawful to cause enemy combatants more suffering than is merited by one’s military objectives. In other words, it acknowledges the need to cause suffering, even death, of enemy forces (military necessity), but countenances only such degree of suffering that is justified by the need to prevail on the battlefield (humanitarian considerations).

Like the other two IHL general principles, the principle of unnecessary suffering is reflected in a number of derivative rules. These are discussed in chapter 11 ‘Weapons’, which, in addition to further discussing the principle, deals with individual weapons restrictions and bans. A number of the rules analysed in chapter 10 ‘Methods of Warfare’ on prohibited methods of warfare likewise find their roots in the principle of unnecessary suffering. These include the rules against declaring no quarter, attacking those who are *hors de combat*, and conducting reprisals against prisoners of war (POWs). Analysis of the principle is therefore deferred to those chapters. However, two points merit mention here.

First, the principle applies only to those individuals who may be lawfully targeted: members of the armed forces or other organized armed groups and individuals who are directly participating in hostilities. It does not extend to civilians and other protected persons, because those individuals are immune from direct attack *ab initio*. Any harm to them is subject to the aforementioned rules deriving from the principle of distinction.

Second, the legal issue is not the degree of suffering, but whether that suffering is logically and unavoidably incidental to an attack involving the means or methods chosen. Thus, the notion of unnecessary suffering is not to be equated with severe suffering. For instance, some weapons can cause severe suffering, but that suffering nevertheless may be necessary in the circumstances. Consider the use of incendiary weapons. Even though the suffering that results from their use can be horrific, they are valuable weapons for such purposes as use against enemy personnel under armoured protection or in field fortifications. The fact that incendiary weapons do not run counter to the principle is reflected in the fact that states parties to Protocol III (on incendiary weapons) to the Convention on Certain Conventional Weapons have limited their use only in specified circumstances.⁹⁴ By the same token, there is no established floor of suffering to which the principle applies. For instance, combat knives with serrated edges are generally considered to cause unnecessary (p. 171) suffering, even though far less lethal or injurious than many weapons, because a person may be rendered *hors de combat* with a straight edged knife.⁹⁵

C. Chivalry

The third general principle of IHL bearing on the conduct of hostilities differs from the preceding two in that it is often both a reflection of the balancing of military necessity and humanity and an historical principle that finds its roots in the notion of fairness on the battlefield between honourable warriors.⁹⁶ Although chivalry may seem alien in conflicts with groups like ISIS or Boko Haram, its continued valence during armed conflict is evidenced by the fact that rules based in chivalry are often cited by states, intergovernmental organizations, non-governmental entities, and scholars when assessing compliance with IHL.

Violations of a number of chivalry rules have become appallingly commonplace in modern warfare, particularly by various organized armed groups facing states that enjoy conventional military superiority on the battlefield.⁹⁷ This is because the norms in question typically require an element of good faith on the part of the parties to the conflict. The expectation of good faith is susceptible to being perversely exploited by the asymmetrically

disadvantaged party in order to offset its inferiority, by, for example, using ambulances to approach enemy forces or beheading prisoners to excite the emotions of potential recruits.

The most developed category of rules deriving from chivalry are those dealing with the treatment of POWs. Although rules governing the treatment of prisoners are of ancient lineage, the first modern codification occurred with the Geneva Convention of 1929.⁹⁸ In the aftermath of widespread prisoner abuse during the Second World War, the Third Geneva Convention of 1949 (GCIII), as well as API, were adopted to add greater prescriptive granularity to the subject. These rules and their customary international law counterparts are the subject of chapter 5 'Persons Covered by International Humanitarian Law: Main Categories'.

Also prominent among the rules stemming from the principle of chivalry is the prohibition of perfidy. Article 37 of API prohibits killing, injuring, or capturing enemy forces by feigning protected status,⁹⁹ although a number of states do not accept the reference to capture as reflecting customary international law.¹⁰⁰ Specifically cited as examples of perfidy in the article are feigning: an intent to negotiate or surrender; being wounded, enjoying civilian status, or having status as a member of the United Nations or of neutral states by using their signs, emblems or uniforms. Perfidy must be distinguished from ruses, which are military operations or other activities intended to mislead the enemy, but that do not in any way attempt to exploit feigned protected status to one's advantage.¹⁰¹

(p. 172) Misusing signs intended to signify protected status, as in the case of those that indicate civil defence facilities or the Red Cross, violates IHL, even when there is no intent to betray the confidence of the enemy in order to kill, capture, or wound.¹⁰² Additionally, enemy uniforms or other enemy emblems may not be worn while conducting an attack. It should be noted that it is lawful to wear enemy uniforms at other times, such as while spying in enemy territory or during an attempt to escape capture. However, if captured in the enemy's uniform the individual concerned will not be entitled to POW status. Finally, chivalry is the source of the prohibition on compelling nationals of the enemy to take part in the operations of war directed against their own country.

4. New Technologies of Warfare

A number of new technologies have raised issues regarding the aforementioned IHL conduct-of-hostility rules. Prominent among these are remotely piloted aircraft (drones), autonomous weapon systems, and cyber technologies.¹⁰³ Full treatment of these and other emergent technologies is well beyond the scope of this chapter, and some aspects are dealt with in chapter 11 'Weapons'. Certain key issues merit mention here.

With respect to drones, consensus is slowly beginning to emerge that so long as the target is lawful and all feasible measures have been taken to assess proportionality and to avoid harm to protected persons and objects, such weapon systems do not present significant conduct-of-hostilities issues. Instead, controversy tends to focus on two issues. The first is whether an armed conflict, either international or non-international, exists during contemporary drone operations, such that IHL is the appropriate legal regime when conducting lethal drone operations, rather than international human rights law. Classification of armed conflict is dealt with in chapter 2.

Second, questions as to the geography of war, in particular the geographical reach of IHL beyond the immediate battlefield during an armed conflict, are particularly complex in light of the global reach of some drone operations.¹⁰⁴ In particular, there is an ongoing debate about the legality of crossing into another state's territory to conduct strikes that focuses on whether doing so violates the sovereignty of the state where the operations are being conducted, or constitutes a 'use of force' against that state in violation of article 2(4) of the UN Charter. These questions are beyond the scope of IHL. Even if the state conducting the

operations is in violation of these norms, it and the 'injured' state must comply with the principles and rules set forth in this chapter if the situation amounts to an armed conflict.

Autonomous weapon systems are those that, for the sake of simplicity, can be described as weapon systems that identify, select, and engage targets without human interaction. They are colloquially known as 'man out of the loop systems', to distinguish them from 'man in (p. 173) the loop' systems, in which a human is actively involved in the engagement, or 'man on the loop' systems that involve human monitoring of an engagement and the ability to take control should the need arise. There have been assertions that autonomous weapons systems are unlawful per se because they are incapable of complying with the principle of distinction. Since then, the debate has matured.¹⁰⁵ Whether a system may comply with IHL depends on its sensor capabilities, weapon, and the environment in which it is employed. Most analysis today is instead directed at identifying aspects of autonomy that may present difficulties with respect to the specific rules set forth in this chapter.

Especially problematic in this regard is the question of how such systems might comply with the rule of proportionality. As sensor technologies become increasingly accurate, they are likely to be able to provide sufficient information to distinguish lawful targets from those which are protected by IHL. Yet, it remains difficult to ascertain how an autonomous system could assess military advantage over time or distance. This is because combat can evolve so quickly and dramatically that what is highly militarily advantageous at one moment may not be an hour later. For instance, the military advantage of engaging enemy forces that are attacking your position is higher than doing the same with forces fleeing the battlefield after a major defeat. Some commentators have also pointed to the issue of accountability for autonomous systems should they engage in attacks that violate conduct-of-hostilities rules. Others reply that those who take the decision to employ the systems will be responsible for any foreseeable consequences, including violations of IHL, as they are with respect to other weapons and tactics.

Finally, the advent of cyber operations during armed conflict has raised a number of challenging IHL issues. With respect to the conduct of hostilities, two loom especially large. The first surrounds the meaning of the term 'attack'.¹⁰⁶ The definitional debate is of particular import because many of the prohibitions found in IHL are prohibitions on attack. For example, as discussed above, IHL prohibits 'attacks' on civilians and civilian objects, bars 'attacks' likely to result in excessive collateral damage, and requires the taking of precautions in 'attack'. These and other prohibitions, restrictions, and requirements do not come into play unless the cyber operation in question qualifies as an attack.

There is widespread agreement that any cyber operation causing injury or death to individuals, or damage or destruction of tangible property, qualifies as an attack. So too does one that causes such effects even though no damage or injury is suffered by the entity against which the cyber operation is actually directed (as in opening the flood doors of a dam, thereby killing persons downstream). Consensus also appears to be emerging that cyber operations causing permanent interference with the 'functionality' of cyber infrastructure, or equipment that depends on the infrastructure, amounts to an attack.¹⁰⁷ Whether a cyber operation not having consequences at these levels constitutes an attack for IHL, conduct-of-hostilities purposes remains an open question.¹⁰⁸

(p. 174) The second controversy deals with whether data qualifies as an 'object', such that an operation that destroys or alters civilian data amounts to a prohibited attack on a civilian object. Additionally, the answer to this question will determine whether or not collateral harm to civilian data during a lawful cyber operation against a military objective must be considered in the proportionality analysis and the precautions in attack requirements. A majority of the International Group of Experts that prepared the humanitarian law aspects of *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* concluded that, in the present state of the law, data is not an object. They did so on the basis that data

‘neither falls within the “ordinary meaning” of the term object, nor comports with the explanation of it offered in the ICRC Additional Protocols Commentary’.¹⁰⁹ However, the conclusion has been questioned by some commentators.¹¹⁰

These two issues raise difficult questions of law that are likely to demand attention by the international community. The problem is that there does not appear to be an easy solution to either. Although it might appear appealing to altogether prohibit cyber operations directed against civilians and civilian objects, such a prophylactic ban would, for instance, rule out psychological operations by cyber means directed at the enemy’s civilian population. Since such operations are generally accepted as lawful in the non-cyber context, for instance through broadcasting or the dropping of leaflets, it is unclear why they would be unlawful if conducted by cyber means. Similarly, it might appear excessive to permit cyber operations against civilian data on the basis that they do not constitute objects (unless, of course, the operation qualifies as an attack on the basis of its harmful effects on persons or objects). Much civilian data is essential to the normal functioning of civilian societies and it would seem contrary to the object and purpose of IHL to allow for such wide-ranging operations. However, if data qualifies as an object, the ability of states to conduct cyber operations will be dramatically affected, because they may not conduct cyber operations against civilian data. This is also because the rule of proportionality, and the requirement to take precautions, would prohibit many cyber operations against valid military targets due to the networking of civilian and military systems, and the fact that militaries around the world rely heavily on civilian systems to conduct their military operations. No resolution of either issue is on the horizon.¹¹¹

These and other issues dealing with the application and interpretation of extant IHL norms to new technologies of warfare will inevitably be settled over time through state practice and *opinio juris*. They may also be resolved through adoption new treaty law, although this prospect is far less likely than contextual interpretation of existing general principles and rules. Indeed, IHL has repeatedly proven flexible enough to adapt contextually to the emergence of new technologies; this is worth recalling as the IHL community and states grapple with the confluence of such technologies and international law.

Footnotes:

* The views expressed are those of the author in his personal capacity and do not necessarily represent those of the US government.

1 See also Sylvie-S Junod and Jean Pictet, ‘Commentary on Protocol II’, in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) para 4788: ‘[h]ostilities have been defined as “acts of war that by their nature or purpose struck at the personnel and *materiel* of enemy armed forces” ’ (citations omitted) (AP Commentary).

2 For a discussion of the operation of IHL’s foundational principles, see Michael N Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50 *Va J Int’l L* 795.

3 Eg Elihu Root, ‘Opening Address’ (15th Annual Meeting of the American Society of International Law, Washington, 27 April 1921 (1921) 15 *ASIL PROC* 1, 3: ‘[e]ither the doctrine of *Kriegsraison* must be abandoned definitely and finally, or there is an end of international law, and in its place will be left a world without law’.

4 *United States v Wilhelm List and others* (1949) 8 LRTWC 34 (19 February 1948) (*Hostage case*).

5 Memorandum from Alberto R Gonzales, Counsel to the President, to George W Bush, President of the United States (25 January 2002): describing certain provisions of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1953) 75 UNTS 287 (GCIV) as 'quaint'.

6 See eg *Prosecutor v Fofana and Kondewa* (Appeals Chamber Judgment) SCSL-04-14-A (28 May 2008) para 247.

7 GCIV article 53.

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) articles 54(5), 67(4), 62(1), and 71(3).

9 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI) article 21; GCIV article 19; API article 13(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) article 11(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 1: Rules* (CUP 2005) (CIHL) 91-8, commentary to rule 28.

10 Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907; entered into force 26 January 1910) 187 CTS 227 (Hague Regulations) article 23(c); GCI article 3; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 12 October 1949) 75 UNTS 85 (GCII) article 3; Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 12 October 1950) 75 UNTS 135 (GCIII) article 3; API articles 40-41; APII article 4(1); CIHL 164, rule 47(b).

11 See discussion below.

12 Hague Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899; entered into force 4 September 1900) 187 CTS 429 (Hague Convention II) preamble. See also Hague Convention (IV) with Respect to the Laws and Customs of War on Land (adopted 18 October 1907; entered into force 26 January 1910) 205 CTS 227 (Hague Convention IV) preamble.

13 *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66 (*Nuclear Weapons*) para 78.

14 *ibid* para 78.

15 *Prosecutor v Tadić* (Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 127:

it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part

in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

16 See also CIHL rules 1 and 7. For a non-API Party adoption of the principle, see US Department of Defense (DoD), Office of the General Counsel, *Law of War Manual* (December 2016) para 2.5.

17 This is the approach taken by the International Committee of the Red Cross (ICRC). AP Commentary para 1207.

18 API article 51(4)(a).

19 *ibid* article 51(4)(c); CIHL rule 12(a).

20 API article 51(5)(a); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (adopted 3 May 1996, entered into force 3 December 1998) 2048 UNTS 93 (CCW Amended Protocol II); CIHL rule 13.

21 API articles 51(5)(b), 57(2)(a)(ii), and 57(2)(b); CCW Amended Protocol II article 3(8)(c); CIHL rule 14; *Prosecutor v Galić* (Judgment) IT-98-29 (5 December 2003) paras 58–60; *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 52; *Prosecutor v Martić* (Judgment) IT-95-11 (12 June 2007) para 69.

22 The Program on Humanitarian Policy and Conflict Research at Harvard University, *Manual on International Law Applicable to Air and Missile Warfare* (CUP 2009) (AMW Manual) 98 commentary to rule 14 para 7.

23 AP Commentary para 1980.

24 *Nuclear Weapons* paras 96–97.

25 See, eg, Michael N Schmitt (ed) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) commentary to rule 113 para 6 (*Tallinn Manual*).

26 AP Commentary para 2209.

27 API article 51(4); CIHL rule 12.

28 US DoD, *Conduct of the Persian Gulf War: Final Report to Congress* (10 April 1992) 219.

29 *ibid* 621–3.

30 See also Geneva Conventions Common Article (CA) 3(1)(a); APII article 13(2); *Prosecutor v Kaing* (Judgment) ECCC-E188 (26 July 2010) paras 308–310; *Galić* (above n 21) para 19; *Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004) paras 109–110; *Kordić* (above n 21) para 328; *Prosecutor v Strugar* (Judgment) IT- 01-42-T (31 January 2005) paras 220–221; Eritrea–Ethiopia Claims Commission, *Western Front, Aerial Bombardment and Related Claims*, Partial Award, Eritrea’s Claims (19 December 2005) (*Western Front*) para 95; CIHL rule 1.

31 API article 50(1).

32 A levée en masse consists of ‘[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war’: GCIII article 4(A)(6). See also Hague Regulations article 2.

33 CIHL rule 5.

34 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC 2009).

35 See eg Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *NYUJ Int'l Law & Pol'y* 641; Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *NYUJ Int'l Law & Pol'y* 697; William Boothby, '“And for Such Time As”: The Time Dimension to Direct Participation in Hostilities' (2010) 42 *NYUJ Int'l Law & Pol'y* 741; Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 *NYUJ Int'l Law & Pol'y* 769; Nils Melzer 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *NYUJ Int'l Law & Pol'y* 831; Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *NSJ* 5.

36 ICRC, *Interpretive Guidance* (above n 34) 22.

37 *ibid* 33–5: 'the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities'.

38 *ibid* 44–5.

39 See also *Prosecutor v Abu Garda* (Decision on Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) paras 78–82; *Prosecutor v Milošević* (Judgment) IT-98-29/1-T (12 December 2007) para 947; *Kordić* (above n 21) para 51; *Prosecutor v Fofana and Kondewa* (Judgment) SCSL-04-14-J (2 August 2007) paras 134–135; *Prosecutor v Sesay and others* (Judgment) SCSL-04-15-T (2 March 2009) paras 86, 102–104; *Abella v Argentina (La Tablada case)*, Inter-American Commission No 55/97 (18 November 1997) paras 177–178, 189, 328.

40 CIHL rule 6.

41 ICRC, *Interpretive Guidance* (above n 34) 46.

42 *ibid* 53–4 and n 123.

43 *ibid* 56–7 and n 141.

44 *ibid* 65–8.

45 *ibid* 71, 192.

46 This approach is reflected in Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2nd edn, CUP 2010) para 368. Professor Dinstein was a member of the expert group.

47 On this topic, see Michael N Schmitt, 'Human Shields in International Humanitarian law' (2009) 47 *Colum J Transnat'l L* 292.

48 GCIII article 23(1); GCIV article 28; API article 51(7); CIHL rule 97.

49 US DoD (above n 16) para 5.12.3.3.

50 UK Ministry of Defense (MoD), *The Manual of the Law of Armed Conflict* (2004) para 5.22.1.

51 US DoD (above n 16) para 5.12.3.4.

52 ICRC, *Interpretive Guidance* (above n 34) 56.

53 *ibid*.

- 54** *ibid* 57.
- 55** US DoD (above n 16) para 5.12.3.4.
- 56** API article 50(1); CIHL commentary to rule 6.
- 57** See also CIHL rule 7; *Kaing* (above n 30) para 304; *Blaškić* (above n 30) paras 113–114; *Fofana and Kondewa* (above n 39) paras 116–117.
- 58** CCW Protocol II article 2(4); CCW Amended Protocol II article 2(6); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 171 (CCW Protocol III); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 212 article 1(f) (Second Protocol 1999); *Galić* (above n 21) para 51; *Western Front* para 113; CIHL rule 8; US DoD (above n 16) para 5.6.3.
- 59** *AMW Manual* commentary to rule 22(a) para 1. See also AP Commentary para 2020.
- 60** AP Commentary para 2022.
- 61** *AMW Manual* commentary to rule 22(b). See also AP Commentary para 2021.
- 62** AP Commentary para 2022.
- 63** Michael N Schmitt and John Merriam, ‘The Tyranny of Context: Israeli Targeting Practice in Legal Perspective’ (2015) 37 *U Pa J Int’l L* 53, 120–1.
- 64** United States Navy, United States Marine Corps, and United States Coast Guard, *The Commander’s Handbook of the Law of Naval Operations* (2007) para 8.2.5.
- 65** US DoD (above n 16) para 5.6.6. See also 10 USC section 950p(a)(1).
- 66** See generally Michael N Schmitt, ‘Targeting Narcinsurgents in Afghanistan: The Limits of International Humanitarian Law’ (2009) 12 *YIHL* 301–20.
- 67** AP Commentary para 2024.
- 68** UK MoD (above n 53) para 5.33.5; UK, ‘Additional Protocol Ratification Statement: Reservation’ (28 January 1998) para. (i) (‘UK Ratification Statement’); *AMW Manual* para 6 of commentary to rule 1(w); *Tallinn Manual* para 20 of commentary to rule 100.
- 69** On the issue of doubt arising during targeting, see generally Michael N. Schmitt and Michael Schauss, ‘Uncertainty in the Law of Targeting: Towards a Cognitive Framework’ (2019) 10 *Harvard National Security Journal* 148–194.
- 70** See also *Galić* (above n 21) para 50; *Milošević* (above n 39) para 946.
- 71** See eg UK Ratification Statement para (h).
- 72** CIHL commentary to rule 6.
- 73** See also CCW Amended Protocol II article 3(8)(a); *Galić* (above n 21) para 51; CIHL commentary to rule 10.
- 74** US DoD (above n 16) para 5.4.3.2.
- 75** *ibid*.
- 76** *ibid*.
- 77** GCI articles 24–26; GCII article 36; API articles 15, 62, 67, 71(2), 79; APII article 9; CIHL rules 25, 27, 31, 33, 34.

- 78** GCI articles 19, 20, 23; GCIV articles 14–15, 54–56, 59; API articles 12, 21–24, 53, 60, 69–70; APII articles 11–12, 16, 18(2); Convention on the Safety of the United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363; Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240; Second Protocol 1999; CIHL rules 28–29, 32–33, 35–36, 38, 42–45, 54.
- 79** API article 57(1); Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, preamble; *Prosecutor v Kupreškić et al* (Judgment) IT-95-16-T (14 January 2000) para 524; CIHL rule 15.
- 80** API articles 57(2)(a)(i)–(ii). The condition of feasibility is generally understood to apply to all of the precautionary requirements set forth in article 57.
- 81** UK Ratification Statement para (b); CCW Protocol II article 3(4); CCW Protocol III article 1(5); CCW Amended Protocol II article 3(10); AP Commentary para 2198.
- 82** AP Commentary para 2198.
- 83** UK Ratification Statement para (c). See also CCW Protocol III, US Understanding upon Ratification.
- 84** US DoD (above n 16) para 5.2.3.2.
- 85** API article 57(2)(a)(i); *Galić* (above n 21) para 58; CIHL rule 16.
- 86** API article 57(2)(a)(ii); CIHL rule 17. See also *Ergi v Turkey* App No 40/1993/435/514 (ECtHR, 28 July 1998) para 79.
- 87** API article 57(3); CIHL rule 21.
- 88** US DoD (above n 16) para 5.11.7.1.
- 89** API article 57(2)(c). See also Hague Regulations article 26; CIHL rule 20.
- 90** Schmitt and Merriam (above n 63) 135–6.
- 91** API article 58; *Kupreškić* (above n 79) paras 524–525; CIHL rules 22–24.
- 92** Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg Declaration) (29 November/11 December 1868) 138 Consol TS 297, 18 Martens Nouveau Recueil (ser 1) 474.
- 93** Hague Regulations article 22: ‘the right of belligerents to adopt means of injuring the enemy is not unlimited’.
- 94** CCW Protocol III. See also CIHL rule 85
- 95** CIHL commentary to rule 70.
- 96** US DoD (above n 16) para 2.6. See generally, Tery Gill, ‘Chivalry: A Principle of the Law of Armed Conflict?’, in Mariëlle Matthee et al (eds), *Armed Conflict and International Law: In Search of the Human Face* (Asser 2013) 33–51.
- 97** See eg Human Rights Watch, ‘Ukraine: Insurgents Disrupt Medical Services’ Human Rights Watch News (5 August 2014) www.hrw.org/news/2014/08/05/ukraine-insurgents-disrupt-medical-services.
- 98** GCIII.
- 99** See also CIHL rule 65.
- 100** US DoD (above n 16) para 5.22.2.1.
- 101** API article 37(2).

102 CIHL rules 58–63.

103 For a fuller treatment of the author's views on these technologies, see respectively, Michael N Schmitt, 'Unmanned Combat Aircraft Systems (Armed Drones) and International Humanitarian Law: Simplifying the Oft Benighted Debate' (2012) 30 *BU Int'l L J* 595; Michael N Schmitt and Jeffrey C Thurnher, '“Out of the Loop”: Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 *Harvard Nat Sec J* 231–81; Michael N Schmitt, 'Cyber Operations in the Jus in Bello: Key Issues' (2011) 87 *ILS* 89–110.

104 Michael N Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict' (2014) 90 *ILS* 1–19.

105 Human Rights Watch, 'Losing Humanity: The Case against Killer Robots' (2012) 30. But see Michael N Schmitt, 'Autonomous Weapon Systems: A Reply to the Critics' (2013) 4 *Harvard Nat Sec J* 1.

106 API article 49: '“Attacks” means acts of violence against the adversary, whether in offence or in defense.'

107 *Tallinn Manual* para 20 of commentary to rule 92.

108 Michael N Schmitt, 'Rewired Warfare: Rethinking the Law of Cyber Attack' (2014) 96 *IRRC* 189; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Official Working Document of the 32nd International Conference of the Red Cross and Red Crescent Doc 32IC/15/11 (December 2011) 41; Cordula Droege, 'Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians' (2012) 94 *IRRC* 533, 556–60.

109 *Tallinn Manual* para 6 of commentary to rule 100.

110 Heather A Harrison Dinnis, 'The Nature of Objects: Targeting Networks and the Challenge of Defining Cyber Military Objectives' (2015) 48 *Isr Law Rev* 39; Kubo Macak, 'Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law' (2015) 48 *Isr Law Rev* 55. But see Michael N Schmitt, 'The Notion of “Objects” during Cyber Operations: A Riposte in Defence of Interpretive Precision' (2015) 48 *Isr Law Rev* 81.

111 For a proposed policy response to the issues of attack and data, see Michael N. Schmitt, 'Wired Warfare 3.0: Protecting the Civilian Population during Cyber Operations' (2019) 101(1) *IRRC* 333–355.

(p. 235) 10 Methods of Warfare

1. Introduction

Current world affairs are plagued by a plethora of conflicts, many of them marked by methods of warfare displaying a shocking disregard for the established principles of international humanitarian law (IHL). In some contexts, it seems that methods such as direct attacks against civilians and unarmed or wounded combatants, indiscriminate attacks, perfidious suicide-bombings, and the destruction and pillage of cultural objects have become commonplace, and it seems to have been forgotten that even wars have limits.

The so-called 'Hague Law', which regulates the use of means and methods of warfare so as to mitigate, as much as possible, the 'calamities of war',¹ is the oldest branch of IHL. Its basic tenet can be summarized in three fundamental maxims, namely: (i) that 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy';² and that therefore, in pursuing this aim, both (ii) 'the right of the Parties to the conflict to choose methods or means of warfare is not unlimited';³ and (iii) '[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations'.⁴

The first maxim expresses the basic principle of military necessity, which limits the permissibility of means and methods of warfare to what is actually required for the achievement of a legitimate military purpose. The second maxim provides the basis for the prohibition of means and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering to combatants.⁵ The third maxim concerns the principle of distinction,⁶ which prohibits not only direct attacks against civilians and the civilian population, but also indiscriminate means and methods of warfare. Both the prohibition of unnecessary suffering and the principle of distinction are regarded as 'cardinal principles' of IHL by the International Court of Justice (ICJ)⁷ and, in this basic form, are universally accepted as part of customary international law.⁸

(p. 236) Beyond the restatement of these fundamental maxims and principles, however, a more comprehensive discussion on methods of warfare gives rise to difficult questions. How should the notion of 'methods of warfare' be defined and, in particular, how should it be distinguished from the related notion of 'means of warfare'? Are the generic prohibitions of indiscriminate attacks and of superfluous injury/unnecessary suffering specific enough in terms of detail, and sufficiently broad in terms of scope, to regulate each and every method of warfare? What are the main methods of warfare that have been more specifically regulated in customary and treaty IHL? Are there differences as to how IHL regulates methods of warfare in international armed conflicts (IACs) and non-international armed conflicts (NIACs)?

Once these preliminary issues have been explored, the objective of this chapter is to outline the current state of the law regulating methods of warfare. For the purposes of the chapter, the rules of IHL regulating methods of warfare are distinguished according to their protective purpose, ie those aiming to protect civilians and the civilian population based on the principle of distinction⁹ are discussed separately from those aiming to protect combatants based on the prohibition of unnecessary suffering or other principles of IHL. For each method of warfare, the questions analysed will be the following. When and how has the method been restricted or prohibited in customary or treaty law? Does recourse to the restricted/prohibited method of warfare give rise to individual criminal responsibility? Why has the method been restricted/prohibited (*ratio legis*)? What is the exact content and meaning of the restriction/prohibition? Are there open questions regarding the

interpretation of the elements of the restriction/prohibition? Are there recent examples of contemporary practices and policies which may be relevant to the rule in question?

A concluding section summarizes our findings and attempts a cursory outlook as to the relevance of contemporary trends, such as the advent and seamless integration of new technologies into the arsenal, strategies, and tactics of armed and security forces throughout the world.

2. Defining and Regulating Methods of Warfare

A. Defining Methods of Warfare

The notion of ‘methods of warfare’ is mentioned several times in Additional Protocol I (API) to the Geneva Conventions.¹⁰ It is usually employed together with its twin notion ‘means of warfare’. In Additional Protocol II (APII) dealing with NIACs, where states party to a treaty were hesitant to use the term ‘warfare’,¹¹ and on one occasion in (p. 237) API,¹² treaty law also refers to ‘methods of combat’ instead. Generally, however, states preferred the term ‘warfare’ to that of ‘combat’, the latter having been proposed in the original draft text prepared by the International Committee of the Red Cross (ICRC), because they felt ‘combat’ might be construed more narrowly than ‘warfare’.¹³ For the purposes of the present analysis, both terms will be used synonymously.

In any event, neither the concept of ‘methods of warfare’ nor that of ‘methods of combat’ has been defined in treaty law and there was no attempt to do so in the discussions preceding the adoption of the Additional Protocols to the Geneva Conventions.¹⁴ The Commentaries to the Additional Protocols simply state that while the term ‘means’ of warfare refers to weapons, the term ‘methods’ of warfare generally refers to the way in which weapons are used.¹⁵ This distinction between ‘means’ and ‘methods’ of warfare is important because any weapon (means)—ie even lawful ones—can be used in an unlawful manner (method), whereas the use of weapons that have been prohibited because of their inherent characteristics is unlawful regardless of the manner in which they are being employed.¹⁶ Nevertheless, the interpretation of the term ‘methods of warfare’ as proposed in the Commentaries is too restrictive, given that even methods not necessarily involving the use of a weapon, such as starvation,¹⁷ improper use of emblems,¹⁸ perfidy,¹⁹ or denial of quarter²⁰ are either expressly described as ‘methods of warfare’ or as a ‘method of combat’, or are systematically included in Part III, Section I of API on ‘Methods and Means of Warfare’ (articles 35–42 API).²¹

A partly more convincing interpretation is proposed in the book *How does Law Protect in War?*, where methods of warfare are defined as: ‘(i) the way and manner in which the weapons are used; (ii) any specific, tactical or strategic, ways of conducting hostilities that are not particularly related to weapons and that are intended to overwhelm and weaken the adversary’.²² This definition has the merit of highlighting that methods of warfare are more than just the manner in which weapons are used. It is less convincing in that it requires that methods of warfare must be ‘intended to overwhelm and weaken the adversary’. This element seems to be overly restrictive, given that any hostile act, irrespective of its magnitude, intensity, or target, can employ a method of warfare subject to restrictions under IHL.

The notion of methods of warfare should be understood more accurately as referring to any particular manner of using weapons or of otherwise conducting hostilities, irrespective (p. 238) of permissibility or appropriateness, and ranging from the use of emblems, flags, uniforms, and weapons or other equipment to the choice of targets for attack.

B. Regulating Methods of Warfare

Methods of warfare are regulated, on the one hand, by general principles applicable to all military operations and, on the other hand, by special provisions governing a number of specific methods of warfare. This section focuses on general principles, more particularly on the principle of distinction and the prohibition of superfluous injury or unnecessary suffering.

The principle (or ‘basic rule’) of distinction has attained undisputed customary status in both IACs and NIACs.²³ It prohibits not only direct attacks against civilians, but also indiscriminate attacks as a method of warfare. While the prohibition of direct attacks against civilians is fairly straightforward and identical in both IACs and NIACs, the concept of indiscriminate attacks may require some further explanation. In essence, indiscriminate attacks strike military objectives, civilians, and civilian objects without distinction, either because they are not or cannot be directed at a specific military objective, or because their effects cannot be limited as required by IHL.²⁴

Particularly devastating examples of indiscriminate attacks were the so-called ‘carpet bombing’ campaigns of the Second World War, in which entire areas containing both military objectives, civilians, and civilian objects were treated as a single military objective and attacked without distinction.²⁵ Another example of indiscriminate attacks are those which may be expected to cause incidental harm to civilians or civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated and, therefore, violate the IHL principle of proportionality.²⁶ While the principle of proportionality is extremely important, its operationalization gives rise to challenging questions. When can incidental civilian damage be considered excessive? How does the value of a human life compare to that of a military objective? Should the safety of a belligerent’s own forces be taken into account as part of the military advantage assessment? Should the lives of enemy combatants that are *hors de combat* be taken into account although the rule in API refers to civilians only?

Finally, it should be noted that intentionally attacking civilians or civilian objects, as well as wilfully launching an indiscriminate attack affecting the civilian population or civilian objects knowing that such attack will cause excessive loss of life or injury to civilians, or excessive damage to civilian objects, amounts to a war crime.²⁷

The second general principle restricting methods of warfare is the prohibition of superfluous injury or unnecessary suffering. It is one of the rare principles, if not the only one, that protects combatants and other legitimate targets during the conduct of hostilities. Surprisingly, the prohibition of *methods* of warfare that cause superfluous injury (p. 239) or unnecessary suffering was first introduced in API, whereas the 1864 Saint Petersburg Declaration and 1907 Hague Regulations only deal with *means*—but not with *methods*—of warfare causing superfluous injury or unnecessary suffering.²⁸ The prohibition now belongs to customary law which governs both IACs and NIACs, and the use of such methods is considered as amounting to a war crime in the Rome Statute.²⁹

The key issue is to define ‘superfluous’ and ‘unnecessary’.³⁰ In 1997, the Health Operations Division of the ICRC launched its *SIRUS Project*, which attempted to define what ‘unnecessary suffering’ means from a medical perspective.³¹ According to the resulting study, a specific means or method of warfare should be considered as inflicting superfluous injury or unnecessary suffering if it: (i) would cause a specific disease, a specific abnormal physiological state, a specific abnormal psychological state, a specific and permanent disability, or specific disfigurement; or (ii) would imply a field mortality of more than 25 per cent or hospital mortality of more than 5 per cent; or (iii) would inflict grade 3 wounds as measured by the Red Cross wound classification; or (iv) would cause effects for which there is no well-recognized and proven treatment. However, this proposal failed to gather the support of states and, therefore, remained dead letter. The inevitability of serious

permanent disability can nevertheless be regarded as a relevant factor, which was taken into account, most notably, for the prohibition of blinding laser weapons³² and of antipersonnel landmines.³³

Although treaty law does not define the meaning of the terms ‘unnecessary’ and ‘superfluous’, it can safely be said that the principle requires a balance between considerations of military necessity and of humanity.³⁴ As a minimum, the rule prohibits the infliction of suffering that has no military purpose.³⁵ The ICJ, in its Advisory Opinion on *Nuclear Weapons*, considered that inflicting superfluous injury or unnecessary suffering means to cause combatants ‘harm greater than that unavoidable to achieve legitimate military objectives’.³⁶ In this conception of the principle, it is thus not so much the degree of the inflicted suffering that makes a means or method of warfare unlawful, but that the inflicted suffering exceeds the harm that is unavoidable—ie necessary—to achieve a legitimate military objective.³⁷ (p. 240) When making this assessment, the availability of alternative—less harmful—means and methods of warfare must therefore be taken into account.³⁸

However, as an argument for absolutely outlawing means and methods of warfare that may well be capable of delivering military advantage and even victory—such as poison, blinding laser weapons, and chemical weapons—the prohibition of unnecessary suffering and superfluous injury reflects not only considerations of military necessity, but also those of proportionality with respect to the harm inflicted on enemy combatants.³⁹ Thus, the fact that article 51(5)(b) of API focuses on the protection of the civilian population and does not consider the harm inflicted on able-bodied combatants does not mean that this particular provision exhaustively expresses all considerations of proportionality made in IHL governing the conduct of hostilities. Rather, these provisions of IHL (ie prohibition of unnecessary suffering and superfluous injury and the prohibition of disproportionate attacks) point towards an understanding of proportionality as a general principle of law that governs all resort to force and all causation of harm in any circumstances, including the harm inflicted on able-bodied enemy combatants during hostile conduct.

Based on the prohibition of superfluous injury or unnecessary suffering, certain weapons (ie *means of warfare*) have been prohibited, such as blinding laser weapons, expanding bullets, and weapons that injure by means of non-detectable fragments.⁴⁰ Even fewer examples come to mind concerning *methods of warfare* that cause superfluous injury or unnecessary suffering.⁴¹ The denial of quarter is one of the few methods of warfare that indisputably inflicts unnecessary suffering because it excludes the possibility of weakening enemy forces by merely capturing or injuring—rather than killing—its combatants. Arguably, the denial of quarter was also applied to the scores of Iraqi soldiers needlessly being buried alive in their trenches by US forces in the early hours of the allied ground attack that ended the First Persian Gulf war.⁴²

Although the principle of distinction and the prohibition of superfluous injury/unnecessary suffering are well established, it remains controversial whether or not they can directly prohibit specific means and methods of warfare without a more specific treaty provision or customary rule.⁴³ The predominant and more convincing view, which was also expressed by the ICJ in its *Nuclear Weapons* Advisory Opinion,⁴⁴ is that the prohibitions (p. 241) of indiscriminate attacks and of the means and methods causing superfluous injury or unnecessary suffering constitute generic and legally binding standards by which all means and methods of warfare have to be measured, even in the absence of specific treaty provisions or recognized customary rules relevant to the particular means or method in question.⁴⁵ In essence, therefore, the fact that a specific method of warfare is not prohibited or restricted by a specific treaty provision does not necessarily mean that this method is lawful. This conclusion receives further support in the longstanding customary principle expressed in the Martens Clause, according to which, where treaty law fails to provide a specific rule, ‘both civilians and combatants remain under the protection and

authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.⁴⁶

A final general issue is whether there are any differences in the regulation of methods of warfare, which depend on whether the conflict is of international or non-international character. There are only a few treaty provisions applicable in NIACs that expressly address methods of warfare. While Common Article 3 focuses on the protection of persons *hors de combat*, it allows more specific conclusions as to the permissibility of methods of warfare, albeit only by implication. APII merely recognizes the duty to protect the civilian population against the dangers arising from military operations and prohibits a number of specifically mentioned methods of warfare such as starvation,⁴⁷ the denial of quarter,⁴⁸ and the recruitment of children into armed forces,⁴⁹ as well as deportations.⁵⁰ However, neither does the treaty contain a general prohibition on means and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering.

This omission should not be understood as an intended 'gap' in legal protection but, at least in the case of APII, as an incidental result of significant text cuts carried out on the original draft during the very late hours of negotiations, with the declared aim of producing a simplified text acceptable to states.⁵¹ As 'cardinal principles' of customary international law, the principle of distinction, the prohibition of unnecessary suffering and superfluous injury, and the Martens Clause govern the lawfulness of methods of warfare in any armed conflict, including those of a non-international nature.⁵² The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) asserted in the *Tadić* case that:

[e]lementary considerations of humanity and common sense make it preposterous that the use by states of weapons prohibited in armed conflicts between themselves be allowed (p. 242) when states try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife.⁵³

The same must hold true, *mutatis mutandis*, with respect to methods of warfare.

Indeed, methods of warfare that are prohibited in IACs based on legal principles expressing basic humanitarian considerations can be presumed to be equally prohibited in NIACs.

3. Methods of Warfare that Concern Primarily the Protection of Combatants

This section deals with prohibited/restricted methods of warfare which are primarily concerned with the protection of combatants; and more specifically, (i) the protection of persons *hors de combat*; (ii) the prohibition of denial of quarter; and (iii) the restriction of deception. Unless otherwise specified, the arguments made and the conclusions reached equally concern both IACs and NIACs. In the latter context, therefore, the term 'combatant' will be used in its functional sense, and as covering not only members of the armed forces of a belligerent state, but also members of organized non-state armed groups with a continuous combat function.⁵⁴

A. Protection of Persons *hors de combat*

The protection of persons *hors de combat* against direct attack and abuse of power is a well-established rule of customary and treaty IHL.⁵⁵ The prohibition of direct attack against those *hors de combat* is explicitly recognized in both the 1907 Hague Regulations and in API.⁵⁶ Regarding NIACs, it is expressly recognized in article 3 common to the Geneva Conventions, which protects those taking no active part in the hostilities, including those placed '*hors de combat*', against violence to life and person and other forms of abuse. It has also been codified in article 4 of APII, albeit in slightly different words.⁵⁷ The prohibition is

considered to constitute a customary rule applicable in both IACs and NIACs.⁵⁸ Wilfully making a person the object of attack in the knowledge that he or she is *hors de combat*, thus causing his or her death or serious injury to body or health, is a war crime.⁵⁹

(p. 243) The *ratio legis* for the protection of persons *hors de combat* is that persons *hors de combat* no longer pose a military threat and that, therefore, hostile acts against them could not be justified based on any reasonable balance between considerations of military necessity and humanity. Accurately understood, the reason for the protection granted by IHL is not that the killing of persons *hors de combat* could never offer a military advantage, but rather that absent of any hostile act on the part of those *hors de combat*, their killing would be regarded as inhumane or, more precisely, disproportionately harmful compared to the potential military benefit. Just like the prohibition on unnecessary suffering and superfluous injury, and probably at least in part a concretization of that rule, the *hors de combat* protection is based on generic considerations of necessity and proportionality. Arguably, the protection of those *hors de combat* could also be derived from a broad understanding of the principle of distinction as offering protection against attacks not only to civilians but also to combatants *hors de combat*.

A person is *hors de combat* if he or she is in the power of an adverse party, clearly expresses an intention to surrender, or is incapable of defending him- or herself because of unconsciousness, shipwreck, wounds, or sickness, and, in all those cases, abstains from any hostile act and does not attempt to escape.⁶⁰

Persons are 'in the power' of a belligerent party not only when they are captured, but also when they are otherwise within the effective physical or material control of that party.⁶¹ The ICRC Commentaries even argue that, in the context of an air strike, combatants might be 'in the power of' the air force operators if at some point they are at their mercy and thus defenceless.⁶² A less extreme and, arguably, more convincing argument against attacking defenceless enemy forces that are unable to surrender could be made based on the absence of military necessity in conjunction with the imperatives of humanity.⁶³

Persons can express their intention to surrender in various ways, depending on the circumstances. In land warfare, persons may commonly surrender by laying down their arms and by raising their hands or a white flag.⁶⁴ Regarding persons parachuting from aircraft in distress, attacks are prohibited for the duration of their descent.⁶⁵ Upon reaching the ground in territory controlled by an adverse party, they have to be given an opportunity to surrender before being attacked, unless it is apparent that they are engaging in a hostile act.⁶⁶ This protection does not apply to airborne troops, whose descent constitutes part of their hostile operations.⁶⁷

What happens if a wounded or surrendering soldier on the battlefield resumes fighting or tries to escape? According to the ICRC Commentaries, force can be used against such a soldier but only as a last resort and after a warning appropriate in the circumstances.⁶⁸ The legal (p. 244) reasoning leading to such an assertion is far from clear, however. Article 41 of the API does not seem to support these restrictions. It merely states that a person enjoys the protection of persons *hors de combat* provided that he/she abstains from any hostile act and does not attempt to escape. This would logically mean that the protection of persons *hors de combat* ceases as soon as they commit a hostile act or attempt to escape, and therefore, they become subject to direct attacks under the hostilities paradigm.⁶⁹ On the one hand, it seems clear that once a person *hors de combat* has been taken into custody, any force used in response to a hostile act or attempted escape must be absolutely necessary to prevent said act or escape and strictly proportionate to the danger resulting from such action. Accordingly, the Third Geneva Convention provides that the 'use of weapons against prisoners of war (POWs), especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances'.⁷⁰ On the other hand, persons who are *prima*

facie hors de combat, but who attempt an escape or engage in hostile acts *before* being taken into custody can hardly benefit from a restricted use of force regime comparable to that applicable to POWs. In such a situation, engaging in hostile acts would generally amount to feigning surrender or other protected status with the intent of attacking the enemy by surprise. Both variants would amount to prohibited combat by resort to perfidy and would not justify any restriction of the normal targeting regime.

When enemies have been captured ‘under unusual conditions of combat which prevent their evacuation’, API expressly requires that ‘they shall be released and all feasible precautions shall be taken to ensure their safety’.⁷¹ Thus, if enemy combatants indicate an intention to surrender or otherwise become *hors de combat*, they must be captured or, if their evacuation is not possible, released. Although this rule might seem difficult to comply with, in particular in the context of small-scale operations in enemy territory, treaty law makes it unequivocally clear that, even in unusual combat conditions, *hors de combat* protection remains absolute and non-derogable.⁷²

B. Prohibition of Denial of Quarter

Another longstanding rule that is related to the protection of persons *hors de combat* is the prohibition of denial of quarter.⁷³ It is explicitly recognized in the 1907 Hague Regulations and in API (IACs),⁷⁴ as well as in article 4 of APII (NIACs).⁷⁵ Moreover, this rule is considered customary law⁷⁶ and its violation amounts to a war (p. 245) crime⁷⁷ in both IACs and NIACs. The *ratio legis* for the prohibition of denial of quarter is comparable to that of the *hors de combat* protection, albeit without any aspects of the principle of distinction. As stated in section 2 ‘Defining and Regulating Methods of Warfare’ above, it is a derivative of the prohibition of superfluous injury or unnecessary suffering and a codified expression of the maxim that the purpose of military hostilities in warfare is not to kill combatants but to defeat the enemy, even if this requires the killing of combatants.⁷⁸ The prohibition of denial of quarter, too, balances the potential military advantage of leaving no survivors against the requirements of humanity and, deciding in favour of the latter, expresses generic considerations not only of military necessity but also of proportionality.

According to the rule, ‘[i]t is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis’.⁷⁹ The prohibition of denial of quarter also makes it illegal to deliberately refuse or render impossible an enemy’s surrender or to put to death those who are *hors de combat*.

Given that persons *hors de combat* are already protected, the added value of the prohibition of denial of quarter lies in: (i) the prohibition of threatening or ordering that there shall be no survivors; and (ii) the restraints this imposes on hostile conduct, namely in the prohibition of hostile conduct on the basis that there shall be no survivors.⁸⁰

The prohibition of threatening or ordering that there shall be no survivors primarily concerns military commanders, given that they are in a position to issue such threats or orders.⁸¹ It is rare in international law that the mere threat of committing a violation is prohibited in itself, the other two examples being the prohibition of ‘the threat or use of force in international relations’⁸² and the IHL prohibition to threaten to attack the civilian population with the primary purpose of spreading terror.⁸³ The most likely rationale for outlawing the mere threat of a prohibited conduct is to avoid the escalatory effect of such threats. Thus, threatening the enemy with a general refusal to accept his surrender could potentially incite the threatened opponent to discard the principles of IHL and to resort to any lawful or unlawful means or method of warfare to overcome his enemy.

The prohibition of conducting hostilities on the basis that there shall be no survivors essentially requires that an adversary endeavouring to surrender must be given the opportunity to do so as circumstances reasonably permit.⁸⁴ On the one hand, therefore, methods calculated to completely exterminate opposing forces would be in breach of this rule.⁸⁵ Surprise attacks or employing means and methods of warfare that are incapable of taking prisoners, on the other hand, do not necessarily amount to denial of quarter. In air warfare, for instance, it may not always be feasible to accept surrender. Nevertheless, a policy or practice of conducting ‘follow-up strikes’ or ‘double strikes’—ie ‘attacks that occur after (p. 246) a first one and that may intentionally or incidentally kill wounded persons as well as rescuers’⁸⁶—would be unlawful both under the prohibition of killing persons *hors de combat* and other protected persons and under the prohibited method of denial of quarter. It is also unclear whether conducting warfare exclusively through means and methods of warfare that are incapable of taking prisoners—for example, drone strikes—would be permissible under the prohibition of conducting hostilities on the basis that there shall be no survivors.

C. Deception

1. *The prohibition of perfidy or treachery*

The Hague Regulations of 1907 already prohibited to ‘kill or wound treacherously individuals belonging to the hostile nation or army’.⁸⁷ API broadens this rule by prohibiting the use of perfidy to kill, injure, or capture an adversary.⁸⁸ Although Common Article 3 to the Geneva Conventions and APII do not contain a similar provision, the prohibition of perfidious killing, injury, and capture is considered customary IHL in both IACs and NIACs.⁸⁹ Under the ICC Statute, ‘killing or wounding treacherously’ an adversary—but not perfidious capture—constitutes a war crime in both IACs and NIACs.⁹⁰

According to the rule, perfidy denotes ‘acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’.⁹¹ Relevant examples would include the feigning: (i) of surrender; (ii) of an intent to negotiate under a flag of truce; (iii) of incapacitation by wounds or sickness; (iv) of civilian, non-combatant status; and (v) of protected status by the use of the signs, emblems, or uniforms of the United Nations, of neutral or other non-belligerent states, or of the protective emblem of the red cross, red crescent, or red crystal. It should be noted that IHL does not prohibit perfidy per se, but only the killing, injuring, or capturing of an adversary by resort to perfidy. The resort to perfidy for other purposes, such as intelligence gathering or sabotage, is not covered by the prohibition of perfidy, but may be subject to other restrictions, such as the prohibition on misuse of emblems, signs, and uniforms.⁹² Moreover, the prohibition of perfidy does not prohibit ruses of war, ie ‘acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no (p. 247) rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law’.⁹³ Examples of permissible ruses include the use of camouflage, decoys, mock operations, and misinformation.⁹⁴ Mere intelligence gathering by undercover units disguised as civilians also does not amount to prohibited perfidy.⁹⁵ If captured, such personnel would lose their POW status and, therefore, could be prosecuted as spies under the domestic legislation of the capturing state.

Thus, the *ratio legis* of the prohibition of perfidy or treachery is to safeguard the good faith of the belligerents as far as it concerns their duty to afford, or their own entitlement to, protection under IHL. Indeed, any uncertainty on the part of belligerents as to the reliability and truthfulness of behaviour or circumstances affording civilians or opposing combatants

protection under IHL would seriously jeopardize their respect for the principle of distinction.

2. Misuse of emblems, signs, and uniforms

IHL not only prohibits the use of perfidy to kill, injure, or capture an adversary, but also more generally the misuse of recognized distinctive emblems and emblems of nationality. In particular, it is prohibited to make improper use of emblems, signs, or signals provided for in IHL, such as the distinctive emblem of the red cross, red crescent, or red crystal, or to deliberately misuse other internationally recognized protective emblems, signs, or signals, including the flag of truce, the protective emblem of cultural property (downward-pointed square blue shield on white ground), the distinctive signs of civil defence (orange triangle on blue ground), installations containing dangerous forces (three orange circles), and the distinctive emblem of the United Nations.⁹⁶ IHL also prohibits the use of the flags or military emblems, insignia, or uniforms of neutral or non-belligerent states in an armed conflict, whereas those of adverse parties can be used as a ruse of war, except during direct hostile contact with the enemy, namely while engaging in attacks or in order to shield, favour, protect, or impede military operations.⁹⁷ Under the ICC Statute, 'Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions' amounts to a war crime in IACs when it results in death or serious personal injury.⁹⁸

A well-known example of a violation of this prohibition was the use of the Red Cross emblem by a Colombian military intelligence team in a hostage rescue mission that freed fifteen hostages from the hands of the Revolutionary Armed Forces of Colombia (FARC) rebels in July 2008.⁹⁹ This misuse was subsequently condemned by the ICRC.¹⁰⁰

(p. 248) 4. Methods of Warfare Primarily Affecting the Civilian Population and Civilian Objects

Prohibited methods of warfare are numerous. Many of them have been discussed in other chapters of this book and do not need to be elaborated on here.¹⁰¹ This section focuses on three methods of warfare giving rise to particularly thorny legal issues: starvation, reprisals, and destruction and seizure of property.

A. Starvation

Modern IHL prohibits the starvation of civilians as a method of warfare, ie deliberately depriving [them] of food.¹⁰² Derived from the principle of distinction, this rule appears for the first time in both Additional Protocols of 1977¹⁰³ and, today, is considered customary law in both IACs and NIACs.¹⁰⁴ The Rome Statute provides that 'intentionally using starvation of civilians as a method of warfare' is a war crime in IACs.¹⁰⁵ Under domestic criminal law, individuals have also been convicted for the crime of starvation in the context of NIACs.¹⁰⁶

A corollary to the prohibition of starvation of civilians, IHL also prohibits the attack, destruction, removal, or rendering of useless objects indispensable to the survival of the civilian population (eg foodstuffs, agricultural areas, crops, livestock, drinking water, and irrigation systems) for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whether in order to starve out civilians, to cause them to move away, or for any other motive.¹⁰⁷ These prohibitions do not apply when the objects in question are used as sustenance solely for the opposing armed forces, or otherwise in direct support of military action, unless action taken against them may be expected to starve the civilian population or force its movement.¹⁰⁸ Arbitrarily denying humanitarian access in favour of civilians in need, or arbitrarily restricting the freedom of

movement of humanitarian relief personnel will also constitute violations of the prohibition of starvation.¹⁰⁹

Although sieges, naval blockades, and embargoes have been condemned by the international community,¹¹⁰ they are not prohibited, even if they cause starvation, as long as the (p. 249) purpose is to achieve a military objective and not to starve the civilian population.¹¹¹ At the same time, the prohibition of starvation implies that the besieging party must either allow the inhabitants to leave the besieged area or permit the free passage of humanitarian relief supplies.¹¹²

For example, in the context of the Gaza blockade, which led to harsh humanitarian consequences and 'food insecurity', the issue of starvation has been discussed by several commissions of inquiry. Although these discussions did not reach the same conclusions regarding the lawfulness of the blockade (in terms of proportionality and on whether it amounted to collective punishment), none concluded that the blockade amounted to a violation of the prohibition of starvation as a method of warfare.¹¹³ The reason for this was that the starvation of the civilian population was not the 'sole'¹¹⁴ and not even the 'main' purpose¹¹⁵ of the blockade. This does not, however, relieve the blockading party from their obligation to take into account, when assessing the proportionality of incidental harm, any starvation which may be expected to result as an unwanted consequence resulting from the blockade.¹¹⁶

B. Reprisals

Belligerent reprisals are forcible countermeasures. They cover any 'action that would otherwise be unlawful but that in exceptional cases is considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary'.¹¹⁷ Traditionally, reprisals were regarded as a method of enforcement of IHL.¹¹⁸ Modern IHL, however, prohibits many types of reprisals without outlawing them altogether.

More specifically, the 1949 Geneva Conventions prohibit reprisals against protected persons and objects in the power of the enemy. Thus, reprisals are prohibited against the (p. 250) wounded, sick, and shipwrecked, POWs and civilians,¹¹⁹ as well as against the property of civilians in the hands of an adverse party to the conflict or an occupying power¹²⁰ and against medical objects.¹²¹

API further prohibits attacks in reprisals directed against civilians,¹²² civilian objects,¹²³ historic monuments, works of art or places of worship that constitute the cultural or spiritual heritage of peoples,¹²⁴ against objects indispensable to the survival of the civilian population,¹²⁵ against the natural environment,¹²⁶ and against works and installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations.¹²⁷ Cultural property 'of great importance to the cultural heritage of a people' is also protected against 'any act directed by way of reprisals' in the Hague Convention for the Protection of Cultural Property.¹²⁸

As these provisions make clear, reprisals against military objectives (be they persons or objects) are not prohibited. To be lawful, however, they must fulfil a number of conditions:¹²⁹ They must:

- (1) respond to a prior serious of IHL violations (no 'anticipatory/preventive' reprisal);
- (2) aim to induce the adversary to stop such violations (no punishment or revenge);
- (3) be carried out as a last resort, when no more lawful measures are available and after prior warning has been given;
- (4) be proportionate to the prior violation;

- (5) be authorized at the highest political or military level;
- (6) be terminated as soon as the adversary complies with the law.

This means, for example, that a belligerent victim of an IHL violation (eg the enemy uses chemical weapons), might decide, as a last resort, to use the same prohibited weapons against enemy soldiers in a proportionate way. Although this is disturbing from a humanitarian perspective, this is the current state of the law.

Surprisingly, in the case of the prohibition of reprisals, treaty and customary law do not necessarily match. While it is uncontroversial that the prohibition of reprisals against protected persons and objects in enemy's hands (Geneva Law) is (p. 251) customary,¹³⁰ the same is not true for reprisals against persons and objects in the conduct of hostilities (Hague Law).¹³¹

The rule prohibiting reprisals against civilians in API was regarded as a novelty when it was adopted and several states made reservations to it.¹³² State practice has substantially evolved since then,¹³³ although rarely states maintain that reprisals against civilians in the conduct of hostilities might be lawful in exceptional circumstances.¹³⁴ According to the ICRC Customary IHL Study:

[I]t is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of states, some of which is also ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals.¹³⁵

This very cautious approach contradicted earlier ICTY jurisprudence. In its review of the indictment in the *Martić* case in 1996 and in its judgment in the *Kupreškić* case in 2000, the ICTY found that customary law prohibits reprisals against civilians in combat situations in all types of armed conflicts.¹³⁶ It invoked several arguments, some of which were more convincing than others. It first referred to IHL provisions prohibiting reprisals. While assuming that articles 51 (paragraph 6) and 52 (paragraph 1) of API were not declaratory of customary law, it contended that they have subsequently been transformed into general rules of international law under the pressure of the principle of humanity and the dictates of public conscience (Martens Clause) and under the influence of human rights law.¹³⁷ It pointed to the customary obligation to 'respect and ensure respect' for IHL 'in all circumstances',¹³⁸ even when the behaviour of the other party might be considered wrongful.¹³⁹ It argued that Common Article 3, which belongs to customary law and is applicable in all (p. 252) types of armed conflicts,¹⁴⁰ 'prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment'.¹⁴¹ It insinuated that reprisals are a form of collective punishment, which is prohibited under both treaty and customary law.¹⁴² It also referred to non-binding documents, such as Resolution 2675 (1970) of the UN General Assembly,¹⁴³ providing that 'civilian populations, or individual members thereof, should not be the object of reprisals'.¹⁴⁴ This has been confirmed—albeit much less clearly and forcefully—in the later Trial Judgment of the *Martić* case, when the ICTY stated that 'reprisals must be exercised, to the extent possible, in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition of targeting civilians'.¹⁴⁵ The International Criminal Court (ICC) agreed with the ICTY that 'no circumstances would legitimize an attack against civilians

even if it were a response proportionate to a similar violation perpetrated by the other party'.¹⁴⁶

As for the prohibition of reprisals against civilian objects during the conduct of hostilities, practice seems even less clear.¹⁴⁷ In the aforementioned *Martić* case (Trial and Appeal Judgment), the ICTY examined whether the shelling of Zagreb could be considered a lawful reprisal as argued by the Defence.¹⁴⁸ Although it was found that this shelling was illegal because the conditions justifying reprisals had not been met (no ultima ratio, no warning), it implicitly recognized the possibility of lawful reprisals against civilian objects irrespective of the type of armed conflict.¹⁴⁹

In recent state practice, not many belligerents invoked reprisals to justify IHL violations in IACs.¹⁵⁰ A major exception is to be found in the context of the Iran–Iraq War (1980–1988) when both belligerent states invoked reprisals to justify attacks against cities belonging to the adversary.¹⁵¹ The international community vigorously condemned these justifications.¹⁵²

(p. 253) Regarding NIACs, applicable IHL treaty provisions do not refer to the concept of reprisals at all. However, Common Article 3 and Common Article 4 of APII specify that persons taking no active part in hostilities shall 'in all circumstances' be treated humanely and that acts such as violence to life and person, collective punishment, hostage taking, and outrages upon personal dignity shall remain prohibited 'at any time and in any place whatsoever'. APII contains similar additional absolute prohibitions.¹⁵³ The ICRC and the ICTY, as well as numerous commentators, have interpreted these provisions as implying that reprisals involving the prohibited acts are also prohibited.¹⁵⁴

What is more controversial is whether all other types of reprisal are equally prohibited in NIACs. According to the ICRC, the concept of belligerent reprisals 'has never materialized in non-international armed conflicts', as it originates from state practice dating back to the nineteenth and early twentieth centuries and pertaining to IACs exclusively.¹⁵⁵ The *travaux préparatoires* of APII somehow support this argument. Suggestions made at the time to prohibit certain reprisals in APII (as in API) were rejected because, for many states, the very concept of belligerent reprisals had no place in NIACs.¹⁵⁶ The international community has also often condemned reprisals in the context of NIACs.¹⁵⁷ The ICRC therefore considers that customary law prohibits reprisals altogether in the context of NIACs.¹⁵⁸

This view is not shared by everyone. The ICTY has considered that reprisals are possible if they fulfil stringent conditions and are as far as possible in keeping with the prohibition of targeting civilians.¹⁵⁹ Most authors seem to hold the view that belligerent reprisals might be applicable in NIAC, but be subject to stringent conditions (whose legal basis varies depending on authors).¹⁶⁰ For instance, Cassese maintained that 'there is no logical obstacle' to prevent the use of reprisals by parties to a NIAC as a means to enforce APII, except for those provisions that demand obedience 'in all circumstances' or 'at any time and in any place whatsoever'.¹⁶¹ This possibility for lawful reprisals would be subject to stringent conditions derived from the object and purpose of APII and (p. 254) conforming with the general requirements governing countermeasures under general international law. As Bilkova aptly puts it:

Views on belligerent reprisals in NIAC are divided in both the case law and the literature. There is disagreement whether the institution applies in NIAC at all. Opinions range from a clear *yes* by the ICTY, through a hesitant *probably* by some scholars, to a reluctant *no* by the ICRC and other scholars.

However, instances where belligerent parties officially referred to belligerent reprisals to justify IHL violations in NIACs have not been identified.¹⁶²

In practice, it appears that most of the time reprisals were useless and counterproductive. Even the US *Law of War Manual* (2015–2016), which boldly contends that ‘reprisals are generally permissible under customary international law’,¹⁶³ recognizes that, in practice, ‘reprisals frequently lead only to further unwanted escalation of the conflict by an adversary or a vicious cycle of counter-reprisals’.¹⁶⁴ As such, reprisals are probably one of the most ineffective and dangerous means of enforcing IHL. It therefore may legitimately be asked whether belligerent reprisals can still be considered to strike a fair balance between the principles of military necessity and humanity. Can they ever respect the ‘principles of humanity and the dictates of public conscience’ as set forth in the Martens Clause? Are they not the remainder of an obsolete concept of reciprocity in respect of IHL, which threatens the very humanitarian purpose of that body of law? It is striking that the International Law Commission’s Articles on State Responsibility provide that countermeasures ‘shall not affect ... b) obligations for the protection of fundamental human rights; c) obligations of a humanitarian character prohibiting reprisals; d) other obligations under peremptory norms of general international law’.¹⁶⁵ Insofar as the prohibition of arbitrary killings as well as of cruel inhuman, and degrading treatment are fundamental human rights, whose peremptory character has often been recognized, the continued relevance of belligerent reprisals jeopardizing those rights is questionable. At the very least, it is to be hoped that state practice will continue to develop, *de lege ferenda*, towards the complete prohibition of reprisals.

C. Destruction and Seizure of Property

Article 23(g) of the 1907 Hague Regulations provides that it is prohibited ‘to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’.¹⁶⁶ Under the 1949 Geneva Conventions, ‘extensive destruction (p. 255) and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’ is a grave breach of the Geneva Conventions.¹⁶⁷ This provision only concerns property that is ‘protected’ by the Geneva Conventions, such as fixed medical establishments and mobile medical units,¹⁶⁸ hospital ships,¹⁶⁹ medical transports, including medical aircraft,¹⁷⁰ or objects and property in occupied territory.¹⁷¹ Article 53 of the Fourth Geneva Convention generally protects ‘real or personal property belonging individually to private persons of an occupied belligerent state or to other public authorities’.¹⁷² The term ‘destruction’ is not defined under IHL, but it has been understood as setting fire to a protected object, attacking it, or otherwise seriously damaging it.¹⁷³ The destruction does not need to be committed within the context of military action, but it must be closely related to the hostilities.¹⁷⁴ The ‘appropriation’ of protected property can also be defined broadly and does not require a formal transfer of property title.¹⁷⁵ It covers the ‘taking, obtaining or withholding of property, theft, requisition, plunder, spoliation and pillage’.¹⁷⁶ Pillage is a form of unlawful appropriation for private or personal use, which is also prohibited in separate IHL provisions.¹⁷⁷ Although the provision reads ‘destruction *and* appropriation’, it is clear that the drafters’ intent was to criminalize the two acts separately rather than only cumulatively.¹⁷⁸

To constitute a grave breach the destruction or appropriation must be (i) extensive; (ii) not justified by military necessity; (iii) carried out unlawfully; and (iv) wantonly.

First, the extent of the destruction/appropriation must be assessed on a case-by-case basis.¹⁷⁹ Usually, this criterion will be fulfilled when there is repeated unlawful destruction or appropriation, as made clear by the French translation of ‘extensive’ that is ‘exécutées sur grande échelle’. In exceptional cases, though, a single act, such as the destruction of a hospital, may suffice.¹⁸⁰ We can conclude that the extensive character of the criminalized acts might be either a quantitative criterion (number of destructions/appropriations) or a qualitative criterion (importance of the object’s value).¹⁸¹ Less numerous/serious forms of

(p. 256) destruction/appropriation are still prohibited and might still amount to war crimes, but not to grave breaches.¹⁸²

Second, destruction/appropriation must not be justified by military necessity. While contemporary IHL does not permit invoking military necessity to justify violations of IHL, the principle is still operational where the relevant treaty norm contains a derogatory clause in favour of military necessity.¹⁸³ Thus, where IHL expressly permits the destruction/appropriation of civilian property, the scope and extent of such destruction/appropriation is limited by considerations of military necessity. Except for interpretative purposes, this criterion does not have much normative value.

Third, the destruction/appropriation must be unlawful 'under the specific standards pertaining to the primary obligations' of IHL.¹⁸⁴ For instance, the destruction by an occupying power of a private house is unlawful, except where such destruction is rendered absolutely necessary by military operations as specified in the relevant provision.¹⁸⁵ Similarly, the appropriation of the property belonging to aid societies is unlawful except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.¹⁸⁶

Finally, the destruction/appropriation must be committed 'wantonly'. This mental element has been understood as prohibiting not only the intentional commission of the criminalized act but also recklessness.¹⁸⁷

Several accused individuals were found guilty by the ICTY for unlawful destruction and appropriation of property.¹⁸⁸ For instance, in the *Blaškić* case, the accused was found guilty of a grave breach of the Geneva Conventions for extensive destruction of Bosnian Muslim dwellings, buildings, businesses, private property, and livestock between January 1993 and September 1993.¹⁸⁹

Although Common Article 3 and APII do not address the aforementioned issue as such, the prohibition of destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war has been considered as customary law for both IACs and NIACs.¹⁹⁰ It has also been criminalized in the ICC Statute for Non-International Armed Conflicts.¹⁹¹

Regarding occupied territories, additional specific rules apply and complement the general prohibition of unlawful destruction/appropriation of property discussed above. They are essentially stated in the 1907 Hague Regulations.¹⁹² The legal framework differs (p. 257) depending on the type of property. *Movable public property* which may be used for military operations, such as cash, arms, or means of transport, may be confiscated, or in other words, taken without compensation.¹⁹³ There is an exception to this rule: the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences, including historic monuments and works of art and science, cannot be seized, destroyed, or wilfully damaged.¹⁹⁴ *Immovable public property*, such as public buildings, real estate, forests, and agricultural estates, may not be confiscated by the occupying power. The latter must administer these properties according to the rules of usufruct and safeguard their capital.¹⁹⁵ *Private property* must be respected (and therefore not destroyed) and cannot be confiscated.¹⁹⁶ However, private property that may be used as war material—such as telecommunication and radio equipment, cars, arms, munitions, etc—may be seized, but must be restored and compensated for after the war.¹⁹⁷ Requisitions in kind and services may also be carried out provided that: (i) they are done for the needs of the army of occupation; (ii) they are in proportion to the resources of the country; (iii) they do not involve obliging civilians to take part in military operations against their own country; (iv) they are requested by the military commander in charge of the region; and (v) contributions in kind must as far as possible be paid for in cash as soon as possible.¹⁹⁸ The aforementioned rules are considered as customary law for situations of belligerent

occupation.¹⁹⁹ There are no equivalent rules for NIACs.²⁰⁰ The issue must therefore be analysed under domestic law.²⁰¹

Regarding related judicial practice, two examples can be provided. In the *Palestinian Wall* Advisory Opinion, the ICJ found—without much elaboration—that the construction of the wall had led to the destruction or requisition of private Palestinian properties in a manner that was not consonant with articles 43, 46, and 52 of the 1907 Hague Regulations, and with article 53 of the Fourth Geneva Convention.²⁰² Furthermore, the Eritrea–Ethiopia Claims Commission considered that Ethiopia, as an occupying power in Tserona Town in 2000–2001, had violated articles 43, 46, and 47 of the 1907 Hague Regulations when it ‘permitted’—or rather did not prevent—the unlawful looting and ‘stripping’ (ie demolition) of buildings.²⁰³ The commission argued that this was the case regardless of whether these acts had been committed by Ethiopian military personnel or by civilians.²⁰⁴

Finally, for the sake of completeness, it should be recalled that the general rules on the conduct of hostilities, including the basic principle of distinction, are also relevant to determine which objects are protected from direct attacks and therefore from being destroyed. This point will not be elaborated upon here as it has already been extensively discussed elsewhere.²⁰⁵

(p. 258) 5. Conclusion

The right of belligerents to choose methods of warfare, ie any particular manner of using weapons or of otherwise conducting hostilities, remains both limited and strictly regulated under IHL. The belligerents are governed by general principles applicable to all military operations, most notably the principles of distinction and the prohibition of superfluous injury or unnecessary suffering, both of which have undisputed customary status in both IACs and NIACs.

By virtue of these principles, numerous specific methods of warfare have been prohibited/restricted by IHL treaty provisions. The rationale underlying the restriction or prohibition of certain methods of warfare can be either to protect combatants from superfluous injury or unnecessary suffering, or to protect civilians against the effects of the hostilities. Examples for the first category, protecting primarily combatants, include the prohibition of attacking persons *hors de combat*, the prohibition of denial of quarter, and the restriction on the use of deception. Examples for the second category primarily protecting the civilian population and civilian objects include the prohibition of starvation, reprisals, and destruction and seizure of property as methods of warfare.

Although IHL provisions regulating methods of warfare are much scarcer in treaties applicable to NIAC rather than IAC, this difference can often be compensated by taking into account customary law. Normally, a resort to prohibited methods of warfare not only entails state responsibility but also individual criminal responsibility. Thus, individuals have been prosecuted both at the national and the international level for having resorted to prohibited/restricted methods of warfare.

While this view may still be disputed by some states, the fact that a specific method of warfare is not prohibited or restricted by a specific treaty provision does not necessarily mean that this method is lawful. On the contrary, any method of warfare that has not been subject to specific treaty regulation can also be restricted or prohibited based on the principles of distinction and the prohibition on superfluous injury or unnecessary suffering.

In practice, the legality of new methods of warfare must continuously be examined in light of these and other relevant legal principles, even if they are not (or not yet) prohibited by specific treaty provisions. Article 36 of API provides that:

[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

This obligation also applies to states which are not parties to API because they are legally responsible for ensuring that they do not use prohibited weapons or use lawful weapons in a manner that is prohibited.²⁰⁶

Article 36 of API implies that when developing new weapon systems (*means of warfare*), belligerent parties must ensure that they do not endanger compliance with existing (p. 259) prohibitions/restrictions in terms of *methods of warfare*. For instance, when developing increasingly autonomous weapons systems, states must ensure that they will be capable of being used in compliance with the prohibition of indiscriminate attacks, with the prohibition of attacking persons *hors de combat*, or with the prohibition of denial of quarter. Hypothetically, if soldiers were to be replaced by robots exclusively capable of killing, but not capturing, enemy combatants, this would likely raise serious issues under the prohibition of denial of quarter. In addition, new 'methods', such as human enhancement (eg chemical 'hardening' of soldiers or resort to nano-technologies to render troops invisible) might give rise to new legal challenges, such as whether these methods unduly affect the physical/mental integrity of belligerents' own forces; an issue traditionally not governed by IHL, given its focus on ensuring minimal protection to the enemy. In light of the speed of technological evolution and the unlimited inventiveness of the human mind, however, it may safely be assumed that ensuring the compliance of new methods of warfare with longstanding and fundamental principles of IHL will give rise to considerable challenges both in law and in practice.(p. 260)

Footnotes:

1 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg (29 November–11 December 1868) (St Petersburg Declaration).

2 *ibid.*

3 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (API) article 35(1). See also Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation concerning the Laws and Customs of War on Land (18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations) article 22.

4 API article 51(1).

5 Hague Regulations 1907 article 23(e); API article 35(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005) (CIHL) rule 70. See also St Petersburg Declaration.

6 API article 48; CIHL rule 1.

7 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 266 (*Nuclear Weapons*) para 78.

8 CIHL rules 1 and 70.

9 Note: some of the methods used specifically against civilians are already dealt with under chapter 7 'International Humanitarian Law and the Conduct of Hostilities'. These will therefore be mentioned, but not necessarily much elaborated.

10 The recent IHL provisions using the term methods of warfare: in API: Title of Part III, Section I; article 35(1-3) (Basic Rules); article 36 (New Weapons); article 51 (4(b)-(c) and 5(a)) (indiscriminate attacks); article 54(1) (starvation); article 55(1) (protection of the natural environment); and article 57(2)(a)(ii) (principle of precautions).

11 The ICRC Commentary on Article 14 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) specifies that the Conference 'considered inappropriate to refer to warfare in an instrument concerning non-international armed conflicts'. See Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) (AP Commentary) para 4799. This point raises the question whether methods of warfare are supposed to be more restrictive in NIACs.

12 See API article 51(4)(b) and (c) using the terms 'methods of combat' as an element of the definition of 'indiscriminate attack'.

13 AP Commentary on API article 35 para 1401.

14 *ibid* on APII article 14 para 4799.

15 *ibid* on API article 35 para 1402; on API article 51 para 1957.

16 Nils Melzer, *International Humanitarian Law—A Comprehensive Introduction* (ICRC 2016) 104.

17 API article 54(1) AP and APII article 14.

18 *ibid* articles 38 and 39.

19 *ibid* article 37.

20 *ibid* article 40.

21 Not very helpful in this respect is the rather loose use of the term 'weapon' in the AP Commentary, which states that: 'Starvation is referred to here as a method of warfare, ie, a *weapon* to annihilate or weaken the population' (para 2090) or 'Starvation is prohibited as a method of combat, ie, when it is used as a *weapon* to destroy the civilian population' (para 4799)' (emphasis added).

22 Marco Sassòli, Antoine Bouvier, and Anee Quintin, *How Does Law Protect in War?* (ICRC 2011) 280.

23 API article 48; CIHL rule 1.

24 API article 51 (4) and (5); CIHL rules 11-13.

25 Melzer, *International Humanitarian Law* (above n 16) 86.

26 API article 51(5)(b).

27 *ibid* article 85(3)(a)-(b); Rome Statute of the International Criminal Court, 17 July 1998 (Rome Statute) article 8(2)(b)(i)(ii)(iv) and 8(2)(e)(i).

28 CIHL commentary on rule 70.

29 Rome Statute article 8 (2)(b)(xx).

30 The St Petersburg Declaration also mentions arms rendering death inevitable, although this wording has unfortunately not been adopted by other IHL treaties. It is submitted that methods of warfare rendering death inevitable are equally prohibited.

31 Robin M Coupland (ed), *The SIrUS Project, Towards a Determination of Which Weapons Cause 'Superfluous Injury or Unnecessary Suffering'* (ICRC 1997).

32 Protocol (IV) on Blinding Laser Weapons (adopted 13 October 1995, entered into force 30 July 1998) 1380 UNTS 370 (CCW Protocol IV).

33 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (18 September 1997) (so-called Ottawa Convention). See CIHL commentary on rule 70 and 86.

34 Melzer, *International Humanitarian Law* (above n 16) 110.

35 CIHL commentary on rule 70.

36 *Nuclear Weapons* para 78.

37 cf. in the context of the *Nuclear Weapons* Advisory Opinion requested by the WHO before the ICJ, see the letter dated 19 June 1995 from the Honorary Consul of Solomon Islands in London, together with written comments of the Government of Solomon Islands, para 4.6:

The use of nuclear weapons necessarily causes 'superfluous injury' to its victims. (...) Proponents of the legality of the use of nuclear weapons (...) suggest that there is no unnecessary suffering where there exists a reasonable link between the military advantage gained and the damage caused to the enemy. (See eg United Kingdom (...), Netherlands (...), United States (...)). This approach disregards fundamental principles of humanitarian law. (...) The concept of 'unnecessary suffering' does not depend on what a particular army judges to be good or bad in terms of military advantage, but on an objective determination of the victims' injury. It is their suffering which is at issue, not the interest of obtaining military advantage.

38 CIHL commentary on rule 70 and related practice. See, in particular, US, *Air Force Pamphlet* (1976) para 6-3(b)(1) and (2). See also UK, written statement submitted to the ICJ, *Nuclear Weapons* Advisory Opinion (16 June 1995) 50 para 3.64.

39 See, for instance, in this sense: US, *Air Force Pamphlet* (1976), para 6-3(b)(1) and (2): 'This prohibition against unnecessary suffering is a concrete expression of the general principles of proportionality and humanity.'

40 Melzer, *International Humanitarian Law* (above n 16) 110. For additional examples, see CIHL commentary on rule 70.

41 See CIHL commentary on rule 70, which states that 'States articulating [the prohibition of methods of warfare that cause superfluous injury or unnecessary suffering] do not give any examples of methods of warfare that would be prohibited by virtue of this rule.'

42 Robert Kolb, *Ius in bello: Le droit international des conflits armés, Précis* (Helbing and Lichtenhahn 2003) 139, para 311. For a newspaper article on this attack, see Eric Schmitt, 'U.S. Army Buried Iraqi Soldiers Alive in Gulf War' *New York Times* (New York, 15 September 1991).

43 For instance, France and Russia held in the context of the *Nuclear Weapons* Advisory Opinion before the ICJ that a weapon can be prohibited by virtue of one or the other of the said cardinal principles only if states prohibit the weapon by a treaty. See: Russian Federation, written statement submitted to the ICJ, *Nuclear Weapons* Advisory Opinion (19

June 1995) 12; French Republic, written statement submitted to the *Nuclear Weapons Advisory Opinion* (19 June 1995) 42.

44 *Nuclear Weapons* para 95.

45 Melzer, *International Humanitarian Law* (above n 16) 110–11; Kolb (above n 42) 138–9, para 308; Sassòli et al (above n 22) 33–4; CIHL commentary on rules 70 and 71.

46 API article 1(2). See also the preamble of APII for a shorter version of the Martens Clause and the preamble of the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, Geneva (10 October 1980). For previous versions of the Martens Clause, see: Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (Hague Convention II) preamble (§9); Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 227 preamble (para 8); the four Geneva Conventions 1949 articles 63, 62, 142, and 158 respectively.

47 APII article 14.

48 *ibid* article 4(1).

49 *ibid* article 4(3)(c).

50 *ibid* article 17.

51 CIHL commentary on rule 70.

52 APII, preamble; CIHL rules 70 and 71.

53 *Prosecutor v Dusko Tadić a/k/a 'Dule'* (Decision on the Defence Motion for interlocutory Appeal on Jurisdiction, Appeals Chamber) IT-94-1-AR72 (2 October 1995) para 119.

54 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRCH DPH Guidance (ICRC 2009) 27.

55 *Instructions for the Government of Armies of the United States in the Field*, General Orders No 100 (24 April 1863) (*Lieber Code*) article 71; *Project of an International Declaration concerning the Laws and Customs of War* (27 August 1874) (Brussels Declaration) article 13(c); Institute of International Law, *The Laws of War on Land* (Institute of International Law 9 September 1880) (*Oxford Manual*) article 9 (b).

56 Hague Regulations article 23(c); API article 41(1).

57 See in this sense CIHL commentary on rule 47.

58 CIHL rule 47.

59 See API article 85(3)(e). See also Rome Statute article 8 (2)(b)(vi). These provisions deal with IAs. It is submitted that it should also be considered a crime in NIACs.

60 API article 41(1) and (2); CIHL rule 47.

61 AP Commentary paras 1611–1617.

62 *ibid* para 1612.

63 See also, most notably, Melzer, *Interpretive Guidance* (above n 54) section IX, 77–82.

64 AP Commentary paras 1618–1619. See also CIHL commentary on rule 47.

65 API article 42(1); CIHL rule 48.

66 *ibid* article 42(2).

67 *ibid* article 42(3).

68 AP Commentary on API article 41 para 1613:

From the moment that combatants have fallen ‘into the hands’ of the adversary, the applicability of the Third Convention can no longer be contested. They are prisoners of war and should never be maltreated, but should always be treated humanely. If they make an attempt to escape or commit any hostile act, the use of arms against them is once more permitted within the conditions prescribed in the Third Convention. The same applies a fortiori for adversaries who benefit only from the safeguard of Article 41 without being recognized as prisoners of war. In fact, the proviso at the end of the present paragraph specifically provides it.

69 Melzer, *International Humanitarian Law* (above n 16)106.

70 Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII) article 42. See also AP Commentary para 1613 and n 17.

71 API article 41 (3).

72 Melzer, *International Humanitarian Law* (above n 16) 107.

73 *Lieber Code* article 60; Brussels Declaration article 13(d); *Oxford Manual* article 9(b).

74 Hague Regulations article 23(d); API article 40.

75 APII article 4(1).

76 CHIL rule 46.

77 Rome Statute article 8(2)(b)(xii) (for IACs) and Rome Statute article 8(2)(e)(x) (for NIACs).

78 See also the St Petersburg Declaration, which prohibited the use of explosive projectiles, which ‘uselessly aggravate the sufferings of disabled men, or render their death inevitable’.

79 API article 40. See also Hague Regulations article 23(d) and CIHL rule 46.

80 AP Commentary para 1598. Article 23(c) of the Hague Regulations prohibits the killing and wounding of a combatant *hors de combat* separately from the denial of quarter.

81 CIHL commentary on rule 46.

82 Charter of the United Nations (26 June 1945) article 2(4).

83 API article 51(2).

84 Melzer, *International Humanitarian Law* (above n 16) 107.

85 *ibid*.

86 ‘Double strikes’ or ‘follow-up strikes’ are ‘attacks that occur after a first one and that may intentionally or incidentally kill wounded persons as well as rescuers’: Raymond Ouigou Savadogo and Julia Grignon, ‘Attacks against Wounded, Sick, Shipwrecked and Medical Personnel, as Well as the Challenges Posed by ‘Follow Up Strikes’, in Stephane Kolanowski (ed.), *Proc Bruges Coll, Vulnerabilities in Armed Conflicts: Selected Issues*, 14th Bruges Colloquium, 17–18 October 2013, No 44, Autumn 2014, 12.

87 Hague Regulations article 23(b). For earlier prohibitions, see *Lieber Code* article 101; Brussels Declaration article 13 (b); *Oxford Manual* article 8(b).

- 88** API article 37.
- 89** CIHL rule 65.
- 90** Rome Statute article 8(2)(b)(xi) (for IACs); Rome Statute, article 8(2)(e)(ix) (for NIACs). See also API article 85(3)(f).
- 91** API article 37.
- 92** See below, section 3.C.2 'Misuse of emblems, signs, and uniforms'.
- 93** API article 37.
- 94** *ibid.* See also CIHL rule 57.
- 95** Melzer, *International Humanitarian Law* (above n 16) 109.
- 96** API article 38; APII article 12; CIHL rules 59–61.
- 97** API article 39; CIHL rules 62 and 63.
- 98** Rome Statute article 8(2)(b)(vii).
- 99** Karl Penhaul, 'Uribe: Betancourt Rescuers Used Red Cross', *CNN* (16 July 2008) <http://edition.cnn.com/2008/WORLD/americas/07/16/colombia.cross/index.html>.
- 100** *ibid.*
- 101** The prohibition of direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks, and the prohibition of human shields are dealt with in chapter 7 'International Humanitarian Law and the Conduct of Hostilities'. The prohibition of methods causing widespread, long-term, and severe damage to, or involving the hostile manipulation of, the natural environment is dealt with in chapter 9 'Protection of the Natural Environment'. The prohibition of acts or threats of violence with the primary purpose of spreading terror among civilians as well as hostage taking is dealt with in chapter 17 'International Humanitarian Law and International Human Rights Law'.
- 102** See generally, Dapo Akande and Emanuela-Chiara Gillard, 'Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law' (2019) 17 *JICJ* 753.
- 103** API article 54(1); APII article 14.
- 104** CIHL rule 53.
- 105** Rome Statute article 8(2)(b)(xxv).
- 106** See eg Croatia, District Court of Zadar, *Perišić and others* (Judgment) (24 April 1997).
- 107** API article 54 (2); CIHL rule 54.
- 108** API article 54 (3).
- 109** See CIHL rules 55 and 56. On access to humanitarian relief, see also chapter 13 'Occupation' in this book.
- 110** See eg UN General Assembly Resolutions 48/88 (1993), 49/10 (1994), and 49/196 (1994); UN Commission on Human Rights Resolutions 1994/74 (1994) para 9 and 1995/76 (1995) para 10.
- 111** See CIHL commentary on rule 53. See also France: Ministère de la Défense, *Manuel de Droit des Conflits Armés*, Direction des affaires juridiques, Sous-direction du droit international humanitaire et du droit européen (Bureau du droit des conflits armés 2001) 33; New Zealand: New Zealand Defence Forces, *Interim Law of Armed Conflict Manual*, DM 112 (New Zealand Defence Forces 1992) para 504(2) n 9; Louise Doswald-Beck (ed), *San*

Remo Manual on International Law Applicable to Armed Conflicts at Sea (CUP 1995) (adopted 1994, reproduced 1995) No 309 IRRC 583 (*San Remo Manual*) para 102(a).

112 CIHL commentary on rules 53 and 55. See also Israel: Military Advocate, *Laws of War in the Battlefield: Manual on the Laws of War* (Military Advocate General Headquarters 1998) 59: the prohibition of starvation 'clearly implies that the city's inhabitants must be allowed to leave the city during a siege'.

113 See notably Human Rights Council, *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, UN Doc A/HRC/15/21 (27 September 2010) (it found that the blockade was not proportionate and constituted collective punishment); *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (July 2011) (UN Appointed Palmer Commission) (it found that the blockade was lawful). *The Public Commission Appointed to Examine the Maritime Incident of 31 May 2010*, Part One (January 2011) (Turkel Commission's Report) (it found that the blockade was lawful).

114 See *San Remo Manual* para 102(a), which is often considered as restating customary law.

115 See >Humanitarian Policy and Conflict Research at Harvard University (HPCR), 'The Commentary on the Humanitarian Policy and Conflict Research (HPCR) Manual on International Law Applicable to Air and Missile Warfare' (March 2010) 296 article 157(a) <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>. This Manual proposed amending the wording of article 102(a) of the *San Remo Manual* in order to prohibit the imposition of a naval blockade not only if starvation of the civilian population is its 'sole' but also its 'main' purpose.

116 In this sense, Turkel Commission's Report para 75.

117 CIHL commentary on rule 145.

118 See eg Emerich de Vattel, *The Law of Nations, or the Principles of Natural Law* (1797) para 342 http://files.libertyfund.org/files/2246/Vattel_1519_LFeBk.pdf.

119 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI) article 46; General Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 12 October 1949) 75 UNTS 85 (GCII) article 47; GCIII article 13(3); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) article 33.

120 GCIV article 33.

121 GCI article 46; GC II art 47.

122 API article 51(6).

123 *ibid* article 52.

124 *ibid* article 53.

125 *ibid* article 54.

126 *ibid* article 55.

127 *ibid* article 56.

128 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 Convention) article 4 (4).

129 CIHL commentary on rule 145 (and further references therein). For relevant jurisprudence, see eg Special Arbitral Tribunal, *Naulilaa* case (Decision) (31 July 1928) 1026-7; *Nuclear Weapons* para 46; *Kupreškić* case (ICTY Judgment) (14 January 2000), para 535; *Martić* case (ICTY Trial Judgment) (2007) paras 465-467.

130 The ICJ even considered that massacres of civilians as a form of reprisal during the Second World War were clearly serious violations of the law of armed conflict applicable at the time. See *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) (3 February 2012) para 52.

131 CIHL commentary on rules 146 and 147.

132 *ibid* commentary on rule 146. For reservations, see eg UK, Reservations and Declarations made upon ratification of the 1977 Additional Protocol I (28 January 1998) para (m). See also the more ambiguous reservations/declarations of Egypt (9 October 1992) para 3; France (11 April 2001) para 11; Germany (26 May 1997) 167 para 137; and Italy (27 February 1986) para 10 https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/states.xsp?xp_viewstates=XPages_NORMstatesParties&xp_treatySelected=470.

133 For instance, Egypt, France, and Germany have since considered that reprisals against civilians in the conduct of hostilities is prohibited. See: Egypt, *Written statement submitted to the ICJ, Nuclear Weapons* (Advisory Opinion) (20 June 1995) para 46; France, Ministère de la Défense (above n 111) 85; Germany, Bundesministerium der Verteidigung, *Druckshrift Einsatz n 03, Humanitäres Völkerrecht in bewaffneten Konflikten—Handbuch*, DSK SF009320187, RII3 (Bundesministerium der Verteidigung 2006) 4.

134 See eg US Department of Defense (DoD), *Law of War Manual* (Department of Defense June 2015, updated December 2016) 1115-16 para 18.18.3.4. See also (more narrowly) Italy, Ufficio Adestramento e Regolamenti, *Manuale di diritto umanitario, Intro and Vol I, Usi e Convenzione di Guerra*, SMD—G-014, Stato Maggiore della Difesa, I Reparto (Ufficio Adestramento e Regolamenti 1991) paras 23 and 25.

135 CIHL commentary on rule 146. See also rule 147.

136 *Martić* (Review of the Indictment) (8 March 1996) paras 15-17; *Kupreškić* (above n 129) paras 527-531.

137 *Kupreškić* (above n 129) paras 527 and 529.

138 Common Article 1 to the 1949 Geneva Convention; API article 1(1).

139 *Martić* (Review of the Indictment) (above n 136) para 15.

140 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) (27 June 1986) para 219.

141 Sentence quoted in the *Kupreškić* case (above n 129) para 534. This quotation must be attributed to the International Law Commission. See the Commission's comments on the former Article 14 of the 2nd Part of the Draft Articles in *Yearbook of the International Law Commission*, Vol 2, Part 2 (1995) A/CN.4/SER.A/1995/Add.1 (Part 2) (State responsibility) 72 para 18. For more information on Common Article 3 and the prohibition of reprisals, see below.

142 *Martić* (Review of the Indictment) (above n 136) para 16. *Kupreškić* (above n 129) para 528. On the customary prohibition of collective punishment, see CIHL rule 103.

143 UN General Assembly Resolution 2675 (XXV) (9 December 1970).

144 *Martić* (Review of the Indictment) (above n 136) para 16; *Kupreškić* (above n 129) para 532.

145 *Martić* (ICTY Trial Judgment) (above n 129) para 467. Although the armed conflict was probably non-international at the time, the ICTY did not classify the situation considering that '[w]hen an accused is charged with violation of Article 3 of the Statute, it is immaterial whether the armed conflict was international or non-international in nature' (para 42).

146 *Mbarushimana*, ICC (Decision on the Confirmation of Charges) (16 December 2011) para 143 (quoting the ICTY's *Martić* decision of 8 March 1996). (Note that the case concerns a NIAC, but the ICC considers that reprisals against civilians are always prohibited irrespective of the type of armed conflict). See further below on NIACs.

147 CIHL commentary on rule 147.

148 *Martić* (ICTY Trial Judgment) (above n 129) paras 464–468 and (Appeal Judgment) (2008) paras 263–267.

149 *Martić* (ICTY Trial Judgment) (above n 129) para 468.

150 CIHL commentary on rule 145.

151 Iraq, Letter dated 2 May 1983 to the UN Secretary General, UN Doc S/15743 (4 May 1983); Iraq, Letter dated 18 February 1987 to the UN Secretary General, UN Doc S/18704 (18 February 1987); Islamic Republic of Iran, Letter dated 2 February 1987 to the UN Secretary General, UN Doc S/18648 (2 February 1987); Islamic Republic of Iran, Letter dated 24 February 1987 to the UN Secretary General, UN Doc S/18721 (25 February 1987); Islamic Republic of Iran, Minister of Foreign Affairs, Letter dated 27 February 1987 to the UN Secretary General, UN Doc S/18728 (27 February 1987); Islamic Republic of Iran, Letter dated 24 June 1987 to the UN Secretary General, UN Doc S/18945 (24 June 1987).

152 See UN Secretary General, Message dated 9 June 1984 to the Presidents of the Islamic Republic of Iran and the Republic of Iraq, UN Doc S/16611 (11 June 1984); UN Security Council, Statement by the President, UN Doc S/PV.2798 (16 March 1988) 2; ICRC, Press Release No 1479: 'Iran-Iraq War: ICRC Appeals to Belligerents' (15 December 1983); ICRC, Press Release No 1489: 'Bombing of Iraqi and Iranian Cities' (7 June 1984).

153 See APII article 7 (humane treatment of wounded, sick and shipwrecked in all circumstances), article 10(1) (no punishment for having carried out medical activities compatible with medical ethics under no circumstances), article 11 (respect and protection of medical units and transports at all times unless they are used to commit hostile acts), and article 12 (respect of the distinctive emblem in all circumstances). See also Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *ICLQ* 434.

154 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC 2016) (ICRC Commentary 2016) commentary on Common Article 3, para 905; AP Commentary para 4530; Michael Bothe, Karl Josef Partsch, and Waldemar A Solf (eds), *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff 2013) 731; Cassese (above n 153) 435. See also: *Martić* (Review of the Indictment) (above n 136) para 16; *Kupreškić* (above n 129) para 534; cf Veronika Bilkova, 'Belligerent Reprisals in Non-International Armed Conflicts' (2014) 63 *ICLQ* 155–7.

155 See ICRC Commentary 2016, Common Article 3, para 905; CIHL rule 148.

156 CIHL commentary on rule 148.

157 See eg UNGA Resolutions 48/152 (20 December 1993) para 8 and 49/207 (23 December 1994) para 9.

158 CIHL rule 148.

159 *Martić* (ICTY Trial Judgment) (above note 129).

160 For a careful review of existing literature on the topic, see Bilkova (above n 154) 31–65.

161 Cassese (above n 153) 433–4.

162 See ICRC Commentary 2016 on Common Article 3, para 905; Bilkova (above n 154) 49.

163 US DoD (above n 134) 1096.

164 *ibid* 1099. See also Australia, Australian Defence Force, *Manual on Law of Armed Conflict*, Operations Series, ADFP 37, Interim edn (Australian Defence Force Publications 1994) para 1310; Kenya, School of Military Police, *Law of Armed Conflict, Military Basic Course (ORS) Précis* No 4 (School of Military Police 1997) 4; Sweden, Swedish Ministry of Defence, *International Humanitarian Law in Armed Conflict, with Reference to the Swedish Total Defence System* (Swedish Ministry of Defence 1991) section 3.5, 89; UK, Ministry of Defence, *The Law of Armed Conflict*, D/DAT/13/35/66, Army Code 71130 (rev edn, Ministry of Defence 1981) section 4, 17.

165 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) article 50.

166 This rule can also be found in older documents, such as the *Lieber Code* articles 15–16 and the Brussels Declaration article 13(g).

167 GCI article 50; GCII article 51; GCIV article 147. See also Rome Statute article 8(2)(b) (xiii).

168 GCI articles 19, 33, and 34; GCII articles 11 and 23; and GCIV article 18.

169 GCI article 20; GCII articles 22 and 24.

170 GCI articles 35 and 36; GCII articles 38 and 39; GCIV article 22.

171 *Kordić and Čerkez* (ICTY Judgment) (26 February 2001) para 341.

172 GCIV article 53 only applies to occupied territories as defined in the Hague Regulations article 42. Article 23(g) of the Hague Regulations is thus wider in scope. The destruction of property situated on enemy territory may nevertheless be considered a war crime (but not a grave breach). See *Kordić and Čerkez* (above n 171) paras 335–341 and 347.

173 ICRC Commentary 2016 para 3009.

174 *Hadžihasanović* (ICTY Judgment) (15 March 2006) para 46.

175 ICRC Commentary 2016 para 3011.

176 *ibid*.

177 For the specific provisions on pillage, see: Hague Regulations articles 28 and 47; GCIV article 33(2); APII article 4(2)(g). On the customary character of the prohibition of pillage, see: CIHL rule 52. See also ICC, *Review Conference of the Rome Statute of the International Criminal Court* (Kampala 31 May–11 June 2010) (ICC 2010) ('Elements of Crimes'), which specify that pillage is done 'for private or personal use' (Rome Statute article 8(2)(b)(xvi) and (e)(v)).

- 178** ICRC Commentary 2016 para 3008. See also the Rome Statute, which has reformulated the crime in the following manner: ‘destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war’ (Rome Statute article 8(2)(b)(xiii) and article 8(2)(e)(xii)).
- 179** ICRC Commentary 2016 para 3014; *Blaškić* (ICTY Trial Judgment) (3 March 2000) para 157.
- 180** Ibid. See also *Brđanin* (ICTY Trial Judgment) (1 September 2004) para 587; *Prosecutor v Naletilić and Martinović* (Trial Chamber Judgment) (*Naletilić* case) (31 March 2003) para 576; *Prlić* (ICTY Trial Judgment) (29 May 2013) para 126.
- 181** See, in this sense, *Hadžihasanović* (above n 174) para 43.
- 182** *ibid* para 44; ICRC Commentary 2016 para 3015.
- 183** ICRC Commentary 2016 para 3013. See also Nils Melzer, *Targeted Killing under International Law* (OUP 2008) 280–2 (and additional references therein).
- 184** ICRC Commentary 2016 para 3015.
- 185** GCIV article 53.
- 186** GCI article 34(2).
- 187** ICRC Commentary 2016 para 3016. See also See *Brđanin* (above n 180) para 589; *Naletilić* case (above n 180) para 577(iv) and n 1440; *Kordić and Čerkez* (above n 172) para 341(iii); and *Prlić* (above n 181) paras 127 and 131.
- 188** *Blaškić* (above n 180); *Kordić and Čerkez* (above n 171); *Naletilić* case (above n 180).
- 189** *Blaškić* (above n 180).
- 190** See CIHL rule 50; *Hadžihasanović*, ICTY (Decision on Motions for Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence) (27 September 2004) para 104.
- 191** Rome Statute article 8(2)(e)(xii).
- 192** In ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (9 July 2004) (*Palestinian Wall* case) para 124, the ICJ considered that article 23(g) of the Hague Regulations was not pertinent regarding the situation in the West Bank, since this article is located in section II dedicated to ‘hostilities’. Pertinent rules were found thus exclusively in section III dedicated to occupation (see articles 46 and 52).
- 193** Hague Regulations article 53(1).
- 194** *ibid* article 56.
- 195** *ibid* article 55.
- 196** *ibid* article 46.
- 197** *ibid* article 53.
- 198** *ibid* article 52.
- 199** CIHL rule 51.
- 200** *ibid*.
- 201** *ibid*.
- 202** See ICJ (n 192) paras 124, 126, 132, and 135.

203 Eritrea-Ethiopia Claims Commission, *Central Front, Eritrea's Claim, Partial Award* (28 April 2004) para 67.

204 *ibid.*

205 See chapter 7 'International Humanitarian Law and the Conduct of Hostilities' in this book.

206 Melzer, *International Humanitarian Law* (above n 16) 122. Arguably, this duty can also be derived from the Martens Clause, which is considered to be customary law: Melzer, *International Humanitarian Law* (above n 16) 123.

(p. 261) 11 Weapons

1. Introduction

Weapons are integral to the use of force but there is no accepted definition of what constitutes a weapon under international law.¹ It seems clear, though, that the notion is broader than 'arms', which are factory-produced weapons, especially when destined for the military market. It is not restricted to devices that cause harm by means of kinetic energy, such as a bullet fired from a gun, as damage to the body can also be effected by heat, sound, electricity, bacteria, poison, or electromagnetic energy.² The notion of a weapon would thus encompass a dual-use item, such as a knife, and adapted devices such as improvised explosive devices (IEDs) or a 'dirty bomb', where radioactive material is associated with conventional explosives. The term could also be applied to the use of the internet in a cyber-attack wherein computer code is 'weaponized', for instance, in viruses or worms.³

International humanitarian law (IHL) has traditionally focused on prohibiting or restricting the use of weapons, whether under its Geneva law or Hague law branches (see chapter 7 'International Humanitarian Law and the Conduct of Hostilities'), while disarmament law addressed their manufacture and supply. Beginning in the late nineteenth century, IHL instruments prohibited the use of, among others, exploding bullets;⁴ asphyxiating or deleterious gases;⁵ expanding 'dum-dum' bullets;⁶ chemical and bacteriological methods of warfare;⁷ and modification of the environment;⁸ while two protocols adopted in 1980 (p. 262) under the Convention on Certain Conventional Weapons (CCW)⁹ respectively restrict the use of landmines¹⁰ and incendiary weapons.¹¹

In contrast, in 1971 the Biological and Toxin Weapons Convention (BWC)¹² prohibited states parties 'to develop, produce, stockpile or otherwise acquire or retain' biological weapons, but not their use.¹³ This was despite the fact that the prohibition of biological weapons was based on the 1925 Geneva Protocol to which more than twenty states had made reservations,¹⁴ effectively limiting the prohibition to one of 'no first use'.

The clear distinction that once existed in the regulation of weapons under international law was first overridden in the 1992 Chemical Weapons Convention (CWC),¹⁵ which prohibited, in a single instrument, the development, production, stockpiling, transfer, and use of chemical weapons.¹⁶ Then in 1995 the CCW Protocol IV on Blinding Laser Weapons,¹⁷ an IHL treaty adopted within the United Nations (UN), prohibited not only the use but also the transfer of weapons designed to blind.

In tandem with negotiations to tackle the threat from anti-personnel mines, which led to the conclusion of Amended Protocol II in 1996,¹⁸ states had come to understand that merely regulating use without constraining supply was often ineffective. The adoption of the 1997 Anti-Personnel Mine Ban Convention (APMBC)¹⁹ and then, a decade later, the 2008 Convention on Cluster Munitions (CCM)²⁰ has confirmed a new trend that international weapons treaties follow the approach taken in the 1992 CWC and prohibit not only the use, but also the development, production, stockpiling, and transfer of specific weapons. Despite this evolution in international law, however, most general IHL norms pertain only to use, as section 2 describes.

(p. 263) 2. General Principles and Rules Governing Use of Weapons

A general IHL principle holds that the right of parties to an armed conflict 'to choose methods or means of warfare is not unlimited'.²¹ This means that parties to an armed conflict are restricted by applicable treaty and customary rules in the weapons they may lawfully use as well as in the way they may lawfully use them. Furthermore, according to the International Committee of the Red Cross (ICRC), '[m]ilitary necessity cannot justify any derogation from rules which are drafted in a peremptory manner'.²² The general principle is believed to be part of customary international law²³ and applies to situations of both international armed conflict (IAC) and non-international armed conflict (NIAC).

If, however, a weapon is not per se illegal, its use in armed conflict is always subject to the rule of distinction. This fundamental IHL rule holds that parties to a conflict must direct attacks only against lawful military objectives (military personnel or objects of concrete military value) and never against the civilian population, individual civilians, or civilian objects. According to the ICRC's Customary International Humanitarian Law Study (CIHL Study), the rule, which applies in all armed conflicts, is formulated as follows:

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.²⁴

Civilians are persons who are not members of the armed forces, while the civilian population comprises all persons who are civilians.²⁵ Civilian objects are defined as any objects that are not military objectives, while:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.²⁶

(p. 264) The content and application of the rule are explained in detail in chapter 7 'International Humanitarian Law and the Conduct of Hostilities', while the implications for the illegality of an 'indiscriminate' weapon are discussed in section 3 'General Prohibitions on Use of Weapons' below.

Even if a weapon is targeted at a lawful military objective, the circumstances of its use must still respect the rule of proportionality in attack. According to the CIHL Study, an attack will be unlawful where it is expected to cause incidental civilian harm—deaths or injuries, destruction or damage to civilian objects, or a combination thereof—that is 'excessive' compared to the military advantage anticipated.²⁷ Proportionality thus has 'nothing to do with injury to combatants or damage to military objectives'.²⁸ Moreover, the assessment of likely civilian harm is made by the attacker in advance of the attack: it is not an *ex post facto* analysis based on the extent of any civilian casualties which are actually inflicted.

In its application to means of warfare, the rule of proportionality does not render any given weapon inherently unlawful, as its application and the assessment of legality are always context dependent. It is therefore incorrect to refer to a 'disproportionate' weapon. Controversially, the ICRC has asserted that the rule 'does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.'²⁹ It is by no means certain that this is the state of the law. As Yoram Dinstein has observed, the rule is a balancing act: the greater the anticipated

military advantage, the greater the extent of foreseeable civilian harm that may not be unlawful.³⁰

Complementary to the rules on distinction and proportionality in attack is the rule of precautions in attack. According to the ICRC's formulation of this customary IHL rule, which is similarly deemed to apply in all armed conflicts: '[a]ll feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects'.³¹ This has particular implications for the choice of weapons as well as the decision when and how to use them in any attack. It is correct to assert that the current state of the law is not yet such as to oblige parties to a conflict to use precision-guided ('smart') munitions in populated areas.³² But as the UK has observed, the rule of precautions in attack amounts to an obligation to select the weapons and tactics 'which will cause the least incidental damage commensurate with military success'.³³

It is sometimes argued that the Martens Clause has an influence on the use of weapons under IHL.³⁴ Indeed, no less an authority than the International Court of Justice (ICJ) affirmed in its 1996 *Nuclear Weapons* Advisory Opinion that the Martens Clause 'has proved to be an effective means of addressing the rapid evolution of military technology'.³⁵ (p. 265) The Court did not provide any evidence of how this has been the case and the assertion is not persuasive. The use of weapons in the conduct of hostilities is systematically regulated by the IHL rules described both above and in section 3 'General Prohibitions on Use of Weapons' below. Where a specific weapon is deemed to cause excessive civilian harm or inflict cruel wounds, whether generally or on a wide scale, efforts have been made to prohibit or restrict it by treaty negotiation.

3. General Prohibitions on Use of Weapons

A. Inherently Indiscriminate Weapons

In addition to restricting the use of weapons in all military operations, whether offensive or defensive in nature,³⁶ the rule of distinction means that any weapon that is 'incapable of distinguishing between civilian and military targets' is unlawful. The ICJ described this as a 'cardinal' principle in its 1996 *Nuclear Weapons* Advisory Opinion.³⁷ In 2005, the CIHL Study concluded that: '[t]he use of weapons which are by nature indiscriminate is prohibited'.³⁸ According to the ICRC, the rule is a customary norm applicable in all armed conflicts.³⁹

The UK's 2004 *Manual on the Law of Armed Conflict* describes the applicable rule as comprising two alternative tests: if a weapon cannot be targeted against a specific military objective (for instance, because it has a rudimentary guidance system), or if its effects cannot be limited to a military objective in accordance with IHL, it is an indiscriminate weapon.⁴⁰ While this understanding is not generally contentious, the application of the rule to specific weapons is. In its discussion of the customary rule, the ICRC cites a number of conventional weapons and weapons of mass destruction that have been alleged to be of an indiscriminate nature but observes that there is 'insufficient consensus ... to conclude that, under customary international law, they all violate the rule prohibiting the use of indiscriminate weapons'.⁴¹

Although the precise parameters for what is an inherently indiscriminate weapon are not clear, the strongest argument for a weapon in modern use that cannot be targeted sufficiently accurately is probably a first generation 'Scud' missile. This Soviet missile, the R-11, which was manufactured during the Cold War from 1959 to 1984, was intended to strike targets in Western Europe. Early Scuds, whose gyroscopes and electronics dated

back to the 1950s, were notoriously inaccurate. In general, it was expected that half of the missiles fired at a single target would miss by more than one kilometre.⁴²

(p. 266) Another weapon that has frequently been cited as 'indiscriminate' is the landmine. Here it is the fact that the weapon is activated by the victim that is at the heart of the argument. An anti-personnel mine cannot distinguish between the footfall of a soldier or that of a civilian: either will detonate the weapon. This would tend to suggest that its effects are indiscriminate. The flaw in the argument, though, is that placing anti-personnel mines in a marked and fenced area, and especially one that is patrolled by military personnel, can effectively ensure that the victims of any explosion are predominantly military and not civilian. That this is rarely the case in practice justifies their prohibition by treaty but not the assertion that they are inherently indiscriminate weapons. Moreover, any state that accepts otherwise must surely accept that the use of an anti-vehicle mine is similarly unlawful, yet there is scant evidence of such *opinio juris*.

The US Air Force's 1976 *Manual on International Law* cites biological weapons as a 'universally agreed illustration of ... an indiscriminate weapon', observing that the uncontrollable effects from such weapons 'may include injury to the civilian population of other states as well as injury to an enemy's civilian population'.⁴³ These uncontrolled effects exist not only spatially but also over time. The same often applies to poison; as the ICRC has observed, 'poison is unlawful in itself, as would be any weapon which would, by its very nature, be so imprecise that it would inevitably cause indiscriminate damage'.⁴⁴

B. Weapons Causing Superfluous Injury

One of the very few rules that protect combatants while they are fighting is the prohibition on weapons that are of a nature to cause superfluous injury or unnecessary suffering. The origins of the rule can be traced back to the first modern treaty law prohibition on a conventional weapon, the 1868 Saint Petersburg Declaration on Explosive Bullets.⁴⁵ The Declaration observed that the only 'legitimate object' which states should endeavour to accomplish through warfare is 'to weaken the military forces of the enemy' and that this objective 'would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'.⁴⁶

In 1899, the regulations on land warfare annexed to Hague Convention II stipulated that 'it is especially prohibited ... [t]o employ arms, projectiles, or material of a nature to cause superfluous injury'.⁴⁷ Today, the rule prohibiting the use of weapons causing superfluous injury is a customary IHL norm applicable to all parties to any armed conflict.⁴⁸ In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ defined unnecessary suffering as 'a harm greater than that unavoidable to achieve legitimate military objectives'.⁴⁹ Its application to specific weapons is, though, frequently contested. (p. 267) For instance, it is not settled whether to kill or seriously injure combatants by deliberately burning them out in the open (using napalm or a flamethrower), to deliberately blind them (using a laser), or to kill them slowly through the irremediable effects of radiation (using a nuclear weapon) is a violation per se of the customary rule. The ICRC has asserted that the following are unlawful as a result of the rule:

- Explosive bullets and projectiles filled with glass;
- Bullets which easily expand or flatten in the human body;
- Poison and poisoned weapons, as well as any substance intended to aggravate a wound;
- Asphyxiating or deleterious gases; and

- Bayonets with a serrated edge and lances with barbed heads.⁵⁰

It further notes that 'hunting shotguns are the object of some controversy, depending on the nature of the ammunition and its effect on a soft target'.⁵¹

4. Prohibitions and Restrictions on the Use of Specific Weapons

In addition to the general treaty and customary prohibitions on use of weapons, certain conventional weapons and weapons of mass destruction have been outlawed by specific treaties. Conventional arms are understood in the negative to encompass all arms other than weapons of mass destruction.⁵² Weapons of mass destruction have been defined by the US Department of Defense as 'chemical, biological, radiological, or nuclear weapons capable of a high order of destruction or causing mass casualties'.⁵³ This definition implies, for instance, that chemical agents that do not generally inflict mass casualties (such as riot control agents) are not weapons 'of mass destruction' and should therefore be considered as conventional arms. The scope and main provisions of the treaty prohibitions are summarized below.

A. Conventional Weapons and Ammunition

1. Anti-personnel mines

In 1996, an Amended Protocol II was adopted by states parties to the CCW,⁵⁴ in reaction to the 'epidemic' of landmine injuries occurring in many developing nations even long after the end of armed conflict.⁵⁵ The Protocol prohibits the use or transfer of anti-personnel (p. 268) mines that are deemed undetectable,⁵⁶ and/or are remotely delivered (eg by artillery or aircraft) but which fail to meet the technical specifications for self-destruction and self-deactivation (outlined in a technical annex).⁵⁷

On 3 May 1996, at the closing assembly of the diplomatic conference that adopted the Protocol, Canada announced that, given the number of states already favouring an outright prohibition on anti-personnel mines (more than forty at the time), it would host a meeting of like-minded states in Ottawa to discuss how to achieve a total ban. This meeting, held in early October 1996, saw the genesis of a fast-tracked negotiation of a comprehensive prohibition of anti-personnel mines, known as the Ottawa Process. The process resulted in the adoption in Oslo in September 1997 of the Anti-Personnel Mine Ban Convention (APMBC).

The agreement was based primarily on text adapted from the 1992 Chemical Weapons Convention. Article 1 prohibits all use, as well as development, production, acquisition, stockpiling, retention, and transfer of anti-personnel mines. Assisting, encouraging, or inducing prohibited activities is also unlawful. Each state is allowed up to four years after becoming party to the treaty to destroy all stocks⁵⁸ (aside from the 'minimum number absolutely necessary' for the 'development of and training in mine detection, mine clearance, or mine destruction techniques').⁵⁹ It requires clearance of anti-personnel mines in mined areas within ten years (although it allows affected states to seek and obtain extensions of up to ten years at a time to this deadline from the other states parties; to date, several dozen have done so).

The APMBC calls for donor support for risk education and victim assistance, but does not explicitly require a state to assist its own mine victims. A verification and compliance mechanism has been included, which allows the possibility of non-consensual fact-finding (however remote the likelihood of this occurring in practice).⁶⁰ Annual meetings of states parties are complemented by five-yearly review conferences; the latest (the fourth) was

held in Oslo, Norway, in November 2019. No reservations are allowed to the treaty's provisions.⁶¹

2. Cluster munitions

A few years after the adoption of the APMBC, another group of weapons came under increasing international scrutiny: cluster munitions.⁶² These weapons contain multiple submunitions, within a container or dispenser, that are dropped or ejected and then disperse over a wide area.⁶³ They were originally developed with a view to targeting personnel (p. 269) and/or materiel: during the Cold War, NATO powers saw them as a way to stop Warsaw Pact tank divisions advancing through West Germany in the event of war between the East and the West. As with other air-dropped ordnance, though, the munitions would frequently not detonate as intended upon impact with the ground but were all too often killing civilians, sometimes long after the end of conflicts, in a similar way to mines.⁶⁴

Norway was the catalyst for the treaty prohibition. The Oslo Process, launched at a gathering of states and non-governmental organizations (NGOs) in the Norwegian capital in February 2007, culminated in the adoption on 30 May 2008 of the Convention on Cluster Munitions (CCM) at a diplomatic conference in Dublin. The basis for the treaty was the APMBC and the core prohibitions in the CCM, set out in article 1 of the CCM, are to all intents and purposes the same as in the APMBC. Reservations are not possible to any of the provisions.

Stockpiling is still clearly prohibited but with a longer period of time allowed for destruction than in the APMBC (eight years after entry into force for each state party)⁶⁵ and, in contrast to the APMBC, the CCM includes the possibility of seeking extensions (for up to four years at a time).⁶⁶ Unexploded and abandoned submunitions, known collectively as 'cluster munition remnants', must be cleared by each affected state party, with ten years again the primary deadline, but with the possibility of seeking extensions of up to only five, not ten, years at a time.⁶⁷

An article is dedicated to victim assistance (article 5), which imposes clear duties on each state party 'with respect to cluster munition victims in areas under its jurisdiction or control'.⁶⁸ A streamlined verification and compliance provision is incorporated (article 8). As with the APMBC, annual meetings of states parties are complemented by five-yearly review conferences, the first of which took place in Dubrovnik, Croatia, in September 2015.⁶⁹

The CCM differs materially from the APMBC though. In particular, the prohibition on assisting, encouraging, or inducing 'in any way, anyone to engage in any activity prohibited to a State Party' contained in article 1(c) of the APMBC was materially softened in the CCM. The words 'in any way' were deleted and a new provision in article 21(3) expressly allows states parties, their military personnel or nationals, to 'engage in military cooperation and operations' with states not party 'that might engage in activities prohibited' for a state party. A state party may not, though, itself use cluster munitions or 'expressly request the (p. 270) use of cluster munitions in cases where the choice of munitions used is within its exclusive control'.⁷⁰

3. Blinding laser weapons

Under article 1 of CCW Protocol IV it is 'prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices'. The negotiation of the Protocol was motivated by the development of laser rifles that could blind instantly at a distance of several kilometres; this included the marketing of a hand-held blinding laser rifle by China. As noted in section 1 'Introduction' above, a prohibition on transfer was also included in the Protocol.⁷¹ The argument advanced by a small number of states, notably the US, that it would be more

humane to blind combatants than to kill them was thus not accepted. In 2001, a US commentator claimed that the Protocol 'does not conclude that blinding laser weapons cause unnecessary suffering or superfluous injury'.⁷² In December 2015, *China's People's Liberation Army Daily* announced that Chinese soldiers were equipped with laser guns to counter technology such as unmanned aerial systems (drones) or the thermal imagers of tanks.⁷³ China is a state party to CCW Protocol IV.

4. Exploding bullets

The 1868 Saint Petersburg Declaration on Explosive Bullets, referred to in section 3 'General Prohibitions on Use of Weapons' above, outlawed the use among states parties' armed forces 'of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances'. The Declaration represents the first modern treaty prohibiting the use of a specific weapon during war. Five years previously, the Russian military had invented a bullet that exploded on contact with hard substances and whose primary military utility was to blow up ammunition wagons. In 1867, however, the bullet was modified so it would explode on contact with a soft substance, which would have meant that its use against the body would render the victim almost certain to be killed. According to the ICRC, under customary IHL: '[t]he anti-personnel use of bullets which explode within the human body is prohibited'.⁷⁴ This rule applies in all armed conflicts.

5. Expanding bullets

Expanding bullets are those which 'expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions'.⁷⁵ In the early 1890s, concerned that their new .303' calibre rifle ammunition was ineffective in 'stopping' attacking tribesmen, British troops began filing down the tip of the round in the field to reveal the bullet's lead core. This caused the bullet to expand when it entered the human body, inflicting significantly greater wounds than its unadapted original. This (p. 271) improvised soft-point round⁷⁶ became known as the 'Dum Dum' bullet, so called after the factory at Dum Dum near Calcutta that manufactured it in the mid-1890s. Subsequently, a hollow-point bullet⁷⁷ with similar terminal ballistics effects was produced at the Woolwich ordnance factory in the late 1890s.⁷⁸

In general, use of expanding bullets by armed forces in the conduct of hostilities is not only a serious violation of IHL, it is also, when it occurs with the requisite *mens rea*, a war crime.⁷⁹ It should, though, be noted that expanding bullets are permissible for use in law enforcement operations, meaning that a soldier of one state may not use expanding bullets against a soldier of another state during an armed conflict but a police officer may lawfully use expanding ammunition against one of his state's own citizens.⁸⁰ This is one of the very few instances when IHL does not allow a weapon that is permissible (albeit under far more restrictive circumstances) under the law of law enforcement.

6. Incendiary weapons

CCW Protocol III prohibited only certain uses of incendiary weapons. Efforts by some states in the 1970s to ban outright the use of incendiary weapons, particularly napalm, following extensive use by the US in the war in Indochina, were unsuccessful. The Protocol prohibited direct attacks on civilians or attacks that would be expected to have disproportionate effects (consonant with the general rule on proportionality in attack described in section 2 'General Principles and Rules Governing Use of Weapons' above).⁸¹ Upon its ratification of the Protocol in 2009, the US included a reservation whereby it retained 'the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons'.⁸² It pledged that, in so doing, it would take 'all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and

in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.⁸³

The ICRC acknowledged in its commentary of 1977 Additional Protocol I (API) that none of the rules in CCW Protocol III explicitly protects combatants against incendiary weapons such as flame-throwers or napalm. It observed, however, that 'it is generally (p. 272) admitted that these weapons should not be used in such a way that they will cause unnecessary suffering ... which means that in particular they should not be used against individuals without cover'.⁸⁴ In its CIHL Study published in 2005, the ICRC affirmed that a rule existed whereby the 'anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat'.⁸⁵ It further claimed that it was 'reasonable to conclude that the rule is applicable in non-international armed conflicts'.⁸⁶ Whether the proposed rule is indeed black-letter law is not settled.

7. Anti-vehicle mines

Anti-vehicle mines are specifically governed by the 1980 Protocol II and 1996 Amended Protocol II to the CCW. In fact, the provisions add little to the general customary IHL rules that govern all weapons. Article 6(3) of Amended Protocol II prohibits the use of remotely delivered anti-vehicle mines 'unless, to the extent feasible', they have an 'effective self-destruction or self-neutralization mechanism' and 'a back-up self-deactivation feature', which will operate when the mine 'no longer serves the military purpose for which it was placed in position'. Subsequent efforts to impose stricter rules on the use of anti-vehicle mines have run into strong opposition, particularly from China and Russia.

B. Weapons of Mass Destruction

1. Chemical weapons

The use in warfare of asphyxiating and poisonous gases, such as chlorine or sulphur mustard, was first prohibited in the Hague Declaration (IV, 2) of 29 July 1899. In 1925, however, following their widespread use against combatants during the First World War, a new protocol was negotiated at a conference held in Geneva under the auspices of the League of Nations.⁸⁷ The preamble to the 1925 Geneva Protocol noted the intention of states parties to ensure that the prohibition of the use of 'asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices' would become 'universally accepted as a part of International Law, binding alike the conscience and the practice of nations'.⁸⁸ However, as noted above, subsequent reservations by more than twenty states parties effectively reduced the Protocol to only a ban on first use.

It took a further sixty-seven years to transform that prohibition on use into a comprehensive disarmament treaty prohibiting all use of chemical weapons in the conduct of hostilities. Thus, the development, production, stockpiling, transfer, and use of chemical weapons are generally prohibited under the 1992 CWC, and their use as a method of warfare in armed conflict is prohibited under customary international law. Use of chemical weapons is also a war crime for which potential jurisdiction is given to the ICC through the prohibition of 'Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices'.⁸⁹ While the use of riot control agents such as tear gas is specifically prohibited as (p. 273) a method of warfare, the CWC admits an exception for their use for law enforcement, 'including domestic riot control'.⁹⁰

Oversight of the implementation of the Convention was tasked to the Organisation for the Prohibition of Chemical Weapons (OPCW), specially created by the CWC for the purpose. Despite the OPCW's involvement in Syria, though, following that state's accession to the CWC in October 2013, chemical weapons have been used on many occasions during the different armed conflicts that were ongoing as of writing. In March 2016, it was claimed that some 1,500 people had been killed by chemical attacks during the five years of armed conflict. The report by the Syrian-American Medical Society documented 161 chemical

attacks in Syria on the basis of testimony from doctors operating in the areas that had borne the brunt of chemical attacks, leading to the deaths of 1,491 people and injuries to 14,581 others. More than one-third of the attacks used chlorine gas.⁹¹

2. Biological weapons

Biological weapons potentially comprise viruses such as smallpox and bacteria such as anthrax. The development, production, stockpiling, and transfer of biological weapons are generally prohibited under the 1972 Biological and Toxin Weapons Convention (BTWC) and their use as a method of warfare in armed conflict is prohibited under customary international law.⁹² The 1925 Geneva Protocol explicitly extended the prohibition on use of chemical weapons to the use of bacteriological methods of warfare. Use of biological weapons is also a war crime, even though it was not specifically included in the Rome Statute.⁹³ As of writing, no verification system exists with respect to biological weapons, though a protocol to the BTWC has been proposed by a number of authorities.⁹⁴

5. Disarmament-Type Prohibitions

In addition to the disarmament treaties that prohibit production, stockpiling, and transfer of weapons discussed above, a number of provisions across a range of international instruments impose obligations or disarmament-type prohibitions linked to compliance with IHL during armed conflict. Here two key norms are considered, the first of which concerns the duty to conduct a legal review prior to procurement, and the second of which regards a prohibition on transfer when war crimes would be committed, or a prohibition on export where an ‘overriding’ risk exists of their being used to commit or facilitate a serious violation of IHL.

(p. 274) A. Review Prior to Procurement

Article 36 of API requires that states parties conduct legal reviews prior to procurement or adoption of a new weapon. The aim of the review is to determine whether the weapon’s use would inevitably, or only in certain circumstances, be prohibited by the Protocol or any other applicable rule of international law.⁹⁵ Such law could be disarmament law or international human rights law (IHRL) in addition to IHL, and could be a customary rule or a treaty obligation.

The requirement for a review of legality of weapons under international law prior to the ‘development, acquisition or adoption’ of a weapon was not, though, included in the rules identified by the ICRC in its study of customary IHL. However, it has since been asserted that the obligation is not only treaty-based, but also one of customary law.⁹⁶ Indeed, it is hard to understand how a state could lawfully deploy a new weapon without conducting at least some form of legal assessment.

B. Transfer Prohibitions Linked to IHL

The Arms Trade Treaty (ATT) was adopted on 2 April 2013 by the UN General Assembly,⁹⁷ after consensus-based negotiations in a specially convened diplomatic conference were blocked by opposition from Iran, the Democratic People’s Republic of Korea, and Syria. The ATT entered into force on 24 December 2014, and aims to contribute to international and regional peace, security, and stability; reduce human suffering; and promote responsible action in the international trade in conventional arms.

Article 6(3) of the ATT prohibits the transfer of conventional arms within the scope of the treaty when a state party ‘has knowledge at the time of authorization’ that the weapons or associated ammunition ‘would be used in the commission of’ certain war crimes, including grave breaches of the 1949 Geneva Conventions and ‘attacks directed against civilian objects or civilians protected as such’.⁹⁸ While the notion of grave breaches only applies in IACs, the reference to attacks against civilians or civilian objects applies to all armed

conflicts. Where a transferring state is party to other IHL agreements in which war crimes are 'defined', the relevant war crimes will also be covered by the provision.

If a proposed export of weapons or associated ammunition is not prohibited under article 6, it will be prohibited under article 7, where the requisite risk assessment⁹⁹ determines (p. 275) that there is an 'overriding' risk that it would be used to commit or facilitate a serious violation of IHL. A serious violation encompasses all IHL rules that form the basis of a war crime and also includes conduct that is not itself criminalized, for example where isolated instances of unlawful conduct are nevertheless of a serious nature; where conduct takes on a serious nature because of its systematic repetition or the circumstances; and where there are 'global' violations, for instance where a situation, territory, or category of persons or objects is withdrawn from the application of IHL.¹⁰⁰

6. Conclusion: Regulation on the Horizon

In the future, IHL will need to apply additional restrictions to specific means or methods of warfare. As of writing, there are a number of challenging regulatory issues in the area of weapons law, including fully autonomous weapons, cyber weapons, and nuclear weapons, as well as the use of conventional weapons in space. Fully autonomous weapons—robots that determine what or whom to target and when to fire, without reference to a human operator—are already available to armed forces. Discussions on lethal autonomous weapons systems were first held in May 2014 under the auspices of the CCW though little substantive progress towards the prohibition that many NGOs are seeking has so far been achieved.¹⁰¹ Indeed, in October 2015 the ICRC had encouraged states to 'now turn their attention to fixing limits on autonomy in the critical functions of weapon systems, to ensure that they can be used in accordance with IHL and within the bounds of what is acceptable under the dictates of public conscience'.¹⁰²

A little-referenced provision in the 2008 CCM presages future regulation of autonomous weapons. Article 2(2)(c) of the CCM excludes from the definition of a cluster munition (for the purposes of the treaty) a munition that contains fewer than ten submunitions where each submunition weighs more than 4 kilogrammes, is designed to detect and engage a single target object, and is equipped with an electronic self-destruction mechanism and an electronic self-deactivating feature. This is a form of fully autonomous weapon.¹⁰³

There is no treaty specifically regulating cyber warfare. As Michael Schmitt explains, the international legal aspects of cyber operations in armed conflict were first discussed in some detail in the late 1990s but the issue gained a far higher profile from the extensive Russian cyber operations against Estonia in 2007 and against Georgia during a war in 2008, as well as the targeting of the Iranian nuclear facilities with the Stuxnet worm in 2010.¹⁰⁴ The *Tallinn Manual on the International Law Applicable to Cyber Warfare* was written by an 'International Group of Experts' at the invitation of the North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence (CCDCOE), an international (p. 276) military organization based in the Estonian capital.¹⁰⁵ This soft-law document, which took three years to complete, identified seventy 'black-letter rules' applicable to cyber warfare during situations of armed conflict.¹⁰⁶

After many years without substantive progress, a treaty outlawing nuclear weapons was adopted by the United Nations in 2017.¹⁰⁷ On 7 July 2017, 122 states at a UN conference 'to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination' agreed on the text of the Treaty to Prohibit Nuclear Weapons. The nine nuclear-armed states boycotted the negotiations. As of writing, 34 states had adhered to the Treaty, whose entry into force will be triggered once 50 have done so. This will not directly

affect the conduct of the nuclear-armed states, but will dent a little further the notion that these weapons could ever be used lawfully.

Finally, the issue of weapons in space is also receiving renewed attention after the range of treaties adopted in the 1960s and 1970s, such as the 1967 Outer Space Treaty¹⁰⁸ and the 1979 Moon Treaty.¹⁰⁹ In its address to the UN General Assembly's First Committee in October 2015, the ICRC raised concerns over the 'weaponization' of outer space:

While the Outer Space Treaty clearly prohibits the placement of weapons of mass destruction in orbit, it does not expressly apply such prohibition to other weapons, although virtually all States support the prevention of an arms race in outer space. What is certain is that any hostile use of outer space in armed conflict—that is, any use of means and methods of warfare in, from, to or through outer space—must comply with IHL, in particular its rules of distinction, proportionality and precautions in attack. It is important to stress that, by asserting that IHL applies to outer space warfare, the ICRC is in no way condoning the weaponization of outer space, which recurring resolutions of the General Assembly have sought to prevent. The point is that warfare in outer space would not occur in a legal vacuum.¹¹⁰

In a conference on space security convened by the UN Institute for Disarmament Research (UNIDIR) in 2014, one expert, Professor Li Juqian of the China University of Political Science and Law, suggested that new treaty law would be needed to address the fast-paced evolution of space weaponry and related technologies.¹¹¹

Footnotes:

1 A United States (US) Department of Defense Working Group reportedly suggested a definition of 'all arms, munitions, materiel, instruments, mechanisms or devices that have an intended effect of injuring, damaging, destroying or disabling personnel or property'. Cited in International Committee of the Red Cross (ICRC), *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977* (ICRC 2007) 8 n 17. Within the context of international humanitarian law (IHL), a weapon has been defined by one British military lawyer as connoting 'an offensive capability that can be applied to a military object or enemy combatant'. Justin McClelland, 'The Review of Weapons in Accordance with Article 36 of Additional Protocol I' (2003) 85 *IRRC* 397, 404.

2 See proposed definition in Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (CUP 2014), xx.

3 See David P Fidler, 'Cyberattacks and international human rights law', in Casey-Maslen, *Weapons under International Human Rights Law* (above n 2) 303.

4 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (adopted 11 December 1868) (1868) 138 CTS 297.

5 Declaration concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 453 (Hague IV, 2).

6 Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 459 (Hague IV, 3).

7 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (signed 17 June 1925, entered into force 8 February 1928) 94 LNTS 65 (1925 Geneva Protocol).

- 8** Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (adopted 18 May 1977 UNGA Resolution 31/72, entered into force 10 December 1976) 1108 UNTS 151.
- 9** The formal title is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137 (CCW).
- 10** Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 168 (CCW Protocol II), annexed to the CCW. As discussed below, the Protocol was amended in 1996 and a new instrument adopted by state parties to the CCW.
- 11** Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 171 (CCW Protocol III), annexed to the CCW.
- 12** Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (opened for signature 10 April 1972, entered into force 25 March 1975) 1015 UNTS 163.
- 13** Use is mentioned in the preamble, with reference to the 1925 Geneva Protocol. Subsequently, however, state parties have included in the declarations of review conferences the statement that a prohibition on use is inherent in the other prohibitions set out in article I.
- 14** 1925 Geneva Protocol.
- 15** Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 13 January 1993, entered in force 29 April 1997) 1974 UNTS 45 (CWC).
- 16** Its primary obligations in article I were still of a purely disarmament nature: ‘never under any circumstances ... (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone’. But sub-para (b) contained an explicit and unequivocal prohibition on use of chemical weapons.
- 17** Protocol (IV) on Blinding Laser Weapons (adopted 13 October 1995, entered into force 30 July 1998) 1380 UNTS 370 (CCW Protocol IV), annexed to the CCW.
- 18** CCW Protocol II (as amended 3 May 1996). The amended Protocol also prohibits the transfer of weapons whose use is outlawed therein.
- 19** Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211 (APMBC).
- 20** Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 30 (CCM).
- 21** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) article 35(1).
- 22** Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) 1405 (AP Commentary).

23 According to the US Department of the Navy, for example, ‘it is a fundamental tenet of the law of armed conflict that the right of nations engaged in an armed conflict to choose methods or means of warfare is not unlimited’. US Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M (US Department of the Navy 2007) para 9.1. In *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons*) 266 para 78, the International Court of Justice (ICJ) affirmed that states ‘do not have unlimited freedom of choice of means in the weapons they use’, though the Court incorrectly limited the principle to the rule prohibiting use of weapons that cause unnecessary suffering to combatants.

24 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol 1: Rules* (CUP 2005) (CIHL) rule 1: ‘The Principle of Distinction between Civilians and Combatants’ and rule 7: ‘The Principle of Distinction between Civilian Objects and Military Objectives’.

25 CIHL rule 5: ‘Definition of Civilians’.

26 *ibid* rule 8: ‘Definition of Military Objectives’.

27 The ICRC has expressed the customary IHL rule as follows: ‘Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.’

28 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 129.

29 AP Commentary para 1980.

30 Dinstein (above n 28) 131.

31 CIHL rule 15: ‘Principle of Precautions in Attack’.

32 Dinstein (above n 28) 142–3.

33 UK Ministry of Defence (MoD), *Manual of the Law of Armed Conflict* (OUP 2004) para 5.32.4.

34 A version of the Martens Clause is included in API article 1(2) and the CCW preamble. According to the Martens Clause, in cases not covered by treaty, ‘civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’.

35 *Nuclear Weapons* para 78.

36 See API article 49(1) (‘Definition of attacks and scope of application’): ‘“Attacks” means acts of violence against the adversary, whether in offence or in defence.’

37 *Nuclear Weapons* para 78. The Court’s formulation is unfortunate, given that it implies there are civilian ‘targets’. A better formulation would have been ‘incapable of distinguishing between civilians and civilian objects and military objectives’.

38 CIHL rule 71: ‘Weapons That Are by Nature Indiscriminate’.

39 *ibid* rule 71. See also William H Boothby, *Weapons and the Law of Armed Conflict* (OUP 2009) 82.

40 UK MoD (above n 33) para 6.4: ‘[i]t is prohibited to employ weapons which cannot be directed at a specific military objective or the effects of which cannot be limited as required

by Additional Protocol I and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction’.

41 CIHL rule 71: ‘Weapons That Are by Nature Indiscriminate’.

42 See Stuart Casey-Maslen, ‘The Use of Nuclear Weapons under Rules Governing the Conduct of Hostilities’, in Gro Nystuen et al (eds), *Nuclear Weapons under International Law* (CUP 2014) 100.

43 US Department of the Air Force, ‘International Law—The Conduct of Armed Hostilities and Air Operations’ Air Force Pamphlet 110-31 (19 November 1976) 6-3.

44 AP Commentary para 1402.

45 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (adopted 11 December 1868, entered into force 11 December 1868) 138 CTS 297.

46 *ibid.*

47 Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation concerning the Laws and Customs of War on Land (18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations) article 23(e).

48 CIHL rule 70: ‘Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering’.

49 *Nuclear Weapons* para 78.

50 AP Commentary 1419.

51 *ibid.*

52 See eg US Department of Defense (DoD), *DoD Dictionary of Military and Associated Terms* (DoD as amended 31 October 2009) 122.

53 But not ‘the means of transporting or propelling the weapon where such means is a separable and divisible part from the weapon’. US Department of Defense (DoD), *DoD Dictionary of Military and Associated Terms* (DoD as amended November 2019). This and previous editions of the *DoD Dictionary* no longer include a definition of the term ‘conventional arms’.

54 CCW Protocol II (as amended 3 May 1996).

55 See eg Robin M Coupland and Remi Russbach, ‘Victims of Antipersonnel Mines: What is Being Done?’ (1994) 1 *Medicine & Global Survival* 18.

56 All anti-personnel mines produced after 1 January 1997 must ‘incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass’. CCW Protocol II, technical annex sub-para 2(a).

57 No more than one in ten activated mines may fail to self-destruct within thirty days after emplacement, and each mine shall have a back-up self-deactivation feature with the result that, in combination with the self-destruction mechanism, ‘no more than one in one thousand activated mines will function as a mine 120 days after emplacement’. CCW Protocol II, technical annex sub-para 3(a).

58 APMBC article 4.

59 *ibid* article 3(1).

60 *ibid* article 8.

61 *ibid* article 19.

62 See eg ICRC, *Cluster Bombs and Landmines in Kosovo: Explosive Remnants of War* (2001) https://www.icrc.org/en/doc/assets/files/other/icrc_002_0780.pdf.

63 The term ‘bombie’ was used in south-east Asia to describe the hundreds of millions of submunitions dropped by the US during the Vietnam War.

64 The distinction being that mines are victim activated by design whereas unexploded submunitions are victim activated by failure (for instance, of the detonation mechanism).

65 Of all but the ‘minimum number absolutely necessary’ for ‘the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures’: CCM article 3(6).

66 CCM article 3. It subsequently appears that fears of the time and cost involved in stockpile destruction were unfounded, though in 2019 Cluster Munition Monitor reported that Guinea-Bissau did not meet its stockpile destruction deadline of 1 May 2019 and has been in violation of the convention since then while Bulgaria submitted a request to extend its stockpile destruction deadline by another 18 months, until 1 April 2021, the first State Party to make such a request. See *Cluster Munition Monitor 2019* (Cluster Munition Coalition) (2019) 2 http://the-monitor.org/media/3047840/Cluster-Munition-Monitor-2019_online.pdf.

67 CCM article 4. Where, after a state has become party to the CCM there is new use by another state on its territory, clearance and destruction of any resultant cluster munition remnants ‘must be completed as soon as possible but not later than ten years after the end of the active hostilities during which such cluster munitions became cluster munition remnants’: *ibid* article 4(1)(a).

68 *ibid* article 5(1).

69 The second review conference of the CCM was taking place in Lausanne in November 2020.

70 CCM article 23(4)(c)–(d).

71 CCW Protocol IV article 1.

72 Donna M Verchio, ‘Just Say No! The SIrUS Project: Well-Intentioned, but Unnecessary and Superfluous’ (2001) 51 *AFL Rev* 183.

73 Jeffrey Lin and Peter Singer, ‘Chinese Soldiers Have Laser Guns: Be Careful, You’ll Burn Someone’s Eyes Out’, *Popular Science* (7 January 2016) www.popsoci.com/chinese-soldiers-have-laser-guns.

74 CIHL rule 78: ‘Exploding Bullets’.

75 Hague IV, 3.

76 A soft-point bullet is one whose metal jacket is cut back at the nose to reveal the lead core.

77 A hollow-point bullet is a semi-jacketed bullet, the nose of which has a cavity.

78 Open-tip-match rounds, which have been used by US forces in Afghanistan, have a small aperture in the nose. This is the result of the manufacturing process, during which the core is poured in through the aperture. It is intended to improve the bullet’s accuracy as it was originally developed for match competition.

79 The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) gave the International Criminal Court (ICC) possible jurisdiction over the war crime, in IAC, of '[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions': Rome Statute article 8(2)(b)(xix). An amendment to the Rome Statute adopted by states parties in 2010 extends the jurisdiction of the ICC to the use of expanding bullets in NIACs (that is, a situation in which one or more states is/are engaged in regular and intense armed violence against an organized armed group): Rome Statute (as amended) article 8(2)(e)(xv). The US is not a party to the Rome Statute and may lay claim to persistent objector status to the customary prohibition on use of expanding ammunition.

80 Given that law enforcement operations are often conducted in public places, and that expanding ammunition is believed to significantly reduce the risk of over-penetration and possibly also of ricochet, the danger of innocent bystanders being harmed when police officers open fire must be reduced to a minimum.

81 CCW Protocol III article 2.

82 See CCW 'Declarations and Reservations' 6-14, 8. A significant number of states have objected to the US's reservation to Protocol III, notably Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

83 See CCW 'Declarations and Reservations' 6-14, 8.

84 AP Commentary 390 para 1424.

85 CIHL rule 85: 'The Use of Incendiary Weapons against Combatants'.

86 *ibid.*

87 1925 Geneva Protocol.

88 *ibid.*

89 ICC Statute articles 8(2)(b)(xviii) and 8(2)(e)(xiv).

90 CWC articles 1(5) and 2(9).

91 See eg Kareem Shaheen, 'Almost 1,500 Killed in Chemical Weapons Attacks in Syria', *The Guardian* (Beirut, 14 March 2016) www.theguardian.com/world/2016/mar/14/syria-chemical-weapons-attacks-almost-1500-killed-report-united-nations.

92 CIHL rule 73: 'Biological Weapons'.

93 Although the ICRC customary IHL Study does not make it explicit, it is stated that the use of prohibited weapons is a war crime, which unquestionably includes biological weapons. ICRC Customary IHL, 'Rule 156 ("Definition of War Crimes")', "List of War Crimes" ' https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156.

94 See Natalino Ronzitti, 'Aspetti Giuridici del Progetto di Zona Priva di Armi di Distruzione di Massa in Medio Oriente', in Natalino Ronzitti (ed), *Una Zona Priva di Armi di Distruzione di Massa in Medio Oriente: Problemi Aperti* (Istituto Affari Internazionali 2012) 43. See also 'Civil Society Preparations for the 7th BWC Review Conference 2011' (*BioWeapons Prevention Project*) www.bwpp.org/revcon-verification.html.

95 According to API article 36:

[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this

Protocol or by any other rule of international law applicable to the High Contracting Party.

96 See Michael N Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics' (2013) *Harv Nat'l Secur J Featur* <http://harvardnsj.org/2013/02/autonomous-weapon-systems-and-international-humanitarian-law-a-reply-to-the-critics>; see also William H Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (Asser Press 2014) 170-1.

97 Arms Trade Treaty (adopted 2 April 2013 by A/RES/67/234b, entered into force 24 December 2014) UN Doc A/CONF.217/2013/L.3 (ATT). The ATT was adopted by 154 votes to 3, with twenty-three states abstaining.

98 For a detailed discussion of this provision, see Andrew Clapham, 'Commentary on Article 6(3)', in Stuart Casey-Maslen et al, *The Arms Trade Treaty, A Commentary* (OUP 2016) para 6.153ff.

99 See ATT article 7(1).

100 See Clapham and Casey-Maslen (above n 98) para 7.44ff (citing AP Commentary para 3592).

101 See, eg, 'Ban Support Grows, Process Goes Slow', *Campaign to Stop Killer Robots* (15 April 2016) www.stopkillerrobots.org.

102 ICRC, 'Weapons: ICRC Statement to the United Nations, 2015'. Statement to the UNGA First Committee (70th Session) (15 October 2015) (ICRC Weapons Statement).

103 See eg Textron Systems, 'Textron Systems' BLU-108 Submunition is Successful in Weaponized UAV Demonstration', 13 September 2004 <https://investor.textron.com/news/news-releases/press-release-details/2004/Textron-Systems-BLU-108-Submunition-is-Successful-in-Weaponized-UAV-Demonstration/default.aspx>.

104 Michael N Schmitt, 'Introduction', in Michael N Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013) 1-2.

105 North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence (CCDOE), 'Tallinn Manual' (CCDOE) <https://www.peacepalacelibrary.nl/ebooks/files/356296245.pdf>.

106 Six further rules confirm that cyber warfare is indeed subject to IHL and set out in which circumstances this would be the case.

107 Treaty on the Non-Proliferation of Nuclear Weapons (opened for signature 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT) article 6 obliges states parties to 'pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control'.

108 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 19 December 1966, entered into force 10 October 1967) 610 UNTS 205.

109 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3.

110 ICRC Weapons Statement.

111 United Nations Institute for Disarmament Research (UNIDIR), *UNIDIR Space Security 2014 Conference: The Evolving Space Security Regime: Implementation, Compliance, and New Initiatives* 7 www.unidir.org/files/publications/pdfs/space-security-2014-en-614.pdf.

(p. 262) 7 Warfare - the Conduct of Hostilities

We have seen that under international law (and some constitutions) it is now illegal to go to war, and that a state is generally only entitled to use force against another state in self-defence in response to an armed attack, or with the authorization of the Security Council. War as an institution has been outlawed, even (I would say) abolished, and yet there are still rules for fighting wars: the laws of war. Let us unpack this conundrum. Those in the movement to outlaw war likened their quest to the abolition of slavery and duelling as institutions. It made no sense after abolition to continue to apply the rules for duels or enforce contracts for the sale of slaves. With abolition, the rules that bolstered the legal institution fell away. With the outlawing of war new rules indeed flowed that reinforced the prohibition: territory seized would not be recognized, treaties that were coerced would not be valid, wars of aggression became criminalized.¹ But states continued to engage in armed conflicts, whether they labelled them wars or something else. While the special rules for duelling and slavery fell away to be replaced by the regular national laws covering public order, violence and forced labour, the international treaties and law providing protection to the victims of war were still needed.²

Nevertheless, in the wake of the successful adoption of the UN Charter, which not only outlawed the use of force but also promised international peace and security through effective sanctions and the ready deployment of armed forces, there was queasiness about any international exercise aimed at codifying or adapting the old laws of war. The United Nations International Law Commission, meeting for the first time in 1949 in New York at Lake Success, determined not to tackle this topic. The Report shows that 'The Commission considered whether the laws of war should be selected as a topic (p. 263) for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant.'³ Brierly, the member from the United Kingdom, was among the most persuasive voices on this point. He is reported as saying the Commission should

refrain from taking up the question of the laws of war because if it did so its action might be interpreted as a lack of confidence in the United Nations and the work of peace which the latter was called upon to carry out, and as a proof of the very relative value which might be attached to the obligation assumed by the signatories to the Charter to settle their disputes by peaceful means. Nothing would create a worse impression of the Commission's work, nothing would upset public opinion more.⁴

Of course part of the context was that the Swiss Government was convening, the next day, outside the United Nations, a 'Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War'. Four months later, that Conference adopted the four 1949 Geneva Conventions (GCs I-IV). These new treaties had been developed by the International Committee of the Red Cross (ICRC) (in consultation with governments) following the Second World War. The Conference significantly produced a new treaty on the protection of civilians (particularly in occupied territory), a draft having been submitted by France at an earlier meeting in 1947. And the Conference further adopted revised versions of earlier Conventions covering the sick and wounded (adapting the rules to include the situation at sea) as well as prisoners of war. The Conventions now were adjusted to include a 'mini-convention', known as Common Article 3 to the Conventions, covering non-international armed conflicts.

Jean Pictet, writing in 1985 and at the time the Director of the ICRC, later explained a key change that took place in 1949:

Another achievement of the 1949 Diplomatic Conference arose from the fact that a large number of prisoners of war had been refused the benefit of the 1929 Convention, their captors claiming that there was no war as defined in international law or denying that their adversary was a State, that (p. 264) it was at war or even that it existed. This unhappy circumstance produced common Article 2, which stipulates that the Conventions shall apply not only to all cases of declared war but also to any other armed conflict, even if the state of war is not recognized. This means that the law must apply whenever there are victims, the only humane criterion. The ICRC, however, does not seek to exacerbate the situation by claiming that all armed clashes are wars.⁵

As we saw in the previous chapter, the Geneva Conventions and their 1977 Protocols now apply to different types of armed conflict, and there is no need for any such armed conflict to be recognized as a War.

Pictet recounts how the ICRC was thwarted after the Second World War in its attempt to tackle the bombardment of civilian populations. Essentially this was because powerful states were keen not to be prevented from using their newly found nuclear options. But by 1977, after four years of discussion, the Diplomatic Conference in Geneva was nevertheless able to adopt treaty provisions in the Protocols protecting the civilian population, regulating aerial bombardment and prohibiting bombardment for the purpose of spreading terror. Pictet rightly considered that such provisions 'represented a tremendous advance.'⁶

But not every humanitarian dream is protected in rigorous terms in the treaties. As Pictet puts it, this humanitarian law

results from the balance struck between the principle of humanity – that is, the imperative which drives a human being to act for the good of fellow beings – and the principle of necessity – that is, the duty of public authorities to preserve the State, defend its territorial integrity and maintain order.⁷

His formula for preparing such texts is as witty as it is revealing:

Briefly, in order to codify successfully, take two drops of dreams, one drop of madness and one hundred drops of realism, and blend thoroughly before serving. I make you a gift of the recipe.⁸

(p. 265) These Geneva treaties, together with relevant Conventions adopted in The Hague and elsewhere, contain hundreds of Articles, and we will here only barely scratch the surface.⁹ Traditionally, the law of armed conflict was broken into what was known as Hague law and Geneva law. Hague law covered the means and methods of warfare, or, in other words, the conduct of hostilities. Geneva law was said to be for the protection of the victims of war (eg the wounded, prisoners of war and civilians in occupied territory). These labels now make little sense, as the law of the Geneva Additional Protocols covers extensive rules related to the conduct of hostilities. The distinction nevertheless remains relevant to an understanding of the development of the law of armed conflict.¹⁰ I have split our discussion into two parts, dealing first here with the conduct of hostilities and later (in Chapter 9) with the humanitarian protection of the victims of war.

7.1 Privileged Belligerents and Combatant Immunity

As we saw in the last chapter when we looked at the case of Senika-Wakan-Ota, aka 'Plenty Horses', behind the idea of war is an understanding that killing the enemy is not murder. This idea endures. I am continually surprised how often I come across claims that the laws of war entitle you to kill members of the enemy's armed forces. This is sometimes explained as exercising 'law of war authority', or as being justified as a 'lawful act of war'. More popularly, the idea is today often expressed as a 'licence to kill'; and I guess that we have the fictional James Bond and the film franchise to thank for that.

In fact, when the idea of the Double O signifier was invented for OO7 by Ian Fleming in 1953, it was explained by Bond himself as follows: 'A Double O number in our Service means you've had to kill a chap in cold blood in (p. 266) the course of some job.'¹¹ Bond explains that his first was a Japanese cipher agent, operating on the 36th floor of the Rockefeller Building in New York, decoding British communications. Bond took a room on the 40th floor in the next door skyscraper and shot the Japanese agent through a hole in the window with a telescopic sight and silencer. The second was a Norwegian who had been acting as a double agent and working with the Germans. He was knifed in his hotel room in Stockholm. 'For those two jobs I was awarded a Double O number in the Service. Felt pretty clever and got a reputation for being good and tough.' But Bond tells the story at a time when he is considering resigning:

Now . . . that's all very fine. The hero kills two villains, but when the hero Le Chiffre starts to kill the villain Bond and the villain Bond knows he isn't a villain at all, you see the other side of the medal. The villains and heroes get all mixed up. Of course . . . patriotism comes along and makes it seem fairly all right, but this country-right-or-wrong business is getting a little out-of-date. Today we are fighting communism. Okay. If I'd been alive fifty years ago, the brand of conservatism we have today would have been damn near called communism and we should have been told to go and fight that. History is moving pretty quickly these days and the heroes and villains keep on changing parts.¹²

The idea morphed even within the James Bond books,¹³ and indeed some agents in real life have enjoyed immunity from prosecution in their own country. There are still books and films entitled *Licence to Kill*, but none of this contributes to the formation of international law. Should any government choose to have laws that immunize its agents from prosecution at home for murder (whether committed at home or abroad), it is clear that no other state would be obliged to recognize such a so-called 'licence to kill'.¹⁴

(p. 267) And yet the deeper idea of soldiers' being entitled to kill continues in multiple forms. General David Petraeus, the former Commander of US General Command, complaining about the influence of human rights law ('negative lawfare'), explained that 'under the Geneva Convention (which codified the law of armed conflict) lethal force is allowed as a matter of first resort against a clearly identified enemy'.¹⁵ Now I realize that the expression 'Geneva Convention' is being used here loosely to invoke the law of armed conflict, and of course General Petraeus is expressing himself not as a lawyer, but rather in accessible shorthand to make a point, but in the present context I want to use his phrasing to make my own point. My point is that we should challenge this assumption that something called the 'Geneva Convention', or something called the 'laws of war', *authorizes* in broad terms lethal force as a matter of first resort against an identified enemy.

The codification in the 1949 Geneva Conventions grants no such permission to kill people. It actually contains prohibitions, including prohibitions on 'murder' of persons protected by those Conventions.¹⁶ It will, of course, be argued that what is not prohibited is permitted (even authorized), but such an approach, while perhaps received wisdom in times when war was an acceptable way to resolve international disputes, should no longer apply to conflicts

today. Now, both sides will be bound by the laws that confine the resort to the use of force,¹⁷ and individuals are protected by multiple legal regimes, including human rights law.¹⁸

(p. 268) If there is any so-called 'licence to kill', it is very tightly circumscribed. In fact the issue is better understood by considering the international rule concerning 'combatant immunity'. This is the rule that quickly gets translated into a vaguer, deeper idea about some right to kill. The parameters of the actual rule are important because, outside the bounds of those particular circumstances, a killing would quite possibly be a war crime, or a crime that could be prosecuted as murder under national law.

This is an area of law that few humanitarian lawyers feel comfortable examining. It is easier to list the prohibitions than the permissions in the law of armed conflict. Humanitarian law feels not so humanitarian when it gets deployed to justify killing. Sean Watts has, however, grappled with the issues and researched the state practice. He finds in the context of inter-state armed conflict that 'The concept of combatant status has ancient law-of-war roots.'¹⁹ Of course in ancient times combatant status might indeed have implied such a right to fight, but on capture under the ancient law of war one could also be enslaved, ransomed or simply slaughtered. This is not the case today. So ancient law-of-war roots are not enough to prove that a right continues unaltered over millennia. The ancient right to kill one's prisoners is obviously no longer valid. Turning to the treaties, Watts finds that they do not actually commit states to a clear set of rights and obligations for combatant status under international law. He concludes:

States' apparent reluctance to commit combatant status fully to international law in IAC [international armed conflict] makes the prospect that they would do so in NIAC [non-international armed conflict] extremely unlikely. Nothing even approaching the partial coverage offered by Additional Protocol I appears in Additional Protocol II. Nor do any of the usual indicators of customary norms, such as military manuals or statements of *opinio juris*, indicate any State commitment of combatant status in NIAC to international law.²⁰

Today, then, we can say with some certainty that states only accept that forces on the other side have combatant status *if they are part of the armed forces of another state*. On the other hand, states do not accept combatant status for rebel forces. States do not accept that rebel forces should merely (p. 269) be detained as prisoners of war, rather than prosecuted for shooting at or bombing the state's own forces. Shooting at the armed forces of a state is often criminalized by the law of that state (even if the rebels and others claim these are lawful acts of war).²¹ In the contemporary world, shooting at the state's soldiers is likely to be criminalized as terrorism. At this point it is clear that the mantra that the law of war treats belligerents equally seems to have broken down. The state will not prosecute its own soldiers for shooting at armed groups fighting against them. But the same state will prosecute fighters from those armed groups for shooting at its troops. Of course an international lawyer can recount that the law of war treats both shootings equally (in that this law does not prohibit such killings), but this is of no interest at all to the rebel who is arrested and tried by the state for murdering the state's own troops (it is no defence to say 'I did not violate the law of war').

Such one-sidedness makes no sense if one starts from the idea that the law of war provides the 'rules of the game'. But in fact we should abandon the idea that the law of war provides such a 'level playing field', or that the rules treat parties equally irrespective of the purpose of the war. The law of war is better seen, as Sir Adam Roberts explains, as 'a modest and limited set of rules that establish certain limitations in war'.²² For him it is a 'misleading assumption' that the law of war 'grants belligerents certain "rights", including the right to shoot at the soldiers of an opposing army'. Rather than deriving from the law of war, Sir Adam says 'the right to attack the armed forces of an adversary' is simply something

‘intrinsic to war’.²³ How to explain this conundrum? In war one might assume that one must have a ‘right’ to shoot at the other side, and yet this is not a right derived from law, and certainly does not apply when (p. 270) one is a non-state actor, whether one is labelled an insurgent, a rebel or a terrorist.

We saw in the previous chapter that during the US Civil War, and even in some instances in the wars with different tribes of Native Americans,²⁴ privileged belligerency or combatant immunity was granted to those who fought against government forces. Today such grants of immunity would most likely be treated as privileges that were bestowed, rather than as legal rights that flow from the fact of war. So what exactly is the law that prevents a soldier who shoots their enemy from being tried for murder?

National law tends not to address this issue. In English law, murder is not defined by statute but is generally understood under the Common Law to cover unlawful killing with malice aforethought of someone ‘under the Queen’s Peace’. This last antiquated expression (dating from around four centuries ago) has recently been argued to mean that a killing of someone thought to be an enemy in war could not be murder.

The Court of Appeal did not entertain such a theory when it dealt with the killers of Lee Rigby. Fusilier Rigby had seen service for the British Army in Afghanistan and was a recruiter for the Army in the United Kingdom when he was attacked and brutally killed in a knife attack. His attackers produced a statement at the scene of the crime, stating that this knife attack was in retaliation for deaths in Muslim lands.²⁵ In court, the argument for one of the attackers was that murder under the law does not include killing in the course of a war. The situation was not under the Queen’s Peace, it was argued, and therefore fell outside the definition of murder. The Defence stated:

At all times the [applicant Adebolajo] honestly believed he was fighting a war. He believed he was a soldier fighting that war. He only targeted a serving member of the British armed forces because they were engaged in fighting an unjust war on behalf of the State.²⁶

The Court of Appeal limited the discussion of the Queen’s Peace to questions of jurisdiction over acts committed abroad, and saw no reason to discuss the issue of war.²⁷ To the extent that the Queen’s Peace is a requisite element for the crime of murder, the judgment stated: (p. 271)

Although the Queen’s Peace may play some part still in the elements that have to be proved for murder as regards the status of the victim (and it is not necessary to examine or define the ambit of that), it can only go to the status of the victim; it has nothing whatsoever to do with the status of the killer.²⁸

One can see why the Court did not want to countenance the idea that murder could be excused because someone considered they were in a state of war with their own state,²⁹ but some might still consider that in war, battlefield killings by members of the armed forces could not be considered murder. We should perhaps not lose sight completely of the idea that the inclusion of the phrase ‘the Queen’s Peace’ in the definition of murder is seen by some as necessary. As Hirst explains:

The justification generally advanced for including reference to the Queen’s peace in the definition of murder is that it is necessary in order to exclude the killing of enemy soldiers or rebels in battle from the ambit of the offence. The enemy soldier (so the argument goes) is not within the Queen’s peace. Killing him cannot

therefore be murder, unless he has surrendered, in which case he does come within the Queen's peace and enjoys the protection of English law.³⁰

The law here is so untested that, in the run up to the United Kingdom's armed conflict with Iraq in 2003, the Legal Advisor to the Foreign Office could not say with certainty 'whether troops involved in conflicts which are unlawful under international law would be committing criminal offences in the UK'. In his preliminary views, responding to a request from the Foreign Secretary for an urgent note, he points to the two arguments that could be used to suggest that there would be no prosecution: that an alien enemy (p. 272) would not be within the Queen's Peace, and that the Common Law 'will accept that belligerents in an armed conflict cannot be prosecuted for normal acts of conflict'. But he concludes that 'there must at least be uncertainty, arising from the fact that the law is nowhere laid down'.³¹

There is also considerable confusion in the United Kingdom when it comes to the immunity from suit before national courts for battlefield activity. This has nothing to do with the international rules on combatant immunity, and is confusingly referred to in the British context as 'combat immunity' (as opposed to *combatant* immunity under international law). Accordingly:

Combat Immunity is a legal principle which provides an exemption from legal liability for members of the Armed Forces and the Government within the context of combat in armed conflict. So a soldier does not owe a fellow soldier a duty of care where a personal injury has resulted when either one or both of them is engaged with an enemy in the course of combat, and the Ministry of Defence is not under the normal duty to maintain a safe system of work for Service personnel engaged with an enemy in the course of combat.³²

There is new legislation that extends this idea by amending the law relating to time limitations on legal actions for personal injury or death brought against the Ministry of Defence. Courts will not be allowed to permit cases to be brought more than six years after the relevant date.

(p. 273) The same legislation amends the Human Rights Act 1998, affecting the discretion to allow human rights cases to proceed beyond the normal time limit by asking the relevant court to have particular regard to 'the operational context' in overseas operations and 'the exceptional demands and stresses' on the members of the armed forces.³³ In a way these developments extend the idea of *combat immunity* in the UK legal order.

But let us return to the general situation seen from the perspective of international law. There are different ways of looking at the ways in which killing in war is not to be tried as murder. One way stresses that a lawful combatant cannot be prosecuted on capture by the enemy side for merely participating directly in hostilities. While this might seem inherent in some general conception of war, in fact today it can only really be said to apply to the armed forces in inter-state armed conflicts.³⁴ The sole reference to such a combatant immunity principle is found in Additional Protocol I (AP I), which applies only to inter-state conflicts, or conflicts between states and National Liberation Movements under certain conditions. The relevant provision states:

Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.³⁵

This right has to be respected by the other state that is a party to the inter-state conflict; to prosecute a combatant just for fighting in an inter-state conflict is therefore a violation of international law. The national law of murder may have been violated, but prosecutions cannot be brought against the combatant from the armed forces of the other state due to the international law of combatant immunity. The individual being prosecuted has, in the words of the treaty, 'the right to participate directly in hostilities'. Of course anyone captured may nevertheless be tried for war crimes.³⁶

(p. 274) Another way to look at this is from the humanitarian point of view of the protection of those who fall into the hands of the enemy. As we shall see, various categories of persons, including combatants in an international armed conflict, are entitled to prisoner of war status, and this implies that the combatant will be held until the end of the conflict and not prosecuted for taking part in the conflict. The ICRC is clear that, under customary international law, the connected ideas of a right to participation in hostilities and the right to prisoner of war status apply only in conflicts between states: 'Combatant status . . . exists only in international armed conflicts . . . '³⁷

The implications of being recognised as a combatant in an international armed conflict are significant, as only combatants have the right to participate directly in hostilities Upon capture, combatants entitled to prisoner-of-war status may neither be tried for their participation in the hostilities nor for acts that do not violate international humanitarian law.³⁸

To the extent that the concepts of combatant and prisoner of war status exist in customary international law, they only apply to international armed conflicts.³⁹

Dinstein similarly asserts that international law simply protects the soldier from trial for murder:

Warfare amounts to a series of acts that are generally forbidden – and subsumed as criminal – in the various domestic legal systems, eg murder, assault, and arson. When a combatant, John Doe, holds a rifle, aims it at Richard Roe (a soldier belonging to the enemy's armed forces) with the intent to kill him, pulls the trigger, and causes Richard Roe's death, what we have is a premeditated homicide fitting the definition of murder in most (possibly all) domestic penal codes. If upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. International law provides John Doe with a legal shield, protecting him (p. 275) from trial and punishment, by conferring upon him the status of a prisoner of war.⁴⁰

This legal shield or immunity can, however, be lost. A privileged belligerent, entitled as a member of the armed forces of a state fighting another state, can lose their combatant immunity if they fail to distinguish themselves from the civilian population when directly engaged in hostilities. If captured in such circumstances, they can be prosecuted under the national law of the other state for unlawful participation in the fighting. The UK's *Military Manual* states:

The position of a person who takes a direct part in hostilities while failing to comply with the rule of distinction is as follows. If he falls into the power of the enemy while engaged in an attack or a military operation preparatory to an attack, and is not at that time complying with the requirements of the general rule (or, where applicable, the special rule . . .), he forfeits his combatant status and may be tried and punished for unlawful participation in hostilities.⁴¹

The overarching point is that, in an international armed conflict (whether considered a war or not), those entitled to fight on behalf of the state cannot (p. 276) be prosecuted by the other state for simply engaging in hostilities in a regular way.

In recent times the combatant immunity rule has come under pressure from different quarters. Two approaches in particular seek to improve the humanitarian protection offered by the laws of war. A first set of suggestions revolve around the idea that combatant immunity should be extended to rebels in an internal armed conflict.⁴² Under the current rule, rebels are detained and often prosecuted for having taken part in the rebellion. As they are likely to be imprisoned for long periods, or even executed for treason, sedition or rebellion, there is then, it is argued, little incentive to abide by the humanitarian law that protects civilians when rebels are engaged in armed conflict. For the present, however, governments simply have no appetite for any recognition of armed non-state actors as being entitled to any sort of combatant immunity.⁴³ During the conflict the armed group will most likely be labelled terrorist. It will not be accepted that they have a right to fight.

After the fighting, there may be some negotiated peace agreement that grants amnesties or pardons to those who merely took up arms and engaged on the battlefield. Such arrangements have been made in recent years for Colombia.⁴⁴ In other situations, such as South Sudan, the peace agreements simply make provision for the release by all sides of detained fighters.⁴⁵ So, in practice, there may be some sort of immunity depending on the distribution (p. 277) of power at the end of the fighting. But rebel fighters have no way of knowing during the conflict whether there will be a negotiated peace of this sort. During the fighting the rebels might have to presume that on capture they will be tried and prosecuted for simply being fighters. Rebels have no combatant immunity as a matter of international law.

A second line of argument comes from those who, building on just war theory, question the morality of treating soldiers from the just and unjust sides in the same way. David Rodin has suggested that individual soldiers fighting an unjust war should and could be punished at the end of the war for their mere participation. This assumes that in any armed conflict one side is to blame, and therefore asks why we should not seek to minimize the chances of participation in such unjust wars by punishing those who fight on the wrong side. Rodin is aware that the law does not currently favour such an approach, and that there is no obvious impartial institution to determine which side is in the wrong, but he asks that we should be 'constantly seeking opportunities to align both legal norms and legal institutions more closely with moral considerations'.⁴⁶ He recounts that British and American officers told him they believed the 2003 invasion of Iraq was morally unjustified. He points to standard moral and legal concepts concerning reasonable belief and justification to suggest that soldiers could be punished for fighting an unjust war. He makes the point that 'War leaders are held responsible for the decisions they make in light of facts as they honestly and reasonably believed them to be. It is at the very least unclear why we should not hold soldiers responsible in the same way.'⁴⁷

Ten years after Rodin wrote this, we now have, since 2018, the prospect of individual leaders being prosecuted in the International Criminal Court, or in various national jurisdictions,⁴⁸ for manifest violations of the UN Charter (the crime of aggression). Stepping back, it is perhaps not such a leap of logic to extend the idea of prosecution for aggression from leaders to commanders or soldiers, sailors and pilots. And yet such an idea would be met with howls (p. 278) of protest not only from state representatives, but also from scholars. There is so much invested in the idea that the laws of war will apply equally to both sides, that few of the relevant legal experts will countenance the suggestion that the combatants from one side might lose their immunity from prosecution due to their knowing contribution to an aggression. As Weiler and Deshman have argued, opposition to mixing up the illegality of the war with the rights of those fighting it will be, in part, traceable to legal conservatism, and in part 'motivated by purely political calculations of what would increase

the likelihood of moral, legal, or military victory', but the opposition 'can just as easily be driven by close emotional proximity to those who must live, fight, and die on one side of a conflict'.⁴⁹

Moreover, the traditional humanitarian approach has been to remain impartial, treating everyone equally in time of war. Questions of the legality of the war (the *jus ad bellum*) are to be banished from the realm of the humanitarian law of armed conflict to another sphere. And yet Rodin, Weiler, Dashman and others are highlighting fundamental shifts that are going on:

The normative perspectives of human rights and international criminal law have put a very particular lens on the current debate. Whereas pure humanitarianism tends to insist on absolute separation and simply protecting all humans caught up in war, the human rights framework imposes a more complex analysis.⁵⁰

Human rights law demands that the taking of a life be necessary and not arbitrary.⁵¹ Killings have to be justified. We will consider issues of necessity in the next section. For now, with regard to the need for killings to be lawful rather than arbitrary, let us note that the Human Rights Committee concluded in 2018 that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant [the right not to be arbitrarily deprived of one's life].'⁵² In other words, members of the armed forces killed in action as the victims of an aggressor state's armed forces have had their human rights violated.

(p. 279) In sum, the popular idea that war brings with it a licence to kill has no basis in law. The immunity from prosecution of soldiers is limited to those fighting for the armed forces of one state against another state. This combatant immunity is inapplicable if a soldier is caught attacking or spying out of uniform. The so-called equal application of the law of war does not prevent states from prosecuting rebels for taking up arms. Nor does equal application prevent leaders who plan or execute or assist others in an act of aggression from being prosecuted for the crime of aggression. Finally, even if killing the enemy is seen by some as simply a 'lawful act of war', from a different perspective the UN Human Rights Committee has now confirmed that when forces from the aggressor side kill anyone (combatants included) from the other side, that constitutes a violation of the victim's rights under international human rights law. Far from being licensed, the killing is unlawful.

7.2 Distinction

7.2.1 Military Objectives and Civilian Objects

International law now contains detailed rules on the obligation to distinguish between military objectives and civilian objects.⁵³ The rules apply to all parties to the conflict, and certain violations will constitute war crimes.⁵⁴ Today, for all operations that take effect on land, at sea, in the air or even in the context of a cyber operation, attacks must be directed at military objectives.⁵⁵ (p. 280) Attacks in this context mean 'acts of violence against the adversary, whether in offence or in defence'.⁵⁶

What, then, constitutes a military objective? The concept has been codified in treaty law, and the rule is applied as a matter of customary international law to all armed conflicts.⁵⁷ The relevant provision in Additional Protocol I reads:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose

total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁸

There is plenty of debate over how to interpret each and every aspect of this rule.⁵⁹ Some insight as to how part of this might be applied in practice is gleaned from this paragraph in the US Commander's *Handbook on the Law of Navy Operations*:

An object is a valid military objective if by its nature (eg, combat ships and military aircraft), location (eg, bridge over an enemy supply route), use (eg, school building being used as an enemy headquarters), or purpose (eg, a civilian airport that is built with a longer than required runway so it can be used for military airlift in time of emergency) it makes an effective contribution to the enemy's war-fighting/war-sustaining effort and its total or partial destruction, capture, or neutralization, in the circumstance ruling at the time, offers a definite military advantage.⁶⁰

Let us highlight three controversies related to what should constitute a military objective. The first one relates to the way in which the same *Handbook* and the *US Law of War Manual* seem to expand the idea of purpose. The (p. 281) same paragraph from the *Handbook* continues: 'Purpose is related to use, but is concerned with the intended, suspected, or possible future use of an object rather than its immediate and temporary use.' This introduces considerable latitude. If a civilian object becomes a military objective simply due to some possible future use, this is potentially a 'disturbing loophole'.⁶¹ Other Manuals seem to restrict the purpose criterion, so an attacker would need to have a reasonable belief that there is an *intention* to use the object for military purposes.⁶² And Dinstein adds that 'most enemy intentions are not easy to decipher'.⁶³ He urges:

When in doubt, caution is called for, especially where hospitals, schools, places of worship and cultural property are concerned. For instance, field intelligence revealing that the enemy intends to use a given school as a munitions depot does not justify an attack against that school as long as no practical steps have been taken to move the munitions in.⁶⁴

A second issue relates to the insistence by a number of western states that here, and elsewhere in the Protocol, the reference to the military advantage 'anticipated from an attack is intended to refer to the advantage anticipated from *the attack considered as a whole* and not from isolated or particular parts of the attack'.⁶⁵ The United States, even though not a party to this treaty, has endorsed this understanding of the general rule. The relevant paragraph from the *US Law of War Manual* is worth quoting here, as it illustrates how the concept of the anticipated military advantage has become defined by the United States, first by the concept of the attack 'considered as a whole', and then seen against the 'full context of the war strategy':

'Military advantage' refers to the advantage anticipated from an attack when considered as a whole, and not only from its isolated or particular (p. 282) parts. Similarly, 'military advantage' is not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy.⁶⁶

There is a real danger here that once the idea of an attack as a whole morphs into a 'war strategy', the range of military objectives becomes overly broad. Dinstein has stressed, however, that '“an attack as a whole” must be a finite event, not to be confused with the entire war'.⁶⁷ Similarly, the latest *New Zealand Manual of Armed Forces Law* confirms the point: 'The term “operation as a whole” is to be assessed realistically and in good faith. It is not to be expanded to routinely refer to the entire war or campaign'.⁶⁸ Precisely because today permission to engage in warfare may be limited by the specific authorization of the

Security Council, the concept of military advantage has to be seen as an aspect not of winning the war, but of fulfilling a limited objective.⁶⁹

A third controversy is whether a military objective can cover objects that make 'an effective contribution to the enemy's war-fighting/war-sustaining effort'. The latest US *Law of War Manual* proposes that such objects are covered, but acknowledges that there is no explicit authority for such an expansive view:

Military action has a broad meaning and is understood to mean the general prosecution of the war. It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as 'war-fighting,' 'war-supporting,' and 'war-sustaining' are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts.⁷⁰

(p. 283) Although reference is made here to the prosecution of a 'war',⁷¹ the US authorities have in recent years been applying this expansive understanding of the objects that can be targeted to its attacks on objects sustaining non-state armed groups such as the so-called 'Islamic state'.⁷² The argument emerges clearly from a 2016 speech given by the General Counsel of the US Department of Defence:

First, the targeted object must make an effective contribution to military action. In the case of ISIL and the targeting of certain petroleum facilities it controls, petroleum is the principal source of support for ISIL's armed action. ISIL regularly uses petroleum to support its armed action, and, indeed the organization depends on it. The money it receives from sales of petroleum is used to purchase weapons and pay fighters. ISIL funnels petroleum revenues directly to the group's fighting forces. ... Given this analysis, certain petroleum facilities such as pumping stations or the transportation assets that take the oil either to its depots or to market to be sold make an effective contribution to ISIL's military action . . .

The second part of the legal test is that the complete or partial destruction of the object must offer a definite military advantage in the circumstances at the time. This requirement generally excludes attacks for which anticipated military gains are indeterminate or speculative. Because ISIL controls and depends on petroleum production, sales, and revenue for its military operations, the military advantage the United States gains from striking this infrastructure is not indeterminate or speculative. The United States eliminates not only the use of the petroleum for military purposes, but also the opportunity to sell the petroleum to create cash that will also be used for military purposes. Also, ISIL cannot easily substitute petroleum for other sources of ready fiscal income. So the military effects of damaging or destroying ISIL-controlled petroleum facilities will be more certain than (p. 284) they might otherwise be if ISIL could easily replace that revenue from other sources.⁷³

This notion that fighting a war entitles parties to destroy those objects that can be considered as making an effective contribution to the war-fighting/supporting/sustaining capabilities of the enemy may have existed in the past, and the United States points to the Lieber Code (1863),⁷⁴ but today this notion is rejected in a range of other Manuals.

Those who have sought to defend a wider understanding of military objectives have sometimes pointed to a paragraph in New Zealand's *Interim Law of Armed Conflict Manual* of 1992, which read:

Economic targets that indirectly but effectively support enemy operations may also be attacked to gain a definite military advantage. For example, an 1870 international arbitral tribunal recognized that the destruction of cotton was justified during the American Civil War since the sale of cotton provided funds for almost all Confederate arms and ammunition. Authorization to attack such targets will be reserved to higher authority.⁷⁵

But the current *Manual* (2019), which replaces the earlier one, has excised that paragraph and today makes no reference to economic targets or indirect support.⁷⁶

The established expert manuals on armed conflict at sea, on air and missile warfare, on non-international armed conflict and on cyber operations have all rejected such an expansion of military objectives to those objects that contribute to the enemy's war-sustaining effort.⁷⁷ Kenneth Watkin (a retired Brigadier-General from the Canadian Forces and an experienced law of war commentator) has warned that 'Historically, this is an issue that stands at (p. 285) the edge of a very steep and slippery slope that has led directly to considerable humanitarian suffering.'⁷⁸ Other, similarly qualified writers have given examples of what cannot be targeted in this context. APV Rogers (a retired Major-General from the British Army) stated:

If a country relies almost entirely on, say, the export of coffee beans or bananas for its income and even if this income is used to great extent to support its war effort, the opinion of the author is that it would not be legitimate to attack banana or coffee bean plantations or warehouses.⁷⁹

Similarly Dinstein opines:

It is true that revenues from export may sustain the war effort. Yet, enemy exports on board neutral vessels can be stopped or curtailed only through the imposition of a blockade on the enemy coast ... The link between crops for export and military action is too remote. For an object to qualify as a military objective, there must exist a proximate nexus to 'war-fighting'. Crops and other agricultural produce as such do not qualify as military objectives . . . In the same vein, the stock exchange, banking system and money markets of the enemy State – albeit, perhaps, vital to its economic staying power in the armed conflict – do not, as such, constitute lawful military objectives.⁸⁰

Returning to the example of attacks on the oil tankers on land servicing ISIS, where the 'goal of the attacks is to stop refined oil from being supplied to Islamic State military forces', a case could indeed be made that such fuel makes an effective contribution to military action (war-fighting).⁸¹ But a considerable bulk of expert opinion is against allowing for a more general campaign against objects that are merely war-sustaining (both with regard to inter-state conflicts and conflicts with non-state armed groups, including those labelled as terrorists). The International Law Association's Study Group issued the most recent unequivocal pronouncement:

(p. 286)

There is no indication in State practice that objects contributing to the enemy's war-sustaining effort qualify as such as military objectives and the [Study Group] believes that this position has no basis in the law as it stands today and should be clearly rejected.⁸²

As we shall see in the next chapter, there is an idea that war, and especially total war,⁸³ justifies capturing enemy merchant ships on the high seas and cutting off an enemy nation (and its people) through Blockade. This thinking resulted in the 'unrestricted' submarine warfare against merchant shipping in the two World Wars leaving thousands of civilian crew from merchant ships killed, and millions of tons of shipping destroyed.⁸⁴ This practice from the Second World War is referenced in the 2017 US Naval Commander's *Handbook*. A legal explanation is given:

Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant vessels were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/(p. 287) war-supporting/war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.⁸⁵

The conditions for rendering a merchant ship or civilian aircraft a military objective have been codified in two expert manuals. Rather than referencing any such war-sustaining effort, they refer to 'making a contribution to military action eg carrying military materials'.⁸⁶ Once the line between military objectives and civilians involved in the war-sustaining effort is blurred, we clearly risk reducing the protection of civilians to vanishing point.⁸⁷

Today it is certainly worth reinforcing the rule that a military objective is limited to those objects that both make an effective contribution to military action and whose destruction at that time offers a definite military advantage. We might also add that it is no longer accepted that a state can establish at sea a 'war zone' or 'exclusion zone' where any vessel (including merchant (p. 288) vessels) can be attacked on sight.⁸⁸ The state's obligations under international humanitarian law continue to apply even in any such declared war zone.⁸⁹

7.2.2 The Prohibition on Attacks on Civilians

Civilians enjoy protection from being the objects of attack, 'unless and for such time as they take a direct part in hostilities'.⁹⁰ This last concept of direct participation has also been stretched to attempt to include economic support, for example by drug traffickers with links to an insurgency.⁹¹ Rather than examining the developing doctrine over what can be considered direct participation, it is suggested here that armed forces are more likely to consider the lists prepared in manuals, which limit what activity can be considered direct participation in hostilities. For example, the New Zealand *Manual* (2019) has a carefully considered list:

- a. armed attack by whatever means, including shelling, bombardment, missile launch and small-arms fire;
- b. aggressive manoeuvring, such as positioning and registration of mortars, taking up firing positions or moving in military configuration towards an objective;
- c. positioning, emplacement and/or detonation of mines, booby traps or emplaced munitions;

- d. conducting reconnaissance, surveillance or espionage on behalf of an opposing force;
- e. passing targeting information to an opposing force or acting as a lookout or scout;
- f. interdiction of logistic support;
- (p. 289) g. deliberate interference with command, control, communications, computers or intelligence systems, whether by direct physical means, through information operations or cyber warfare;
- h. interfering with lines of communication, eg by destroying roads, bridges, railway lines, etc;
- i. clearing mines and other obstacles laid by a force (other than for humanitarian purposes) while they are of tactical importance;
- j. capturing, holding and guarding [prisoners of war] PWs, detainees or hostages;
- k. attempting to liberate PWs or detainees held by the force;
- l. providing direct logistic support to an opposing force, eg carrying ammunition or other material, constructing and providing improvised explosive devices (IEDs);
- m. denying access to military objectives or interfering with manoeuvre, eg deliberately blocking roads or bridges;
- n. defending military objectives against attack;
- o. commanding, directing or controlling military operations, including issuing orders and directives and making operational or tactical decisions;
- p. planning military operations; and
- q. gathering, analysing and transmitting tactical intelligence to an opposing force.⁹²

Rogers sets out a similar list. He also gives an example of civilian activity that does *not* render the civilians legitimate targets: 'Working in commercial institutions that indirectly support the war effort by financing the government through taxation.'⁹³

Let us now turn to the specific rules that protect civilians in the context of targeting military objectives. This means dissecting what is often known as the 'proportionality' rule and delving into ideas of excessive incidental loss of life, or injury to civilians or, as it is often termed, 'collateral damage'.⁹⁴

(p. 290) 7.2.3 Indiscriminate Attacks and Proportionality

We set out above which objects that can be attacked as military objectives. Everything else is considered a civilian object.⁹⁵ Civilian objects cannot be attacked. Where the attack is indiscriminate, in that it is not directed at a specific military objective, or because of the weapons used cannot distinguish properly between military objectives and civilian objects, this too is prohibited. One type of such a prohibited attack is a disproportionate attack, as explained in Additional Protocol I:

the following types of attacks are to be considered as indiscriminate:

. . .

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁹⁶

So where a legitimate military objective has been identified, those who are planning or deciding on the attack have to determine whether this proportionality test is met.⁹⁷ If it is not, the attack has to be cancelled or suspended.⁹⁸ A disproportionate attack will be a violation of the laws of war, and can be a war crime.⁹⁹ The nature of this test, however, makes it tricky to apply when it (p. 291) comes to determining a violation or individual criminal responsibility. I do not wish to suggest that the test is unworkable or ignored. In fact, in contemporary conflicts, military commanders run sophisticated tests to determine the lawfulness of targeting, and there is plenty of evidence that attacks are called off when they do not pass the test.¹⁰⁰ But the nature of the present book is that we should point to some of the controversies and complications.

The first problem is that someone has to weigh the anticipated military advantage against the expected civilian damage and decide whether it is worth it. And anyone weighing these rather different considerations against each other is going to bring their own appreciation of what each is worth. What are the lives of 10 civilians worth in terms of an anticipated military advantage? Is the calculation different when the civilians are working in a munitions factory, or when they are children playing in an adjacent house? Are commercial premises worth less than a residential block? Does one take into account the future effect on the civilian population, or just the immediate damage?

We have perhaps reached the limits of what can usefully be set out as clear legal rules and ought to spend more time encouraging an ethical approach to such questions. Rather than thinking about whether targeting is allowed under this rule, it might be better to have policies that take into account a multiplicity of interests (without allowing for action that would violate the rule). So, for example, there is a good argument that the attacker should consider the longer-term effects of an attack for the civilian population. The expected destruction could be significant not only for the civilian population itself, but also for the longer-term political and military strategy of the attacker. The destruction could affect the prospects of alienation of the host population, and have major implications for reconciliation or reconstruction. Lawyers are reluctant to allow these future effects (sometimes known as 'reverberating harm'¹⁰¹) to be factored into the equation.¹⁰²

The paucity of case-law probably means that prosecutors may prefer to charge an indiscriminate attack, or even a simple attack on civilians, rather than enter this terrain involving proportionality. In any event, it seems to me (p. 292) that the key to this test is admitting that there may be a very different weight to be given to a military advantage depending on the context. The instinct of law of war lawyers is to banish discussions of the rationale for a war when discussing the laws of war. But today, as we have seen, conflicts are rarely fought as wars until one side is vanquished or conquered. A contemporary armed conflict involving such targeting decisions is more likely to have been undertaken for the protection of civilians, or to destroy weapons of mass destruction, or as part of a limited self-defence action against a terrorist group, or in order to restore law and order in the face of armed activities by an armed group (counter-insurgency). The aim of the military advantage may not be, as in the past, a step on the path to total victory over an enemy.

The most recent discussions regarding the proportionality test are starting to consider these issues. It may be admitted that what counts as a military advantage in the context of repelling the massed armed forces of a neighbouring state, bent on conquest, is very different from action that might create an advantage when faced with confronting a local group plotting to use home-made bombs against a peace enforcement mission.¹⁰³ In the latter case it is increasingly recognized that antagonizing the local population by killing innocent civilians as collateral damage in an attack on an amateur bomb-making facility, may simply represent a set-back rather than an advantage.¹⁰⁴ The same considerations would not apply to hitting a vital state munitions factory in enemy territory during a protracted inter-state war over disputed territory. On the other hand, if the whole point of the military campaign is the protection of civilians, the timely neutralization of the bomb-making equipment could save many civilian lives, and in such circumstances the protection of civilian lives can be seen today as a 'concrete and direct military advantage'.¹⁰⁵ It sometimes emerges that rather than seeking zero civilian casualties, guidelines allow for commanders to authorize strikes up to certain limits. With regard to US airstrikes on ISIS in 2016, it was reported that military leaders 'may authorize strikes where up to 10 civilians may be killed, if it is deemed necessary in order to get a critical military target'.¹⁰⁶ (p. 293) Higher numbers of civilians require higher authority. This approach seems to be more based on calculations of what public opinion will bear at any one time,¹⁰⁷ rather than an attempt to apply the spirit and purpose of the rule.

A second problem is that another facet of this test is that it can require a judge to consider what the decision-maker foresaw at the time, and then consider compliance with the benefit of judicial hindsight.¹⁰⁸ The proportionality rule demands that a prospective attacker (and of course this also applies to actions contemplated in defence) weigh two future variables, the *anticipated* military advantage and the *expected* civilian damage. By the time that a third party comes to judge the actions, either as a serious violation of international humanitarian law, or as a war crime, the damage will have been done, and the military advantage may or may not have materialized. States have been keen to emphasize that 'Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.'¹⁰⁹ Nevertheless, the concept of an anticipated 'concrete and direct military advantage' is explained in the British *Military Manual* as meaning

that the advantage to be gained is identifiable and quantifiable and one that flows directly from the attack, not some pious hope that it might improve the military situation in the long term. In this sense it is like the term "definite" used in the definition of military objects.¹¹⁰

Third, a controversy surrounds how to factor in wounded military personnel and medical military personnel. Such persons may not be targeted and are protected – but they do not qualify, technically speaking, as civilians in the context of the treaty rule. The latest US *Law of War Manual* suggests (p. 294) that attacks cannot be prohibited on the grounds of incidental harm to wounded personnel due to 'the general impracticality of prohibiting attacks on this basis during combat operations'.¹¹¹ In other words, when targeting a military objective surrounded by wounded soldiers, those soldiers and their attendant medics are not to be considered when weighing up the expected collateral damage. Boothby is clear in his criticism: 'it cannot be right that expected injury or as the case may be damage is simply ignored in applying the proportionality rule'.¹¹²

Fourth, some have argued that civilians who act as human shields should not be counted as civilians, or should be given less weight, in the proportionality calculation.¹¹³ When it comes to voluntary human shields, the argument may turn on whether they are considered as directly participating in hostilities, and for Sassòli this means the act must 'harm the enemy or its military operations through a chain of causality'.¹¹⁴ He continues, however, to outline a number of reasons why one cannot distinguish voluntary from involuntary action in this context. With characteristic insight he points out that

the distinction between voluntary and involuntary human shields cannot be readily determined in practice. How can a pilot or soldier launching a missile know whether the civilians he observes around a military objective are there voluntarily or involuntarily? What counts as a voluntary presence? Must a pilot observing a spouse accompanying a Taliban fighter in Afghanistan determine whether she was the victim of an arranged marriage or is engaged in a love match?¹¹⁵

Lastly, the issue of 'force preservation' has captured the imagination not only of lawyers, but also of philosophers. To what extent are the safety and lives of the attacking forces to be factored into the military-advantage side of the balancing equation. If flying lower when targeting means fewer civilian casualties due to better visibility, what weight should be given to the extra risk from anti-aircraft fire that could kill the pilots and crew? Are such (p. 295) military disadvantages to be placed on the scales? Should it make a difference if the forces are under attack?¹¹⁶ Again, our approach to this quandary may alter depending on how we approach the actual armed conflict: is it on a war footing, or is it resorting to force for some limited reason?¹¹⁷

A recent meeting organized by the ICRC reported 'All the experts agreed that force preservation was a very important military consideration, as the purpose of war is to overcome the enemy and a belligerent needs to preserve its own forces to achieve this.'¹¹⁸ But what if the military action is not really a war at all, but rather a rescue operation to extract children from the hands of an armed group in a civil war, or a raid on a terrorist cell in an urban centre as part of a continuing counter-insurgency effort? How much risk should we expect the military to take in such cases?

As a legal matter, we can simply say that the party is obliged to take as much risk as is necessary to ensure that there is no excessive collateral damage in achieving the legitimate military advantage foreseen in the proportionality test.¹¹⁹ But there is now real political and ethical concern that, in many modern wars, all the risks of loss of life are being transferred from the military personnel belonging to powerful states on to the foreign civilian population. Martin Shaw calls this 'risk transfer-warfare'. Such warfare illustrates a shift,

whereby the governments of advanced democracies, worried about the electoral impact of allowing the costs of war to fall on their citizens, transfer risks away from their combatants toward enemy combatants and noncombatants, minimizing their own casualties while causing excessive collateral damage.¹²⁰

7.3 The Morality of Killing in Contemporary Warfare

Let us leave law for a while and take an excursion into moral philosophy. As Lazar points out in this context, 'People will be more motivated to obey (p. 296) international law if it tracks our moral reasons than if it is just a useful proxy.'¹²¹ As already mentioned, there is considerable discussion on the topic of asymmetric warfare. The interesting thing here is that the word 'asymmetric' is used to evoke so many different conclusions depending on the context. For philosopher Michael Walzer, '[m]ost of the wars of the past several decades have been asymmetric; notably for American citizens';¹²² he then suggests that just war theory was invented for 'conventional' warfare, and that such wars are 'not likely to happen

anytime soon'.¹²³ He wants to argue that the same rules apply to both sides, even when only one warring party is an army 'organized, armed and disciplined by a modern state'.¹²⁴ But he picks out a dimension in modern conflicts that few lawyers want to address. He suggests that the insurgents stand to benefit from a state's killing of civilians, and therefore the dynamics have changed. Of course the law against killing civilians remains the same, but the political costs are now different. Let us consider his arguments in more detail:

Many conventional wars have been fought in crowded urban neighbourhoods; we shouldn't expect insurgents to miss the opportunities offered by cities and also by towns and villages. There is, however, a difference here: a conventional army, fighting its way through a city, will probably kill civilians, but these killings do not benefit the opposing army. In asymmetric warfare, the army's killings definitely benefit the insurgents, who are therefore liable to the charge . . . that they deliberately expose civilians to enemy fire. But suppose they have the support of many of the men and women they expose, from whose homes and neighbourhoods they choose to fight. Then, indeed, the army responding to insurgent attacks will face a difficult and highly charged moral and political decision: how to deal with the 'people,' that is, with unarmed but possibly hostile civilians, who are indistinguishable from the insurgents.

Here is what I take to be the central issue in asymmetric warfare (it's also an issue in conventional wars, but asymmetry gives it special significance): How should the army fight when its fighting puts 'enemy' civilians at risk? 'Enemy' is in scare quotes because, while some of these civilians may well sympathize with or actively support the insurgents (as the insurgents (p. 297) claim), some of them do not; some of them just wish they were somewhere else. . . . The key moral issue can be specified more clearly: What risks should the army ask its soldiers to take in order to reduce the risks they impose on 'enemy' civilians?¹²⁵

Walzer puts forward the moral argument that suggests such civilians 'should not be killed, and these soldiers have an obligation to do everything they can to avoid killing them'.¹²⁶ And then suggests that it is possible that 'the effective meaning of this obligation is that the soldiers won't be able to win asymmetric wars'.¹²⁷ Walzer and others are keen to find ways for armies to fight asymmetric wars and still remain within the law and morality.

On paper the legal test is quite straightforward. It is the rule of proportionality in attack (*jus in bello* proportionality) that we just discussed. As long as the civilian damage is not excessive with regard to the concrete and direct anticipated military advantage, it will not be illegal under this rule. But Walzer inserts the issue of risk undertaken by the army's soldiers to determine as a matter of morality who should get the blame for civilian deaths. In his hypothetical scenario, civilians are on a roof with Taliban insurgents (either dragged there by force, or willingly standing with the insurgents). He suggests an air strike would probably be a war crime, while he thinks there would be no crime if the state's soldiers get onto the roof of an adjacent building and fire at insurgents, killing civilians. Walzer believes 'that whenever soldiers have accepted risks in order to minimize the injuries they inflict on civilians, the blame should fall elsewhere'.¹²⁸

There is no simple answer to the question of how much risk the armed forces are required to accept by law and morality. I would suggest, however, that one has to consider the context, including the reasons for the conflict in the first place. If the army is seeking to rescue a civilian population in imminent mortal danger, the morality of killing some civilians to save others must be different than a situation where civilians are killed to achieve objectives such as disrupting enemy supply lines, or reclaiming territory lost to irregular forces that have split from the army and are now in the opposition. We cannot engage with Walzer's scenarios unless we know why anyone is (p. 298) being killed in the first place. For

me it is no answer to say that as long as soldiers take risks, their killing is morally acceptable.

Such questioning of the purpose of the war itself is not only vigorously discouraged in textbooks on the law of armed conflict (we are constantly reminded that rules on *jus ad bellum* and *jus in bello* must be kept separate, the same rules apply to aggressor and defender and so on). Such an approach is also excluded by Walzer from his suggested morality of targeting. In the most recent edition he generalizes, in what I consider to be a rather particular way:

The army is, as it were, already in power, serving a sovereign state whose political policies and moral authority are contested, rightly or wrongly. So it's the insurgents who usually start the war. Claiming the prerogatives that I have just described, they often attack civilian targets, inviting a military response, the more savage the better.¹²⁹

For Walzer, 'what is critically at issue in asymmetric warfare is less the cause than the conduct of the war'.¹³⁰ I think we are off to a bad start with the idea that in modern wars the insurgents usually started it and deliberately seek to have a regular army inflict savage destruction on the civilian population. To understand the morality of killing civilians standing alongside Taliban fighters one needs to know what the Taliban is going to do next: set off a bomb in a crowded place, execute the said civilians, or enter peace talks with the attacking army.

So, on one view, asymmetric warfare apparently alters the equation for evaluating the morality of killing civilians because, it is assumed, insurgents have chosen to disrupt the normalcy of proper government and deliberately use civilians to shield their operations. At this point, at least according to Walzer, where regular soldiers assume greater risks to save some civilians, their actions should attract less blame than if they refuse to assume those risks.

But from another point of view there is considerable concern – not about the risk-taking by the soldiers on the ground, but rather about the absence of risk for modern-day pilots targeting people through remotely operated air strikes (drone operators). There are various concerns here, one being that this makes conflict and killing more likely and, second, that there is something unfair about killing defenceless people who do not (p. 299) stand a fighting chance. In turn, this is apparently making it harder in the United Kingdom to retain drone crews. According to one researcher, 'Not many people want to sign up to sit in a cabin for eight hours at a time conducting mostly routine surveillance and sometimes killing people who can't fire back. It doesn't compare with the glamour and excitement of live flying.'¹³¹

In 2011, the UK Ministry of Defence addressed the first issue and seemed to accept, at the time, that the ability to use unmanned aircraft does indeed lead to more rather than fewer armed conflicts, to greater use of force and more likelihood of war:

It is essential that, before unmanned systems become ubiquitous (if it is not already too late) that we consider this issue and ensure that, by removing some of the horror, or at least keeping it at a distance, that we do not risk losing our controlling humanity and make war more likely.

For example, the recent extensive use of unmanned aircraft over Pakistan and Yemen may already herald a new era. That these activities are exclusively carried out by unmanned aircraft, even though very capable manned aircraft are available, and that the use of ground troops in harm's way has been avoided, suggests that the use of force is totally a function of the existence of an unmanned capability – it is

unlikely a similar scale of force would be used if this capability were not available.¹³²

This note was withdrawn, and in 2017 the replacement paper concluded 'For the UK, there is no evidence that availability of remotely piloted aircraft has lowered the threshold for the use of force.'¹³³

However one evaluates the evidence, clearly it is arguable that it is easier to go to war or engage in lethal air strikes when there is minimal risk to one's own side.¹³⁴ These are not just philosophical conundrums for the classroom. In the end, the ability of a democracy to sustain a war will depend on public support. And it is the morality of war, just as much as the legality of it, that will in the end determine support for the war.

(p. 300) For legal philosophers such as Paul Khan, risk is what defines war as opposed to other forms of state violence: 'Without the imposition of mutual risk warfare is not war at all.' Such 'riskless warfare' would resemble 'police enforcement', and here he succinctly explains a crucial moral difference: 'The moral condition of policing, however, is that only the morally guilty should suffer physical injury. ... Individuals are the targets of police action because of what they have done, not because of who they are.'¹³⁵

States have tried nevertheless to defend the idea that an asymmetry where only one side is at risk can be justified. The UK 2011 note continued:

The discussion . . . must be tempered however, by the fact that the moral responsibility on every commander to reduce loss of life – on both sides – is clear. The use of unmanned aircraft prevents the potential loss of aircrew lives and is thus in itself morally justified.¹³⁶

Seen from within, one is protecting the lives of one's own troops by carefully tracking targets; by monitoring situations from an eye in the sky, one is engaged in more humane and reliable targeting decisions; and the strikes are all argued to be within the rule of law. But such reasoning does not really address the bigger moral debate seen from outside the armed forces.¹³⁷ There is still a sense that it is simply unfair to pick people off from behind a computer screen at no personal risk. Numerous films, plays and novels have highlighted this moral quandary.¹³⁸ Governments refute the accusation that they 'have created a disconnected "Playstation" generation of operators who are divorced from the reality of their activities'.¹³⁹ The United Kingdom's response to this is that 'Operators have "a strong sense of connection to the life and death decisions they are sometimes required to take . . . in stark contrast to the image portrayed by some pressure groups."' ¹⁴⁰ Indeed it has been (p. 301) shown in a careful survey of the US Air Force that the level of mental-health issues, including post-traumatic stress, suffered by drone operators is similar to that suffered by those pilots deployed in manned aircraft in similar missions.¹⁴¹ But none of this can take away the lingering idea that the rules of chivalry that once permeated the laws of war (or even the law of arms we encountered in section 2.1) would not accept such an uneven fight. In Singer's words, what 'gives war its humanity' is the 'willingness to bear the most horrible burdens, face the most terrible risks, and even make the ultimate sacrifice, for your nation or your buddies'.¹⁴²

Walzer, by contrast, does not focus on mutual risk; he sees the obligation as stemming from the job of being a soldier, and rather wants to address the soldier's moral choices in war. For him, the 'war convention requires soldiers to accept personal risks rather than kill innocent people'.¹⁴³ He has been tracking the orders given to soldiers that suggested that soldiers accept 'some risk' in order to avoid killing civilians. Irrespective of the orders or rules of engagement, Walzer explains:

I have talked to American and Israeli soldiers who firmly believe that taking risks to minimize civilian casualties is part of their job. It is crucial to the pride they take in doing their job.

But to what extent is this their job? Taking risks to save lives is required in certain professions – it is a central feature of the fireman’s professional code, for example, and this is true whether the people at risk are citizens or foreigners, relatives, friends, or personal enemies. But rescuing people trapped in burning buildings is the most important job of the fireman. The military profession is different. The most important job of the soldier is to win the war or to accomplish a military mission that is closely connected to winning the war. It is commonly taken for granted that some number of civilian deaths is ‘not disproportionate’ to the value of that mission. We want soldiers to minimize that number as best they can, even at some risk to themselves. But the risk-taking can’t undermine or endanger the mission. (p. 302) This military target is so important (we believe) that we will allow some collateral damage in order to capture or destroy it.¹⁴⁴

Walzer’s argument, in this piece and elsewhere, is that there is a strong moral argument that soldiers should accept this risk as part of their role.

Not everyone agrees.¹⁴⁵ In particular, his approach has been challenged head on by Kasher and Yadlin, who focus on examples from Israel’s activity in the Gaza Strip.¹⁴⁶ They contextualize the issue and dismiss Walzer’s idea as ‘unrealistic’, particularly because they say one should include in the equation the value of the civilian lives they are defending:

[A]ssuming ‘some risk’ to soldiers’ lives would take the form of taking prior action designed to separate terrorists from their neighbors before carrying out the required engagement with the terrorists. Obviously, such prior action would affect the possibility of the soldiers to accomplish their mission because it would eliminate the element of surprise, reveal the soldiers’ positions, and so on. If ‘some risk’ taking should not affect the possibility of accomplishing the mission, we must conclude that ‘some risk’ taking should not be assumed, because it interferes with the possibility of the soldiers of successfully carrying out their mission.

Therefore, we do not believe there is any moral validity to Walzer’s priorities, which are based on an unrealistic view in which battling terrorists is akin to jousting or based on a mistaken comparison between the risks to which soldiers are exposed and the risks to which terrorists’ neighbors are exposed.¹⁴⁷

From another perspective, McMahan wants to go further and distinguish between, those innocent civilians who are likely to benefit from the attacker’s humanitarian intervention, and innocent civilians in other situations. He (p. 303) argues that the civilians who are the ‘expected beneficiaries of the war’ can expect to have extra risks imposed on them by the combatants fighting to save them.¹⁴⁸ This reasoning, while philosophically eye-catching (as with McMahan’s related idea that some civilians can be targeted as morally responsible),¹⁴⁹ not only cuts across the contemporary understanding of the need to distinguish between military objects and civilians in the law of armed conflict, but also challenges normal ideas of human rights. If all the civilians liable to be killed as collateral damage have the human right to life, and are to be considered worthy of protection due to the need to respect their individual dignity, it cannot be compatible with such a view of human rights that some civilians on one side should be instrumentalized for the greater good of those on the other side.¹⁵⁰

But thinking about this quandary in human rights terms also forces us to think about the human rights of the attacking soldiers, who are being asked to risk their own lives. Benvenisti accepts that there may be a 'moral duty of *combatants* to consider taking some risks to reduce the harm to enemy civilians, but not a duty to actually risk themselves'.¹⁵¹ He accepts the legal duty 'to reduce harm to enemy civilians', but determines that the dignity principle that underpins human rights means that this duty 'does not entail an obligation to assume personal life-threatening risks'.¹⁵² The important conclusion (p. 304) is about how alien a human rights approach still is in this context, in part due to the way politicians and the military have come to view their enemies:

For many armies it is difficult to subscribe to the human dignity principle because they indoctrinate their combatants on an opposite perception, one that dehumanizes the enemy. They coach their soldiers to fear and hate the enemy out of their belief that portraying adversaries as evil and malicious creates feelings that make killing easier. This approach seeks to prevent the recurrence of the behavior of Allied soldiers during the two World Wars, most of whom balked at firing at the enemy even when attacked. American troops in Vietnam acted differently, suggesting that new training methods fostering aggressive behavior have been effective and leading psychologists to conclude that soldiers who dehumanize the enemy fight better. Commanders and soldiers who are goaded to view their enemy as subhuman will find it enormously difficult to risk their lives to save those they had been told are unworthy creatures. And, of course, they believe that their – subhuman – opponent is equally motivated to kill them and their civilians.¹⁵³

7.4 Necessity

7.4.1 Necessity as an Excuse

The concept of 'necessity in war' or 'military necessity' is complicated by the fact that its meaning has radically changed over time. In Chapter 1 we saw how the concept of being at war involved the idea that the associated death and destruction were not murder and arson but justified as lawful acts of war. Allied with this was a conception that 'military necessity' provided an excuse, especially in a total war, to violate what would otherwise be enforceable protective rules. The latest version of the New Zealand *Military Manual* addresses the point:

The principle of military necessity is not the same thing as the nineteenth-century doctrine, 'necessity in war overrules the manner of warfare', which held that any measure was justified in order to defeat the enemy. In German: '*Kriegsraison geht vor Kriegsmanier*'. These views, not unique to (p. 305) the German states, find much support in the writings of other military theorists, generals, admirals and jurists. Nor is modern military necessity to be confused with military expediency or convenience.¹⁵⁴

This old doctrine of military necessity is no longer acceptable, and has been roundly rejected in various contexts.¹⁵⁵ Dinstein confirms its obsolescence as follows:

In the past, it was often claimed that a belligerent party is at liberty to deviate from the law of international armed conflict when military necessity – especially in dire circumstances – so demanded. This claim, which actually means that military necessity is superior to the law, is now completely defunct.¹⁵⁶

We know, then, that military necessity cannot be used as an argument to override existing rules of international law. But the concept continues to play a significant role in our understanding of rights and obligations in war, even though it is nowhere properly defined in international law. As with the concept of war, the concept of ‘necessity in war’ or ‘military necessity’ needs to be treated with care. On the one hand, it is claimed that the ‘principle’ is a *right*: it *justifies* what is necessary to win the war (within the law); but (confusingly) on the other hand, and at the same time, the same principle is seen as including an *obligation*: it provides an additional *restraint* on the warring parties. At one level this makes sense, if you have a right to do something up to a point, then you may also have an obligation not to do that thing if you go beyond that point. But the aim of the following discussion is to show that there are choices about how we present this ‘doctrine’ on military necessity, and the choices we make can have concrete consequences – not least in the way that members of the armed forces and their commanders perceive their duties in warfare.

On reading military manuals one gets the impression that military necessity justifies action and creates rights for the military. The US *Manual on the Laws of War* (2016) takes this a little further and places necessity against the context of winning the whole war: ‘*military necessity* justifies those measures (p. 306) necessary to achieve the object of war, and the object of war is not simply to prevail, but to prevail as quickly and efficiently as possible’.¹⁵⁷ The UK *Manual* has been amended to incorporate a form of the NATO definition and elaborate on it:

Military necessity is now defined as ‘the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war’. Put another way, a state engaged in an armed conflict may use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.¹⁵⁸

But such an approach is at risk of orientating the concept of military necessity into something that excuses action that would otherwise be illegal.

It is true that the expression ‘military necessity’, or variations such as the ‘necessities of war’, is found explicitly incorporated into certain treaty provisions of the laws of war, including provisions that are specifically aimed at humanitarian protection, designed for strictly humanitarian purposes. In these specific contexts, military necessity may indeed justify a departure from the rule. The list of provisions of law of war treaties that specifically reference military necessity, or a similarly phrased exception, includes, for example, a restriction on choosing where to visit prisoners of war:

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.¹⁵⁹

Similarly, consider the rule prohibiting the destruction of property in occupied territory: (p. 307)

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public

authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.¹⁶⁰

We could easily list the other main provisions that explicitly allow exceptions to the party's obligations for reasons of military necessity, military considerations, imperative military reasons, the needs of the army of occupation and the necessities of war.¹⁶¹

But outside these specific rules that contain such explicit limitations, *there is no room for implied exceptions for reasons of military necessity or the necessities of war*. For a well-known example, consider the rule that states that if a group of armed forces captures an enemy combatant during an operation, and they are unable to intern or evacuate that person due to the nature of the operation, they then have to release the captured person – they cannot claim military necessity and kill the prisoner (however much they feel that releasing the captive will endanger the operation).¹⁶² In short, you cannot invoke military necessity to get around a rule from the laws of war.

A second confusion sometimes arises when people refer to the plea of necessity under general international law. This plea means that a state can avoid its international obligations where its act 'is the only means for the State to safeguard an essential interest against a grave and imminent peril'.¹⁶³ But this general rule is not available to states in the present context. It cannot be used to justify force, even for the purposes of humanitarian intervention,¹⁶⁴ and it cannot be used to avoid the rules in the law of armed conflict. The International Law Commission's Commentary explains that the general rule on necessity does not cover the 'doctrine of "military necessity"', as that doctrine is the underlying criterion for 'a series of the substantive rules of the law (p. 308) of war and neutrality', as well as being specifically mentioned in 'a number of treaty provisions in the field of international humanitarian law'.¹⁶⁵

We can summarize the situation so far. The principle of military necessity:

- (a) does not override the laws of war;
- (b) is said to encapsulate a right to apply required measures for a successful operation;
- (c) operates to limit force to that required to defeat the enemy and involving the minimum loss of life and resources (usually focused on one's own side);¹⁶⁶
- (d) has already been implicitly or explicitly been built into the laws of war; in the absence of an explicit exception for military necessity or an equivalent phrase, one cannot rely on military necessity (or necessity as a general plea) to excuse behaviour that is otherwise in violation of the laws of war.

7.4.2 Necessity is Rejected in Submarine Warfare Against Merchant Ships

Perhaps to get a better sense of how the necessity excuse may be rejected, let us consider the early controversy over submarine attacks on merchant ships. As already mentioned, the degeneration into unrestricted submarine warfare led to considerable loss of life. For some this was seen as justified by the necessity of winning the war. As Fenrick explains:

Although the use of submarines and aircraft to sink merchant vessels on sight was inconsistent with the pre-1914 law of naval warfare, there were militarily important reasons for doing so. As the World Wars tended towards totality, merchant shipping was incorporated into the belligerent war effort, and it was reasonable to conclude that, in general, merchant vessels (p. 309) did not travel to and from belligerent states unless they carried cargoes that would either improve the ability of a belligerent to make war or provide revenue to bolster the belligerent's war

economy. As the submarine was a small vessel and, with the exception of torpedoes, weakly armed, it was not able to perform the traditional tasks of visit and search of merchant vessels once the opposing belligerent began to arm merchant vessels and to order them to act aggressively in self-defence by ramming. Further, the British tactic of using Q-Ships, warships disguised as merchant vessels which would attempt to lure submarines within range of their weapons and then disclose their identity and attack, did not provide an incentive for submarines to comply with traditional practices.¹⁶⁷

The trial of Admiral Dönitz before the International Military Tribunal in Nuremberg revealed the practices on both sides. The Nuremberg Tribunal mitigated the punishment of Admiral Dönitz for certain specific violations of the laws of war in this context, on the premise that both sides had engaged in such violations.¹⁶⁸ It also declined to find him guilty for attacks on British merchant ships, due to the fact that the British Admiralty had armed the merchant vessels, was using intelligence from them on the position of sighted enemy submarines and had ordered them to ram German U-boats if possible.¹⁶⁹

Nevertheless Dönitz's infamous orders against rescuing survivors led in part to his conviction for war crimes. War Order 154 is worth reproducing for what it tells us about the idea of war at that time:

Do not rescue any men; do not take them along; and do not take care of any boats of the ship. Weather conditions and proximity of land are of no consequence. Concern yourself only with the safety of your own boat and with efforts to achieve additional successes as soon as possible. We must be hard in this war. The enemy started the war in order to destroy us, and thus nothing else matters.¹⁷⁰

(p. 310) Later in the War, Dönitz issued the *Laconia* order, which again reveals the war sentiment and the failure to balance the demands of military necessity with any recognition of a principle of humanity:

1. No attempt of any kind must be made at rescuing members of ships sunk; and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
2. Orders for bringing in captains and chief engineers still apply.
3. Rescue the shipwrecked only if their statements will be of importance to your boat.
4. Be harsh, having in mind that the enemy takes no regard of women and children in his bombing attacks on German cities.¹⁷¹

Sentencing Dönitz to 10 years' imprisonment (the shortest of the sentences handed down, most of the defendants were hanged), the International Military Tribunal was clear that there is no room for the argument that force security, military necessity or the necessities of war override a clear humanitarian prohibition set out in the London Protocol of 1936:

The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should

allow it to pass harmless before his periscope. These orders, then, prove Dönitz is guilty of a violation of the Protocol.¹⁷²

(p. 311) 7.4.3 Necessity as an Extra Layer of Restraint in Warfare

The concept of necessity (sometimes distinguished from military necessity) is also seen by key commentators, but not all,¹⁷³ as providing an extra layer of restraint. We have already seen that necessity operates in the context of self-defence to limit the options of the state acting in self-defence, or under authority from the Security Council, or indeed under any claim to be acting legally.¹⁷⁴ So experts such as Greenwood and Garraway have consistently suggested that 'far from justifying a state in acting contrary to humanitarian law, the principle of necessity operates as an additional level of restraint by prohibiting acts which are not otherwise illegal, as long as they are not necessary for the achievement of legitimate goals'.¹⁷⁵

More recently, Adil Ahmed Haque has argued that, with the abolition of the sovereign right to go to war, 'we must understand military necessity in a fundamentally different way, not as an authorizing principle entitling both sides to fight, but as a constraining principle prohibiting both sides from inflicting excessive harm'.¹⁷⁶

Let us consider the scenario provided by Steven Haines. Today a warship can be

taken out of contention by a single hit from a missile. This can result in a catastrophic failure of the warship's power and essential fighting systems, severely disabling the vessel and rendering it incapable of further involvement in combat operations, despite the majority of the crew itself remaining physically capable of doing so.¹⁷⁷

(p. 312) For Haines, an attack on enemy naval units has to be limited to 'that which is necessary to render the target incapable of engaging in hostilities', and launching further attacks on a severely disabled warship would be an unnecessary act.¹⁷⁸

A fierce controversy has developed around the idea of necessity's being considered an extra layer of restraint in a series of operational settings. One could choose to see this in part as a struggle for the legal high ground between humanitarians and military lawyers.¹⁷⁹ But the commentators represent multiple, even shifting, positions on a wide spectrum. Indeed one of the foremost among them has admitted to having changed his mind: having asserted in 1997 that military necessity is a 'principle of limitation, not authorization',¹⁸⁰ he now claims that it 'is not, as sometimes asserted, a limitation on military operations. Instead the principle recognizes the appropriateness of considering military factors in setting the rules of warfare'.¹⁸¹

This is an area of law and moral philosophy that is far from stable.¹⁸² In fact, the idea that necessity is a rule of restraint rather than a permission is not as modern as is often suggested. Even at the beginning of the 19th century, necessity in war was not universally seen as a way around the rules. Necessity was seen by some as a restraint on waging war. The historian Geoffrey Best has helpfully reproduced the following statement by Napoleon:

My great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules, is excusable only so far as it absolutely necessary; everything beyond that is criminal.¹⁸³

Gérard de Rayneval reflected the legal point in his 1803 book *Institutions du droit de la nature et des gens*: 'The law of war rests on this fundamental and (p. 313) sacred maxim: do to your enemy as much harm as is necessary for force to be just, but go no further'.¹⁸⁴

For a very clear contemporary assertion that the principle of necessity works to restrict the acts of a party to a conflict, consider this passage from Kolb and Hyde:

The aim of the war should not be seen as the destruction of as much of the adverse belligerents property and killing of as many members of the adverse armed forces as possible; rather the aim is to destroy and to kill as few as possible and to cause such damage only to the extent necessary to overpower the enemy. That idea was aptly expressed in the 1868 St Petersburg Declaration. Where it is stated:

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.

Thus, there is a hierarchy of acts allowed: one should capture rather than wound; one should wound rather than kill; one should kill less persons rather than kill more persons and so on. It is often possible to obtain the same military result by placing the military personnel of the enemy *hors de combat* rather than killing them. In operation, the principle of necessity therefore requires that the least destructive measure that gains the same military advantage should be preferred. This rule is expressed in Article 57(3) of Additional Protocol I . . .¹⁸⁵

The objections to such an approach are particularly engaged when it comes to the idea that there is an obligation on soldiers to capture rather than kill.¹⁸⁶

The ICRC has stated that the principle of military necessity implicitly contains a principle of humanity, which complements it and limits the kind and degree of force that is permissible. This position came in the (p. 314) context of its 'Interpretative Guidance on the Notion of Direct Participation in Hostilities'.¹⁸⁷ In the process of consultations on how to interpret this notion in the law of armed conflict, we find, on one account, 'academicians' fundamentally disagreeing with 'military experts',¹⁸⁸ and the 'the preeminent international humanitarian law organization' (the ICRC) being accused of failing to take account of the expert views of those from 'states with the greatest involvement in contemporary armed conflict'.¹⁸⁹ These fundamental, and deeply felt disagreements, can also be seen as part of the battle over 'who owns the rules of war'.¹⁹⁰

The opposition to the idea of a necessity principle that limits permissible force in this context is articulated in different forms. First, it is claimed that the principles of military necessity and humanity 'do not operate as independent legal norms in and of themselves'.¹⁹¹ Second, it is suggested that the laws of warfare on the conduct of hostilities already contain within themselves a balance between humanitarian considerations and military necessity, so there 'can be no appeal to military necessity outside the formulation of the rule'.¹⁹² Third, there is an objection that the rule that limits attacks on military objects to those that contribute to military action, and destruction of which offers a definite military advantage, does not apply to combatants as they are objectives rather than objects.¹⁹³ Fourth, the norm that prohibits employing weapons and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is said to be 'shrouded in mystery', and thus there is no evidence that states would interpret this norm to require the least harmful means.¹⁹⁴ Fifth, we find the objection that such a 'least-harmful-means theory is a creature of human rights law, and it has won no place in the law of war'.¹⁹⁵ Lastly, it is said such a rule is impracticable, in part because the (p. 315) soldier cannot be expected to carry a collection of weapons, just as a golfer carries a range of golf clubs.¹⁹⁶

So from the side of the military experts we have a plea for simplicity, and essentially the idea that some individuals will have assumed a status that means they can be targeted as such. Others seek to suggest that some killing of those directly participating in hostilities may be unnecessary and that the law of armed conflict demands that such targeting must be necessary for it to be legal.¹⁹⁷ Nevertheless, the idea of 'classic large-scale confrontations' (aka wars) with a reduced role for limiting ideas related to necessity,

proportionality and humanity hovers in the background, and seems to encourage an acceptance that the balance can be tipped in favour of what is said to be required by military necessity and away from concerns over humanity.¹⁹⁸ However we see the limits of military necessity, we have definitely come some way from the 19th-century idea that 'extreme necessity could deprive the laws of war of their binding force'.¹⁹⁹ To be clear, there is now complete agreement that we cannot accept the idea of any return to the *Kriegsräson* doctrine that was understood as stating that 'necessities of war take precedence over the rules of war'.²⁰⁰

To get a better sense of the necessity debate let us leave the law and return to questions of morality. Now might be a good time to examine the paradigmatic example of the sleeping soldier. Law of war textbooks invariably reference the idea that it is not a violation of the law of war for one soldier to kill a sleeping enemy soldier. This image remains seared in the minds of those who come across this cliché. I know because it is repeated back to me on an annual basis. The time has come to expose this dangerous trope as a cheeky way to get students' attention, rather than as a helpful way to understand the laws of war.

(p. 316) Gabriella Blum has suggested that even if the current law might allow for the targeting of a soldier who is swimming naked, or sleeping, or sitting cooking, or even retreating, we should move away from questions of legality and consider the morality of such killing. She argues that the existing rules on distinction and necessity can be reinterpreted. She would adjust the rules on distinction, so that non-threatening individuals, including combatants, 'who pose no real threat would be spared from direct attack'. And the principle of military necessity would introduce 'a least-harmful-means test, under which an alternative of capture or disabling of the enemy would be preferred to killing whenever feasible'. She accepts that this would involve extra risk for soldiers, but considers such concern for enemy combatants involves 'moral, cultural, and aesthetic sensibilities' that could possibly 'drive other militaries – although certainly not all fighting forces – to adopt similar doctrines'.²⁰¹

We might take a moment to consider the idea of shooting a naked soldier referenced by Blum. She is in turn using Walzer's reference to the war memoir by Robert Graves, *Goodbye to All That*. Graves' queasiness, I feel, reveals a lot about why we might want to forbid unnecessary killing in war:

I only once refrained from shooting a German I saw, and that was at Cuinchy . . . While sniping from a knoll in the support line, where we had a concealed loop-hole, I saw a German, perhaps seven hundred yards away, through my telescopic sights. He was taking a bath in the German third line. I disliked the idea of shooting a naked man, so I handed the rifle to the sergeant with me. 'Here take this. You're a better shot than I am.' He got him; but I had not stayed to watch.²⁰²

Sassòli has his own explanation of why some militaries object to the idea of necessity playing a limiting role in this context. His insight comes from many years of interacting with the military, and warrants repeating here:

The underlying reason for such resistance against a rule, which corresponds to basic moral imperatives . . . may be the military's fear that – if the rule is not clear-cut – soldiers will hesitate to use lethal force and retroactively (p. 317) second guess their decision, leading them to feel guilty for having killed another human being.²⁰³

7.5 The Weapons of War

Today, weapons are only permitted where they can distinguish between military objectives and civilian objects. The International Court of Justice confirmed this in its opinion on the legality of nuclear weapons: 'States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.'²⁰⁴

But the law of war contains a second fundamental principle, and this one covers attacks even where they only affect the *armed forces* of the enemy. In the words of the Court, 'it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering'.²⁰⁵ The application of this rule requires a contextual reading as to what sort of military necessity or advantage was being weighed at the time.²⁰⁶ And because a number of weapons have been specifically outlawed against this background, there can be a temptation to suggest that what has not been specifically outlawed is permitted. But there is evidence that the rule prohibiting unnecessary suffering to combatants can and does influence behaviour, even in the absence of a prohibition of a specific type of weapon.²⁰⁷

(p. 318) Starting perhaps with ancient prohibitions on poison weapons,²⁰⁸ the unnecessary suffering norm has been behind the expanding list of weapons that are prohibited under international law. In particular, we might mention the following prohibitions: on explosive or expanding bullets; on weapons that injure with non-detectable fragments; and on blinding laser weapons. At the same time, some weapons have been prohibited with more regard to their indiscriminate effects. We might mention chemical weapons, bacteriological weapons, anti-personnel landmines and cluster munitions. Some rules do not actually ban weapons but rather restrict the ways in which they can be used. These rules also create obligations that continue after the arms have been deployed. Here we might mention sea mines, torpedoes, incendiary weapons (including napalm and flamethrowers), booby traps and obligations concerning the 'explosive remnants of war'.

Some of these prohibitions apply to all states and the opposing armed non-state actors in all conflicts (such as chemical weapons); other prohibitions may only be binding for those states that have accepted the relevant treaty (such as cluster munitions).²⁰⁹ The extent to which such prohibitions (p. 319) and restrictions apply in non-international armed conflicts and to the non-state actors party to the conflict is complicated due to the multiple treaties and amendments involved.²¹⁰ In fact, whether or not the armed group is prohibited from using such weapons as a matter of international law, in practice multiple armed groups have entered into commitments to destroy their stockpiles of landmines and refrain from using such weapons.²¹¹

When it comes to weapons of mass destruction, there is a universal ban on states 'providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'.²¹²

National jurisdictions will criminalize the use or stockpiling or transfer of certain weapons in those states that have joined the relevant treaties. Such offences will apply to everyone, irrespective of whether there is any sort of armed conflict or war.²¹³

At the international level, the Statute of the International Criminal Court foresees six types of weapons that can lead to the prosecution of war crimes for those who employ them in the context of an armed conflict:

- poison or poisoned weapons;

- asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;
- employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by x-rays;
- employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent (p. 320) blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.²¹⁴

With regard to the second and third crimes, it is understood that the use of tear gas and expanding bullets for *law enforcement purposes* would not constitute a war crime.²¹⁵ It may seem strange that a bullet could be completely prohibited in times of war due to its capacity to cause unnecessary suffering and yet be legal in times of peace. The reality is that, in situations such as hostage-taking, an expanding bullet is considered the best way to immobilize the hostage-taker without risking injury to the hostages. Experienced commentators have asked whether the comprehensive ban on the use of such bullets in the law of war still makes sense, and whether there may be a rationale for allowing expanding bullets in certain types of urban warfare, where there can be equivalent risks to civilian bystanders.²¹⁶

Although the use of chemical weapons was not explicitly included as a war crime in the Statute of the International Criminal Court, it can be argued that some forms of chemical and biological weapons are included in the war crime related to the use of asphyxiating gases.²¹⁷ In any event, under the Chemical Weapons Convention (CWC) (1993), states are expected to create relevant offences under national law – and indeed do so.²¹⁸ The absence of these weapons (p. 321) from the language of the Statute can be traced to the heated debate over whether to include nuclear weapons in the Statute of the International Criminal Court.²¹⁹

The absence of nuclear weapons from the Statute of the International Criminal Court has not prevented a number of states from pursuing treaties to outlaw their use. The Treaty on the Prohibition of Nuclear Weapons entered into force on 22 January 2021. There are now 50 States Parties to the treaty. Of course nuclear weapon states, their allies and those under their protection have distanced themselves from this process. The United States, the United Kingdom and France have stated that they would not accept ‘any claim that this treaty reflects or in any way contributes to the development of customary law’.²²⁰

The Treaty extends beyond the issue of the *use* of nuclear weapons. It starts:

Each State Party undertakes never under any circumstances to:

- (a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
- (b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
- (c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;

- (d) Use or threaten to use nuclear weapons or other nuclear explosive devices;
- (e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;
- (f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;
- (g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.

The resistance of the states with nuclear weapons should not blind us to the fact that any use of such weapons will almost certainly be a violation of the laws of war and a war crime, due either to the unnecessary suffering imposed (p. 322) on combatants, or to the excessive loss of life or injury to civilians or civilian objects (which is now seen as including the natural environment).²²¹

7.6 The Necessity of Shortening the War

Thinking about nuclear weapons forces us to confront the argument that such a weapon might shorten a war thus saving thousands of lives. The law is clear that targeting civilians is never justified by claims that more lives will be saved in the long run. This has been reaffirmed recently in the context of the law on cyber operations.²²² Of course, as we have already seen, the more complex point comes when the attacker claims that the target is a military objective (broadly defined) and the collateral damage is proportionate to the anticipated military advantage. Throughout this chapter we have seen that the more states seek to expand the definition of military objective, the more one finds recourse to the concept of *war*. The idea becomes seductive that to defeat the enemy, one must be able to eliminate, not only targets that contribute to war-fighting, but also those that sustain the war. Attacks and military advantages start to become associated with a fuller 'war strategy'.

We should not allow the practice and thinking from Wars past, when the distinction between combatants and civilians was almost abandoned, to shape our approach today.²²³ The civilian damage and loss of life that was (p. 323) witnessed in the area bombing of Coventry, Hamburg, London and Dresden, as well as the catastrophes visited on Tokyo, Hiroshima and Nagasaki, should be recalled before anyone considers allowing the contemporary law of war to justify attacking economic targets.²²⁴

The idea that 'vigorous wars' are better for humanity has been with us since at least 1863.²²⁵ In 1945, the idea of shortening the War was famously used in an attempt to justify the use of atomic bombs on the people of Hiroshima and Nagasaki.²²⁶ One must hope that we will never see this sort of planned annihilation again. But there is constant temptation to frame the rules for today's armed conflicts in terms of what is necessary to win the war, rather than in terms of eliminating unnecessary suffering to combatants while respecting the rights of those who are posing no immediate threat. The logic of war is changing. Today, there is no room for the once popular idea that one can shorten the war by weakening civilian morale through bombing campaigns, the primary purpose of which is spreading terror in the civilian population. Creating such terror is now outlawed and can no longer be defended.²²⁷

Footnotes:

- ¹ As discussed in Ch 3, Hathaway and Shapiro term this the 'New World Order'; see their diagram in *The New Internationalists: And Their Plan to Outlaw War* (2017) at 304.
- ² The question of whether Belligerents' Rights that flowed from the State of War continue to exist today is something we shall tackle in the following chapter. We concentrate here on the obligations of the parties to armed conflicts during the conduct of hostilities, primarily on what may not be targeted and what weapons are prohibited. See also Neff, 'The Prerogatives of Violence – In Search of the Conceptual Foundations of Belligerents' Rights', 38 *GYBIL* (1995) 41–72.
- ³ UN Doc A/CN.4/13 at para 18, and Corr 1–3, Report of the International Law Commission on the work of its First Session, 12 April 1949, Official Records of the General Assembly, Fourth Session, Supplement No 10, at 281.
- ⁴ UN Doc A/CN.4/SR.6 Summary record of the 6th meeting, p 52 para 55.
- ⁵ 'The Formation of International Humanitarian Law', 25 *IRRC* (1985) 3–24 at 14.
- ⁶ *Ibid* at 18.
- ⁷ *Ibid* at 20.
- ⁸ *Ibid* at 21.
- ⁹ For a very clear, yet reflective, view of almost the entire set of rules applicable in times of armed conflict, see the important book by Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019) (hereinafter *IHL*).
- ¹⁰ For a brief history of the 'convergence' of these 'currents', together with the suggestion of a third current from New York (human rights), see Kalshoven and Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th edn (2011); for war crimes, see Ch 10 below. Hampson suggests that the different currents address different actors: 'If Hague law is principally directed at the individual operator, Geneva law appears to focus more on the obligations of a party to the conflict. Geneva law provides answers or required outcomes, but Hague law provides tools enabling the operator to arrive at an answer in a specific situation.' Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law', 87 *International Law Studies* (2011) 187–213 at 193–94.
- ¹¹ Fleming, *Casino Royale* (1953) (London: Vintage, 2012) at 170.
- ¹² *Ibid* at 170–71.
- ¹³ In *Dr No* (1958), the hard-earned double 'OO' prefix is linked to a licence to kill (Vintage, London, 2012) at 24.
- ¹⁴ Diplomatic or other immunity under international law would be a separate question. The intelligence services do include their agents in diplomatic lists held by host states, thereby ensuring complete immunity from arrest or prosecution. The United Kingdom has a new statutory scheme to authorize criminal conduct in the course of certain covert operations, see Covert Human Intelligence Sources (Criminal Conduct) Act 2021. The Home Office's Explanatory Notes state that the power remains subject to safeguards including the fact that: 'All public authorities are bound by the Human Rights Act to act in a way that is compatible with the rights protected by the European Convention on Human Rights. Rights that are protected by the Convention include the right to life, and prohibition of torture or subjecting someone to inhuman or degrading treatment or punishment'.
- ¹⁵ 'Human Rights Law is Harming Britain's Armed Forces', *The Times* (19 October 2018).

¹⁶ See especially Common Art 3 to the 1949 Geneva Conventions, and paras 541, 596–600 of ICRC, *Commentary on the First Geneva Convention*, 2nd edn (2016); see also Knuckey, ‘Murder in Common Article 3’, in Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 449–67.

¹⁷ See Ch 4 for the law that binds states in the context of the use of force against another state. Non-state actors resorting to the use of force can hardly rely on humanitarian law to authorize their killing of soldiers from the state they are fighting against. Such acts remain crimes under national law. At the end of the conflict, states are encouraged under Additional Protocol (AP) II to the Geneva Conventions (1977) to grant an amnesty to those who ‘have participated in the armed conflict’, but this does not mean that the acts themselves were authorized by international law. Such an amnesty is not supposed to cover acts that constitute serious international crimes. See further Seibert-Fohr, ‘Amnesties’, *MPEPIL* (2018); and Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (2012) Ch 7.

¹⁸ See Clapham, ‘The Limits of Human Rights in Times of Armed Conflict and Other Situations of Armed Violence’, in Fassbender and Traibach (eds), *The Limits of Human Rights* (2019) 305–17.

¹⁹ Watts, ‘Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict’, 88 *International Law Studies* (2012) 145–80 at 151.

²⁰ *Ibid* at 152.

²¹ For examples of national law in Australia, the Netherlands and the United Kingdom criminalizing violence by non-state actors ‘without any exception whatsoever to accommodate armed conflict and the special regime of IHL’ see B. Saul, ‘Terrorism, Counter-Terrorism, and International Humanitarian Law’, in Saul and Akande (eds), *The Oxford Guide to International Humanitarian Law* (2020) 403–23 at 417. For the jurisdiction asserted by the United States over ‘unprivileged enemy belligerents’ causing loss of life as ‘murder in violation of the law of war’ and ‘terrorism’ see Military Commissions Act of 2009, 10 USC § 950t(15) and (24) (2009). For the definition of ‘unprivileged enemy belligerent’ see 10 USC § 948a(6) and (7). See also Watts (n 19) at 152.

²² Roberts, ‘The Equal Application of the Laws of War: A Principle Under Pressure’, 90 *IRRC* 872 (2008) 931–62 at 935.

²³ *Ibid*. Roberts’ main focus is, however, international armed conflicts (see Roberts (n 22) at 934), and he is addressing those who would seek to enhance the rights of those responding to aggression and addressing the plight of the ‘innocent soldier’ rather than building a case for a right to rebel; see further Roberts, ‘The Principle of the Equal Application of the Laws of War’, in Rodin and Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 226–54.

²⁴ For a list of the wars between US forces and Native American peoples between 1776 and 1890, see Vine, *The United States of War* (2020) Appendix.

²⁵ *R v Adebolajo and Anor* [2014] EWCA Crim 2779 [13].

²⁶ *Ibid* [17].

²⁷ *Ibid* [17] et seq.

²⁸ *Ibid* [33].

²⁹ The Court of Appeal explains (*ibid* [21]): ‘It was not surprising it was submitted that this element of the offence of murder in relation to the Queen’s peace did not normally feature in murder cases because prior to 1997 reliance by a defendant on a state of war would have been likely to involve an admission of treason. On the basis that this argument was available, Adebolajo was therefore entitled to put before the jury his defence that his killing

of Lee Rigby was part of a war with the British Government, involving a people's struggle against forceful occupation and aggression; he had not been under the Queen's peace, but at war with the Queen.'

³⁰ 'Murder under the Queen's Peace', *Criminal Law Review* (2008) 541–46 at 542. Hirst considers this idea might be traced to a passage by Sir Matthew Hale, whose *History of the Pleas of the Crown* (1736) stated that 'If a man kill an alien enemy within this kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.' So for Hirst (ibid), 'killing in the heat of combat is not "unlawful" in the first place'.

³¹ Minute Wood to PS [Private Secretary FCO] 15 October 2002, at paras 5 and 6. Rowe also states in this context that '[t]here is no specific defence to the crime of murder given to a soldier during international armed conflict', and he has suggested ways to introduce combatant immunity in international armed conflict into national law. Rowe, *Legal Accountability for Britain's Wars 2000–2015* (2016) at 135–36. Rowe considers that there would be no combatant immunity for either side in a non-international armed conflict such as those involving British troops in Afghanistan from December 2001 and in Iraq in 2004 (ibid at 136–37). He discusses this point and some of the judicial comments from past cases further in Rowe, 'The Criminal Liability of a British Soldier Merely for Participating in the Iraq War 2003: a Response to Chilcot Evidence', *Criminal Law Review* (2010) 752–60. To the extent that the Common Law has been interpreted in the United States there is little authority. In one case, John Gut was convicted for the murder of Native Americans after they had been captured; at one point in the judgment it was stated 'The evidence offered to prove a state of war existed between the United States and Sioux, and that the State, though its legal authorities had offered a reward for the killing of any male of that tribe, was properly rejected. That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable: but to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder.' *State of Minnesota v Gut*, 13 Minn (1868) 341 at 357.

³² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/573565/20161128-Consultation_document_death_and_injury_compensation_scheme.pdf. At para 21.

³³ Overseas Operations (Service Personnel and Veterans) Act 2021; for the background, see Mills and Dawson, 'Briefing Paper 8983', 22 September 2020; the Act also introduces the idea of a presumption against prosecution for relevant offences once a period of five years has expired, beginning with the day on which the alleged conduct took place. Sexual offences, genocide, crimes against humanity, torture and war crimes are excluded from the scope of this presumption.

³⁴ See also Rowe, *Legal Accountability for Britain's Wars 2000–2015* (2016) at 135–37.

³⁵ AP I Art 43(2).

³⁶ We will deal with the scope of these crimes and the possibilities for prosecution in Ch 10.

³⁷ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, vol 1: Rules* (2005) at 11 in the summary on Rule 3. Under this Rule 'All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel'; see also the introduction to Ch 33 at t 384.

³⁸ Ibid at 384.

³⁹ Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', 857 *International Review of the Red Cross* (2005) 175–212, rules 3, 4 and 106.

⁴⁰ Dinstein, 'The Distinction Between Unlawful Combatants and War Criminals', in Dinstein and Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 103–16 at 104.

⁴¹ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) at 43 para 4.6. For the special rule, see *ibid* at 42 paras 4.5 et seq. Looked at from the perspective of prisoner of war status, the result is similar. The ICRC's study on *Customary International Humanitarian Law* (n 37) states in Rule 106 that 'Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status.' In the past some saw belligerent acts by civilians as offences against the laws and customs of war, or even as war crimes; today such acts do not figure in the catalogues of international war crimes applied by international tribunals. For discussion of this point, and the related issue of spies, see Rogers, 'Unequal Combat and the Law of War', 7 *Yearbook of International Humanitarian Law* (2004) 2–34 at 21–27; Baxter, 'So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs', 28 *BYBIL* (1951) 323–45; Dinstein, 'The Distinction between Unlawful Combatants and War Criminals' (n 40) at 109 makes the further distinction between a soldier removing his uniform during an operation, losing the status of lawful combatant but not becoming a war criminal, and a soldier instead putting on the enemy uniform and becoming a war criminal, as this would be an 'improper use' of the uniform of the enemy under Art 23(f) of the Hague Regulations. The precise application and acceptance of the special rules in Art 44 of AP I is complex and need not detain us here; see further Sassòli, *IHL* (n 9) at paras 8.58, 8.69, 8.70 and 8.83. He concludes that in international armed conflicts, 'although acts of hostility committed by persons who have lost or never had combatant status may be punished under the domestic law of the captor, such acts do not constitute war crimes' (*ibid* at para 8.112).

⁴² Emily Crawford suggests that even before a single regime is achieved for all armed conflicts, captured rebels should enjoy 'treatment' as prisoners of war, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010) at 173; see further section 9.1.2 below.

⁴³ The only exception would seem to be the historical category of *levée en masse*. See Corn et al, *The Law of Armed Conflict: An Operational Approach* (2012) at 134 and 367; and Sassòli, *IHL* (n 9) at para 8.67.

⁴⁴ Consider the most recent arrangements in Colombia under the Amnesty Lei 1820 of 30 December 2016, which allows for pardons for political crimes related to the hostilities where these do not amount to war crimes or human rights violations. See, eg, Art 15: 'Artículo 15. Amnistía de iure. Se concede amnistía por los delitos políticos de "rebelión", "sedición", "asonada", "conspiración" y "seducción", usurpación y retención ilegal de mando y los delitos que son conexos con estos de conformidad con ley, a quienes hayan incurrido en ellos.' Thousands have been granted amnesty by the President for 'political crimes'. See at <http://es.presidencia.gov.co/noticia/170710-Presidente-Santos-firmo-decreto-que-otorga-amnistia-a-3252-miembros-de-las-Farc-por-delitos-politicos>.

⁴⁵ In the Biafra conflict, the Federal authorities and the opposition both treated captured fighters as prisoners of war. Sivakumaran, *The Law of Non-International Armed Conflict* (2012) at 524. The various agreements entered into by the parties to the conflict in South Sudan foresee the release of those detained in relation to the conflict (often referred to as 'prisoners of war'). See, eg, Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan, 12 September 2018, Art 2.1.6. See also the obligation under Art 6(5) of AP II: '5. At the end of hostilities, the authorities in power shall endeavour to grant

the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.’

⁴⁶ Rodin, ‘The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right’, in Rodin and Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 44–68 at 63–64.

⁴⁷ Ibid at 68.

⁴⁸ Hartig, ‘Post Kampala: The Early Implementers of the Crime of Aggression’, 17 *JICJ* (2019) 485–93. In many cases national jurisdictions already had the possibility to prosecute wars of aggression, but these laws have been adjusted in the light of the ICC Statute: see Hartig’s examination with regard to Afghanistan, Croatia, Czech Republic, Estonia, Finland, Germany, North Macedonia and Slovenia; other states that have included the crime of aggression include Luxemburg, Ecuador and Samoa.

⁴⁹ Weiler and Dushman, ‘Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between *Jus ad Bellum* and *Jus in Bello*’, 24 *EJIL* (2013) 25–61 at 57.

⁵⁰ Ibid at 60.

⁵¹ Clapham, ‘The Limits of Human Rights’ (n 18) at 306–07.

⁵² General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc CCPR/C/GC/36, 30 October 2018, para 70.

⁵³ See eg AP I Arts 48–67; and Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol 1: *Rules* (2005) (n 37) Rules 1–56.

⁵⁴ See Ch 10 below; for an overview of some of the recent practice and war crimes trials before international tribunals, see Casey-Maslen and Haines, *Hague Law Interpreted* (2018) Chs 4–7.

⁵⁵ AP I Art 48; Schmitt, Garraway and Dinstein, *The Manual on the Law of Non-International Armed Conflict* (2006) at para 1.1.4; Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) at para 39; The Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), *Manual on International Law Applicable to Air and Missile Warfare* (2013), Rule 10(a)(ii); Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017) Rules 99–100. Sassòli and Quintin point out that certain cultural or medical objects, which might be seen as military objectives under the tests discussed below, are protected from attack under specific rules: ‘Active and Passive Precautions in Air and Missile Warfare’, 44 *Israel Yearbook on Human Rights* (2014) 69–123 at 91, referencing Arts 9 and 11 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and Arts 12 and 13 of the 1999 Second Protocol to that Convention on Cultural Property; as well as Art 21 of GC I of 1949, Art 35 of GC II (1949) and Art 19 of GC IV (1949).

⁵⁶ AP I Art 49(1). For the discussion as to when a cyber attack leads to violence or the destruction of an object, and whether data can be considered objects, see Schmitt (ed), *Tallinn Manual 2.0* (n 55) at 414–22.

⁵⁷ International Law Association Study Group on the Conduct of Hostilities in the 21st Century, ‘The Conduct of Hostilities and International Law: Challenges of 21st Century Warfare’, 93 *International Law Studies* (2017) 322–88 at 327.

⁵⁸ AP I Art 52(2).

- ⁵⁹ See Sassòli, *IHL* (n 9) at Ch 8.6.5; Casey-Maslen and Haines, *Hague Law Interpreted* (n 54) Chs 4 and 5; Boothby, *The Law of Targeting* (2012) at 98–111; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (2016) Ch 4.
- ⁶⁰ US Department of the Navy, NWP 1-14M, August 2017, para 5.3.1.
- ⁶¹ Casey-Maslen and Haines, *Hague Law Interpreted* (n 54) at 102.
- ⁶² UK *Manual of the Law of Armed Conflict* at 56; see also Schmitt, Garraway and Dinstein, *The Manual on the Law of Non-International Armed Conflict* (2006) (n 55) at 6, ‘“Purpose” indicates that it is known, based on reliable intelligence or other information, that the enemy intends to use (or abuse) the object militarily in the future.’
- ⁶³ Dinstein, *International Armed Conflict* (n 59) at 114.
- ⁶⁴ Ibid.
- ⁶⁵ From the understanding made by Canada at the time of ratification (20 November 1990) of AP I (emphasis added); see also the similar positions of Australia, Belgium, France, Germany, Italy, the Netherlands, New Zealand, Spain and the United Kingdom with regard to the idea of considering the attack as a whole and not just isolated parts of the attack.
- ⁶⁶ *Department of Defense Law of War Manual* (2016) at para 5.6.7.3 (footnotes omitted).
- ⁶⁷ Dinstein, ‘Legitimate Military Objectives Under Current Jus in Bello’, 78 *International Law Studies* (2002) 139–72 at 145; and see also Dinstein, *International Armed Conflict* (n 59) at 108–09.
- ⁶⁸ *Manual of Armed Forces Law*, vol 4: *Law of Armed Conflict*, DM 69 (2nd edn) (2019) at para 8.6.5.
- ⁶⁹ See Henderson, *The Contemporary Law of Targeting* (2009) at 152–54.
- ⁷⁰ At para 5.6.6.2 (footnotes omitted); see also the Australian Manual (2006), *Law of Armed Conflict* at para 5.31, ‘economic targets that indirectly but effectively support operations are also military objectives if an attack will gain a definite military advantage’. The differences between the Manuals is significant, the Australian Manual requires that there be effective support to ‘operations’, while the US *Manual* requires ‘an effective contribution to the enemy’s war-fighting/war-sustaining effort’.
- ⁷¹ We might note that in this context that, after referencing the US interpretation of military objectives as including economic targets that ‘indirectly but effectively support or sustain the enemy’s war-fighting capability’, the distinguished drafters of the *Manual on the Law of Non-International Armed Conflict* considered that such a reading of military objective ‘is not relevant to non-international armed conflicts’: Schmitt, Garraway and Dinstein, *The Manual on the Law of Non-International Armed* (n 62) at 6 fn 3.
- ⁷² Egan, ‘International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations’, 92 *International Law Studies* (2016) 235–48 at 242.
- ⁷³ Jennifer M O’Connor (US General Counsel, Dept of Defense), ‘Applying the Law of Targeting to the Modern Battlefield’ (2016), available at <https://dod.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>.
- ⁷⁴ Note the reference to the Lieber Code Art 15 in the US *Law of War Manual* at para 5.17.2.3.
- ⁷⁵ DM 112, para 515(5).
- ⁷⁶ *Manual of Armed Forces Law* (n 68).

⁷⁷ Doswald-Beck (ed), *San Remo Manual* (n 55) at 150; *Harvard Manual on Missile Warfare* (2013) (n 55) at 121: 'The crux of the issue is related to revenues from exports of oil which is not put to military use by the enemy. The majority of the group of Experts took the position that the connection between revenues from such exports and military action is too remote. Consequently, it rejected the war-sustaining argument . . .' and 42 (commentary to Rules 24, and 1y). Also Schmitt (ed), *Tallinn Manual 2.0* (n 55) at 441; Schmitt, Garraway and Dinstein, *The Manual on the Law of Non-International Armed Conflict* (n 62) at 6 fn 3.

⁷⁸ 'Targeting "Islamic State" Oil Facilities', 90 *International Law Studies* (2014) 499-513 at 513.

⁷⁹ Rogers, *Law on the Battlefield*, 2nd edn (2004) at 70-71.

⁸⁰ Dinstein, *International Armed Conflict* (n 59) at 199.

⁸¹ For detail of the approach of the US Department of Defense see Goodman, 'The Obama Administration and Targeting "War Sustaining" Objects in Noninternational Armed Conflict', 110 *AJIL* (2019) 663-79 at 664 and 677. For arguments about targeting cash as 'war sustaining' or 'war supporting', see Schmitt and Merriam, 'The Tyranny of Context: Israeli Targeting Practices in Legal Perspective', 37 *University of Pennsylvania Journal of International Law* (2016) 53-139.

⁸² 'The Conduct of Hostilities and International Law: Challenges of 21st Century Warfare', 93 *International Law Studies* (2017) 322-88 at 341.

⁸³ Total war, under one understanding, 'assumes the commitment of massive armed forces to battle, the thoroughgoing mobilization of industrial economies in the war effort, and hence the disciplined organization of civilians no less than warriors'. See Chickering and Förster, 'Are We There Yet? World War II and the Theory of Total War', in Chickering, Förster and Greiner (eds), *A World at Total War: Global Conflict and the Politics of Destruction (1937-1945)* (2005) 1-16 at 2. To be clear, claiming to be in a total war cannot suspend the laws of armed conflict: Rowe, 'Total War', in Gutman, Rieff and Dworkin (eds), *Crimes of War*, 2nd edn (2007) 402; the origins of the expression in the period between the World Wars is explained by Strachen, when it mainly referred to the demands likely to be made on the belligerent state. Nevertheless, he explains, 'When General Erich Ludendorff's *Der Totale Krieg*, first published in 1935, was translated into English, its title was *The Nation at War*, and "der totale Krieg" was rendered much more accurately as "totalitarian" war. The German warlord's point was that the next war would require the mobilisation of the entire nation for the purposes of its prosecution: the political and social fabric of the state would be bent to the achievement of a single purpose. But between 1939 and 1945 total war acquired an additional and different meaning: it referred to the readiness to breach the principle of non-combatant immunity, one of the keystones of just war theory. It defined not what would be required of one's own population, but what one would inflict on the enemy's.' 'Strategic Bombing and the Question of Civilian Casualties up to 1945', in Addison and Crang (eds), *Firestorm: The Bombing of Dresden, 1945* (2006) 1-17 at 1.

⁸⁴ For the complex arguments about whether the merchant ships had become military objectives by carrying arms for self-defence, whether such attacks were justified as reprisals, and whether the orders regarding submarine crew's obligations towards survivors were illegal see Tucker, *The Law of War and Neutrality at Sea* (1957) at 57-73; see also Goldie, 'Targeting Enemy Merchant Shipping: An Overview of Law and Practice', 65 *International Law Studies* (1993) 1-26; Heintschel von Heinegg, 'Submarine Operations and International Law', in Engdahl and Wrange (eds), *Law at War: The Law as Was and the Law as it Should Be* (2008) 141-62.

⁸⁵ See para 8.6.2.2 (destruction by surface warships); para 8.7.1 (destruction by submarines); and para 8.8 (destruction by military aircraft).

⁸⁶ Eg *San Remo Manual* (n 55) para 60(g). The rules for attacks on enemy and neutral vessels and civil aircraft more generally are found *ibid* at paras 60, 63, 67 and 70, as well as at paras 38–46 and 72–77. The other criteria listed in para 60 include, for enemy merchant vessels: (a) engaging in belligerent acts on behalf of the enemy; (b) acting as an auxiliary to an enemy's armed forces; (c) being incorporated into or assisting the enemy's intelligence gathering system; (d) sailing under convoy of enemy warships or military aircraft; (e) refusing an order to stop or actively resisting visit, search or capture; (f) being armed to an extent that they could inflict damage to a warship. Passenger vessels carrying only civilian passengers may not be destroyed at sea: *ibid* at paras 140 and 152. Cf the International Law Association's Helsinki Principles on the Law of Maritime Neutrality, Principle 5.1.2 para 5, which seems to allow for an attack where passenger ships are 'incorporated into or assist the enemy's intelligence system'. See also the *Harvard Manual on Missile Warfare* (n 55), Rules 27 and 174, for enemy and neutral civilian aircraft; and for civilian airliners servicing passengers, see *ibid* Rules 58–63 and 68–70. For a detailed look at the traditional law, see Fenrick, 'Legal Aspects of Targeting in the Law of Naval Warfare', *Canadian Yearbook of International Law* (1991) 238–82; and Fenrick, 'The Merchant Vessel as Legitimate Target in the Law of Naval Warfare', in Delissen and Tanja (eds), *Humanitarian Law of Armed Conflict – Challenges Ahead: Essays in Honour of Fritz Kalshoven* (1991) 425–43.

⁸⁷ See the detailed criticism of such an approach by Busuttil, *Naval Weapons Systems and the Contemporary Law of War* (1998) at 143–48. See also Heintschel von Heinegg, 'Submarine Operations and International Law', in Engdahl and Wrangé (eds), *Law at War: The Law as Was and the Law as it Should Be* (2008) 141–62 at 157–59; and Heintschel von Heinegg, 'The Law of Armed Conflict at Sea', in Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict*, 3rd edn (2013) 463–547 at 490, '“war material” may not be understood as comprising goods which have some tenuous relevance for the enemy's war efforts. Rather, the objects concerned must be directly apt for use by the enemy's armed forces.' And most recently Heintschel von Heinegg, 'Blockade', *MPEPIL* (2015) at para 54, 'the US position on targeting the enemy's war-sustaining effort has not found approval by other States, and it is therefore contrary to international treaty and customary law'. Dinstein is explicit in his exclusion of exports as an example of a contribution to military action; for a legitimate attack on an enemy or neutral merchant he gives the example of 'carrying military materials': Dinstein, *International Armed Conflict* (n 59) at 129–30.

⁸⁸ Sivakumaran, 'Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice', 92 *International Law Studies* (2016) 153–203.

⁸⁹ See Doswald-Beck (ed), *San Remo Manual* (n 55) 181–83 esp at para 10.

⁹⁰ See AP I Art 51(3) and AP II Art 13(3); the interpretation of what constitutes direct participation remains controversial, see Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', 42 *New York University Journal of International Law and Politics* 3 (2010) 831–916; further controversy surrounds the related concept of a 'continuous combat function' in an armed group, which is said to also remove protection from attack. See section 9.2.1 below. For criticism see Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Study on targeted killings', UN Doc A/HRC/14/24/Add6 (2010) at paras 57–69.

⁹¹ See Alston (n 90) at para 68.

⁹² New Zealand, *Manual of Armed Forces Law* (n 68) at para 6.5.15 (footnotes omitted).

⁹³ Rogers, *Law on the Battlefield*, 3rd edn (2012) at 15.

⁹⁴ The expression ‘collateral damage’ is not defined in the treaties on the law of armed conflict, but it has entered the popular lexicon and may often now be perceived as a euphemism for civilian deaths in a military strike. The use of the term itself, however, does not determine whether or not the strike was legal or the deaths justified. The Elements of Crimes for the International Criminal Court Statute, adopted by the States Parties in 2002, uses the expression to explain that even where such incidental damage is acceptable as a matter of war crimes law, this does not mean that it is necessarily legal under other rules (at fn 36, Art 8(2)(b)(iv)): ‘The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*.’ The *San Remo Manual* (n 55) uses the expression in order to include protected objects beyond civilians and civilian objects (such as wounded combatants and the environment): para 13(c) ‘collateral casualties or collateral damage means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives’. Such a use of the expression ‘collateral damage’ is in my view helpful, as it allows for such non-civilian protected persons to be included in the proportionality equation on the opposite side of the military advantage calculation rather than being ignored. On the issue, see International Law Association Study Group on the Conduct of Hostilities in the 21st Century, ‘The Conduct of Hostilities and International Law: Challenges of 21st Century Warfare’, 93 *International Law Studies* (2017) 322–88 at 357–59.

⁹⁵ We will deal with the specificities of who may be attacked as combatants or fighters or civilians directly participating in hostilities in the sections below, even if some consider that such individuals constitute a military objective. Rogers, *Law on the Battlefield* (n 93) at 102.

⁹⁶ AP I Art 51(5)(b).

⁹⁷ AP I Art 57(2)(a)(iii).

⁹⁸ AP I Art 57(2)(b); for a detailed discussion of all the rules for precaution in attack and by the party subject to the attack, see Sassòli and Quintin, ‘Active and Passive Precautions’ (n 55).

⁹⁹ AP I Art 85(1) and 85(3)(b); ICC Statute Art 8(2)(b)(iv); and for customary international law, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (n 37) Rule 156 at 576 and 590.

¹⁰⁰ For an introduction to some of ways in which collateral damage is calculated, see Corn, Dapper and Williams, ‘Targeting and the Law of Armed Conflict’, in Corn, VanLandingham and Reeves (eds), *US Military Operations: Law, Policy, and Practice* (2016) 167–207; and see also Jones, *The War Lawyers: The United States, Israel, and Juridical Warfare* (2020).

¹⁰¹ See Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment* (2018) at 18–20; Gisel, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law* (2018) at 44ff.

¹⁰² Gisel (n 101) at 21 and 22.

¹⁰³ Blum, ‘The Fog of Victory’, 24 *EJIL* (2013) 391–421 at 420 asks what the aims of modern wars are, and illustrates the inadequacy of considering military advantage as the key concept: ‘Consider, for instance, the “war over hearts and minds”. To the extent that such a war exists, why would it make sense to weigh collateral harm against military

advantage? Why would it not be weighed against popular perceptions of good and bad, the just and the unjust?’

104 Ibid at 14, 21, 22, 55.

105 Ibid at 29–31.

106 Associated Press, ‘New War Rules Emphasize Need to Avoid Civilian Casualties’ (14 December 2016), attributing this to ‘senior defense officials’. In the 2003 Iraq conflict it was reported that ‘Air war commanders were required to obtain the approval of Defense Secretary Donald L Rumsfeld if any planned airstrike was thought likely to result in deaths of more than 30 civilians. More than 50 such strikes were proposed, and all of them were approved.’ Gordon, ‘US Air Raids in ‘02 Prepared for War in Iraq’, *New York Times* (20 July 2003).

107 Gow, *War and War Crimes: The Military, Legitimacy and Success in Armed Conflict* (2013).

108 The United States and other states have stressed that judges should not take into account information that was not available to the decision-maker at the time. See *US Law of War Manual* (2016) at para 5.3.2.

109 From the UK Statement made at the time of ratification of AP I; see also *US Law of War Manual* (2016) at para 5.3.2; for further discussion of what sort of foreseeability is expected in this context, see Gillard, *Proportionality* (n 101) at 15–17.

110 *UK Manual* (2004) at para 5.33.3.

111 *US Law of War Manual* (2016) (n 66) at para 5.10.1.2.

112 Boothby, ‘Aspects of the Distinction Principle under the US DoD Law of War Manual’, in Newton (ed), *The United States Department of Defense Law of War Manual: Commentary and Critique* (2018) 161–200 at 193.

113 See the discussion in Haque, *Law and Morality at War* (2017) Ch 9, and his criticism of the DoD Revised *Law of War Manual* (n 66) on this point at <https://www.justsecurity.org/35589/human-shields-updated-dept-defenses-law-war-manual/>.

114 Sassòli, *IHL* (n 9) at para 8.35.

115 Ibid.

116 For diverging arguments, see Gisel, *The Principle of Proportionality* (n 101) at 23–31.

117 Kennedy, ‘War and International Law: Distinguishing Military and Humanitarian Professions’, 82 *ILS* (2006) 3–33 esp at 25–26.

118 Gisel, *The Principle of Proportionality* (n 101) at 25.

119 See the *UK Manual* (2004) at para 2.7.1.

120 Lazar, ‘War’ in *International Encyclopedia of Ethics* (2013) at 12; see also Shaw, *The New Western Way of War: Risk-Transfer War and its Crisis in Iraq* (2005).

121 Lazar, *Sparing Civilians* (2015) at 143.

122 Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th edn (2015) at xiii.

123 Ibid at xiv.

124 Ibid.

125 Walzer (n 122) at xviii–xix.

- 126** Ibid at xx.
- 127** Ibid.
- 128** Walzer (n 122) at xxi.
- 129** Ibid at xvi.
- 130** Ibid.
- 131** Justin Bronk, quoted in Fisher, 'Stress of Killing from Afar Creates Shortage of MoD Drone Operators', *The Times* (13 January 2020).
- 132** UKMOD, 'The UK Approach to Unmanned Aircraft Systems', Joint Doctrine Note 2/11, 30 March 2011, at para 517.
- 133** 'Unmanned Aircraft Systems', JDP 0-30.2, August 2017, at 50.
- 134** See the discussion by Blum, 'The Paradox of Power: The Changing Norms of the Modern Battlefield', 56 *Houston Law Review* (2019) 745-87.
- 135** Khan, 'The Paradox of Riskless Warfare', 22 *Philosophy and Public Policy Quarterly* 3 (2002) 1-8 at 4.
- 136** JDN 2/11 (n 132) para 517.
- 137** Time and again the debate over drones is reduced to the idea that they are more accurate and less likely to make mistakes in the heat of battle. Drones are said, therefore, to bring better compliance with the law of war. But this manoeuvre avoids tackling the bigger question of whether the killing should be taking place at all. See Boyle, *The Drone Age* (2020) esp at 278-79.
- 138** See, eg, Sutcliffe, *We See Everything* (2018) (book); *Good Kill* (2014) (film); *Grounded* (2012) (play).
- 139** JDN 2/11 (n 132) at 49.
- 140** Ibid at 50; see, for further discussion of the relationship between the US military and the gaming industry, as well as the effects of gaming training on the military, Bourke, *Wounding the World: How Military Violence and War-Play Invade Our Lives* (2014) Chs 6 and 7.
- 141** Otto and Weber, 'Mental Health Diagnoses and Counselling Among Pilots of Remotely Piloted Aircraft in the United States Air Force', Medical Surveillance Monthly Report, US Armed Forces Health Surveillance Centre, available at <https://health.mil/Reference-Center/Reports/2013/01/01/Medical-Surveillance-Monthly-Report-Volume-20-Number-3>.
- 142** Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-first Century* (2009) at 432.
- 143** Walzer, *Just and Unjust Wars* (n 122) at 305.
- 144** Walzer, 'The Risk Dilemma', 44 *Philosophia* (2016) 289-93 at 292-93; and see Kasher and Yadlin, 'Human Life in the War on Terrorism: a Response to "the Risk Dilemma" by Michael Walzer', ibid at 295-308; and Walzer, 'Response to Asa Kasher and Amos Yadlin', ibid at 309-11.
- 145** See Frowe, *Defensive Killing* (2014) Ch 8, who argues that those acting in self-defence may avoid harm to themselves by harming those non-combatants who knowingly contribute to an unjust war; compare Kamm, *The Moral Target* (2012) Ch 4 and Haque, *Law and Morality at War* (n 113) Appendix.

- 146** See Kasher and Yadlin, (n 145) ; and Walzer, 'Response to Asa Kasher and Amos Yadlin' (n 145). For a legal analysis of the way the Israeli Defense Forces include an aversion to the risk of a soldier's being captured when considering proportionality calculations and acceptable civilian damage, see Schmitt and Merriam, 'The Tyranny of Context' (n 81) esp at 128-31.
- 147** Kasher and Yadlin (n 144) at 304-05.
- 148** McMahan, 'The Just Distribution of Harm Between Combatants and Non-combatants', 38 *Philosophy and Public Affairs* (2010) 342-79 at 359.
- 149** '[A] person is morally liable to attack in war by virtue of being morally responsible for a wrong that is sufficiently serious to constitute a just cause for war, or by being morally responsible for an unjust threat in the context of war.' McMahan, 'The Morality of War and the Law of War', in Rodin and Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 18-43 at 22. McMahan also suggests that there is a case for distinguishing between just and unjust combatants when it comes to their liability to attack: McMahan, *Killing in War* (2009) 25. For example, McMahan suggests that there is a case for distinguishing between just and unjust combatants when it comes to their liability to attack *ibid* at 25. Frowe takes this further and would render non-combatants liable to attack even for contributions that do not directly cause a threat. She challenges the 'widespread acceptance of the principle of non-combatant immunity', because a consequence is that 'it undermines the moral pressure on non-combatants to think about the justness of their country's war': Frowe, *Defensive Killing* (n 145) at 185. Some of these arguments are addressed by Haque, *Law and Morality at War* (n 113).
- 150** Similarly from a philosophy of just war perspective, see Margalit and Walzer, 'Israel: Civilians and Combatants', *New York Review of Books* (14 May 2009) at 21-22. In this piece they advocate the following guideline (at 22): 'Conduct your war in the presence of noncombatants on the other side with the same care *as if* your citizens were the non-combatants.' For a thoughtful and detailed look at how these moral concerns map on the international law, see Luban, 'Risk Taking and Force Protection', in Benbaji and Sussmann (eds), *Reading Walzer* (2014) 277-301.
- 151** Benvenisti, 'Human Dignity in Combat', 39 *Israel Law Review* (2006) 81-109 at 90 (original emphasis).
- 152** *Ibid* at 93.
- 153** *Ibid* at 93-94 (footnotes omitted).
- 154** At para 4.2.3 fn 6; and see the similar statement in the US *Law of War Manual* (2016) at para 2.2.2.1.
- 155** For an overview of some of the cases and discussions, see Solis, *The Law of Armed Conflict* (2010) at 258-69.
- 156** Dinstein, 'Military Necessity', *MPEPIL* (2015) at para 8.
- 157** *Manual* (n 41) at para 2.2.3.1 (original emphasis).
- 158** At para 2.2, as amended September 2010 (footnotes omitted). The excerpt quotes the *NATO Glossary of Terms and Definition AAP-06* (2019) at 82.
- 159** GC III Art 126 para 2.
- 160** GC IV Art 53.
- 161** GC I Arts 8, 12, 32, 33, 42, 50; GC II Arts 8, 28, 51; GC III Arts 23, 126; GC IV Arts 16, 18, 27, 49, 51, 53, 55, 83, 108, 143, 147; AP I Arts 54(5) 62(1), 67(4), 71(3). See also Hague IV (1907) Regulations Art 23(g). Note also in the ICC Statute Art 8(2)(a)(iv) 'military

necessity'; Art 8(2)(b)(xiii) 'necessities of war'; and Art 8(2)(e)(xii) 'necessities of the conflict'.

162 See AP I Art 41(3), which is confirmed as a rule of customary international law; see Dinstein, *International Armed Conflict* (n 59) at 11–12.

163 ILC Articles on State Responsibility (2001) Art 25(1)(a).

164 See Crawford, *The International Law Commission's Articles on State Responsibility* (2002) at 185 para 25; and see also ILC Articles (n 163) Art 26.

165 Crawford (n 164) at 185–86 para 21, see also para 19. See also Sassòli, *IHL* (n 9) at paras 5.51–5.55. For discussion of the implicit and explicit references to military necessity in the all treaties dealing with the law of armed conflict, see Dinstein, 'Military Necessity' (n 156).

166 The New Zealand definition of 'military necessity' includes the sentence 'The principle of military necessity holds that a State involved in armed conflict is justified in using such lawful force as is necessary to bring about the submission of the enemy at the earliest possible moment and with the least possible cost to itself in terms of lives and resources. LOAC [the Law of Armed Conflict] does not require a State to allow itself to be destroyed.' See *NZ Manual of Armed Forces Law* (n 68) at 4.2.1.

167 Fenrick, 'Legal Aspects of Targeting in the Law of Naval Warfare' (n 86) at 247.

168 'In view of all the facts proved and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare.' *Prosecutor v Goering et al*, Judgment of the IMT, 1 October 1946, Official Text, at 313.

169 Ibid at 312.

170 As read out at the *Nuremberg Trial Proceedings*, vol 5, Thursday, 9 May 1946, at 218.

171 Ibid at 220.

172 *Prosecutor v Goering et al* (n 168) at 313. See also Boothby and Heintschel von Heinegg, *The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual* (2018) at 333, who conclude that 'the sinking of an enemy merchant vessel without having first placed passengers, crew and documents in a place of safety for the sole reason that capture and sending the vessel into port is impossible or unfeasible because of military considerations will most probably be considered a war crime'. Doswald-Beck has pointed out that the absolute rule in the 1936 Protocol actually concerns removal of passengers from a merchant ship after capture rather than the idea of rescue from a sinking warship: 'The International law of Naval Armed Conflicts: The Need for Reform', VII *Italian Yearbook of International Law* (1986/7) 251–82 at 257. For the expectations on submarine commanders in the context of rescue, see ICRC, 'Article 18' in *Commentary on the Second Geneva Convention*, 2nd edn (2017) at paras 1642, 1644, 1652.

173 The idea of military necessity as an extra layer of restraint is rejected by Hayashi, 'Basic Principles', in Liivoja and McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (2016) 89–105 at 92; and for more detail see Hayashi, *Military Necessity* (2020).

174 Greenwood, 'International Humanitarian Law (Laws of War)', in Kalshoven (ed), *The Centennial of the First International Peace Conference* (2000) 161–259 at 181–84.

- 175** Greenwood, 'Historical Development and Legal Basis', in Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 1–38 at 33; *ibid*, 2nd edn (2007) 1–43 at 38; and the sentence is carried over into the 3rd edn (2013) by O'Connell, 'Historical Development and Legal Basis' 1–42 at 37. See also Garraway, 'International Humanitarian Law in Self-Defence Operations', in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (2010) 213–15, 'the principle of necessity can operate as an additional level of restraint in that acts which might otherwise be legal under international humanitarian law may be prohibited if they are not necessary for the pursuance of legitimate goals'.
- 176** 'Indeterminacy in the Law of Armed Conflict', 95 *International Law Studies* (2019) 118–60; and see also Haque, *Law and Morality at War* (n 113) at 32–34, where he rejects the claim that military necessity can justify or permit certain acts.
- 177** Casey-Maslen and Haines (n 54) at 299.
- 178** *Ibid*.
- 179** For a detailed look at the competing approaches, see Luban, 'Military Necessity and the Cultures of Military Law', *Leiden Journal of International Law* (2013) 315–49.
- 180** Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict', 22 *Yale Journal of International Law* (1997) 1–109 at 54.
- 181** Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', 50 *Virginia Journal of International Law* 4 (2010) 795–839 at 799.
- 182** For an introduction to the debate in modern just-war theory pitting the traditional approach of Walzer against revisionists such as McMahan and Rodin with his concept of 'reductive individualism', see Lazar, 'Method in the Morality of War', in Lazar and Frowe (eds), *The Oxford Handbook of Ethics of War* (2018) 21–40.
- 183** Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1980) at 49; the translation is by Best, who includes the French (*ibid* at 335) 'Ma grande maxime a toujours été qu'en politique comme en guerre que tout mal, fût-il dans les règles, n'est excusable qu'autant qu'il est absolument nécessaire; que tout ce qui est en delà, est crime.'
- 184** Allain, *The Last Waltz of the Law of Nations: A Translation of the 1803 Edition of The Institutions of Natural Law and the Law of Nations by Joseph-Mathias Gérard de Rayneval* (2019) Book III, Ch V, §1, 'On the Effects of War', at 153.
- 185** Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts* (2008) at 47 (footnote reference omitted).
- 186** Goodman, 'The Power to Kill or Capture Enemy Combatants', 24 *EJIL* 3 (2013) 819–53; Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"', 24 *EJIL* 3 (2013) 855–61; Goodman, 'The Power to Kill or Capture Enemy Combatants: A rejoinder to Michael N Schmitt', 24 *EJIL* 3 (2013) 863–66.
- 187** 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009', 90 *IRRC* (2008) 991–1047 at 1040–44.
- 188** Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', 42 *New York University Journal of International Law and Politics* 3 (2010) 769–830 at 784.

- 189** Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', 50 *Virginia Journal of International Law* 4 (2010) 795-839 at 835.
- 190** Anderson, 'Who Owns the Rules of War?', *New York Times Magazine* (13 April 2003).
- 191** Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of *Jus in Bello* Proportionality as We Know It?', 45 *Israel Law Review* (2012) 35-52 at 41.
- 192** Hampson 'Direct Participation in Hostilities' (n. 10) at 194.
- 193** Parks, 'Part IX' (n 188) at 803.
- 194** Kleffner, 'Section IX' (n 191) at 44-45; see also Ohlin, *The Assault on International Law* (2015) at 186-87.
- 195** Ohlin (n 194) at 187.
- 196** Parks, 'Part IX' (n 188) at 786-87, referencing Kalshoven, 'The Soldier and His Golf Clubs', in Swinarski (ed), *Studies and Essays in International Humanitarian Law and Red Cross Principles: Essays in Honour of Jean Pictet* (1984) 360-76.
- 197** Some of the points raised by the military experts have been addressed in detail by Melzer, who was responsible for the ICRC expert process and is the author of its Interpretive Guidance. Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', 42 *New York University Journal of International Law and Politics* 3 (2010) 831-916; Melzer, *Targeted Killing in International Law* (2008).
- 198** Note the admission in the ICRC Guidance (n 187) at 1043, that 'In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL.'
- 199** Schmitt, 'Military Necessity' (n 189) at 796-97.
- 200** Kleffner, 'Section IX' (n 191a) at 41 fn 29; see also Hayashi, 'Basic Principles' (n 173) at 91.
- 201** Blum, 'The Dispensable Lives of Soldiers', 2 *Journal of Legal Analysis* 1 (2010) 69-124 at 69 and 107; see also Blum, 'The Paradox of Power: The Changing Norms of the Modern Battlefield', 56 *Houston Law Review* (2019) 745-87 at 776 on the impact of social and cultural norms; see further Ohlin and May, *Necessity in International Law* (2016) at 184.
- 202** *Goodbye to All That* (1929) (New York: Everyman's Library, 2018) at 136.
- 203** Sassòli, *IHL* (n 9) at para 8.373; a related point is the idea that it is better to have clear guidance than to leave the rules so open-ended that they cannot be applied by soldiers on the ground. See for example Dill 'Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities' in Bohrer, Dill, and Duffy, *Law Applicable in Armed Conflict* (2020) at 197-265 esp at 220.
- 204** *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at para 78.
- 205** *Ibid.*
- 206** See Judge Higgins' Dissenting Opinion in the *Nuclear Weapons Opinion* (n 204) at paras 10-20; for an overview of all the Opinions, see O'Connor, 'Nuclear Weapons and the

Unnecessary Suffering Rule', in Nystuen, Casey-Maslen and Golden Bersagel (eds), *Nuclear Weapons under International Law* (2014) 128–47.

207 See the discussion by Sassòli, *IHL* (n 9) at 8.368–8.372; for a detailed look at some of the parameters of this rule and the history of the discussions around it, see Casey-Maslen and Haines, *Hague Law Interpreted* (n 54) Ch 8; Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St Petersburg of 1868 to Additional Protocol I of 1977', 34 *IRRC* (1994) 98–122.

208 This rule can be traced to the Laws of Manu, in Asia (circa 200 BCE), Ch VII, para 90. When a King 'fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire.' While the Laws of Manu reference the duty of honourable warriors, in Europe in the 17th century, Grotius considered the ban on poison originated with kings who were less safe from poison – see Kalmanovitz, *The Laws of War in International Thought* (2020) at 65 fn 101; the prohibition nevertheless evolved into something aimed at unnecessary suffering for those subjected to poisoned weapons – see Casey-Maslen and Haines, *Hague Law Interpreted* (n 54) at 212, where they highlight the suffering caused by the use of bamboo punji sticks placed in traps in Viet Nam.

209 The relevant treaties are as follows: 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight; 1899 Hague Declaration 2 Concerning Asphyxiating Gases; 1899 Hague Declaration 3 Concerning Expanding Bullets; 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines; 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and their Destruction; 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction; 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, amended in 2001, and its protocols: 1980 Protocol I on Non-Detectable Fragments; 1980 Protocol II on Mines, Booby Traps and Other Devices, amended 1996; 1980 Protocol III on Incendiary Weapons; 1995 Protocol IV on Blinding Laser Weapons; and 2003 Protocol V on Explosive Remnants of War; 2008 Convention on Cluster Munitions; and most recently the (2017) Treaty on the Prohibition of Nuclear Weapons discussed below. For an overview, see Sassòli, *IHL* (n 9) at paras 8.366–8.407; and for a detailed examination, see Boothby, *Weapons and the Law of Armed Conflict*, 2nd edn (2016); Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons* (2019).

210 See for the details, see Boothby (n 209) Ch 18; Sivakumaran, *The Law of Non-International Armed Conflict* (n 45) 392–412.

211 See at <https://www.genevacall.org/>.

212 Security Council Resolution S/RES/1540 (2004) para 1, and note the definition included for the purposes of this Resolution only, 'Non-State actor: individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.' See also S/RES/2325 (2016). For the general prohibition on states regarding transfers of weapons to non-state actors seeking to overthrow another government, see section 4.3.2 above.

213 See, eg, s 2 of the UK's Landmines Act 1998.

214 See ICC Statute Art 8(2)(b)(xvii)–(xix), (xxvii)–(xxix) and (e)(xiii)–(xviii). Some of these crimes represent amendments, so the jurisdiction of the Court will be limited where the state party has not ratified the necessary amendment or the employment takes place in the territory of a non-state party; see further Casey-Maslen, Clapham, Giacca and Parker, *The Arms Trade Treaty: A Commentary* (2016) at 240–41. See also ICC Statute Art 8(2)(b)(xx), but no annex has been adopted.

215 Casey-Maslen et al (n 214) at 240–41.

216 See Casey-Maslen and Haines (n 54) at 216–19, 230–31; Boothby, *Weapons* (n 209) 139–44.

217 There is little doubt that the use of biological or chemical weapons is a violation of customary international law; this was never questioned when Syria (at the time not a party to the Chemical Weapons Convention) was condemned for violating international law. Whether or not such weapons can fall within the crime related to poisonous gases and the jurisdiction of the Court depends on how much one considers that a treaty is to be interpreted according to its ordinary meaning or by reference to the drafting history. See the various views of Alamuddin and Webb, ‘Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute’, 8 *JICJ* (2010) 1219–43; Boothby, *Weapons* (n 209) at 125 considers that ‘certain chemical substances’ would be covered by the crime of employment of poison or poison weapons; Naqvi outlines multiple possibilities for prosecuting the use of chemical weapons: ‘Crossing the Red Line: The Use of Chemical Weapons in Syria and What Should Happen Now’, 99 *IRRC* (2017) 959–93.

218 See Art VII of the CWC; and see, eg, the UK’s Chemical Weapons Act 1996. See also the Decision of the Executive Council of the Organisation for the Prohibition of Chemical Weapons, EC-86/DEC.9, 13 October 2017, which urged states parties to enact penal legislation; a compendium of national legislation can be found at <https://www.opcw.org/resources/national-implementation/legislation-compendium>.

219 See Schabas, *The International Criminal Court* (2010) at 243–47; for an account of the investigations into the use of chemical weapons in Syria and elsewhere see the autobiographical book by de Bretton-Gordon, *Chemical Warrior: Syria, Salisbury and Saving Lives at War* (2020).

220 Press Statement, 7 July 2017; for further background and statements, see Mills and Culpin, ‘A Treaty on the Prohibition of Nuclear Weapons’, Briefing Paper No 7986, 9 October 2018, House of Commons Library.

221 See, eg, the International Court of Justice in the *Nuclear Weapons Opinion* (n 20) at para 95: ‘[M]ethods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.’ See further *ibid* at para 30, and under the Art 8(2)(b)(iv) of the ICC Statute, which covers international armed conflict and includes in the proportionality equation ‘or widespread, long-term and severe damage to the natural environment’. For a detailed look at questions of the environment in this context, see Dinstein, *International Armed Conflict* (n 59) Ch 7; and Henckaerts and Constantin, ‘Protection of the Natural Environment’, in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 469–91. For discussion of when the use of a tactical nuclear weapon would not violate the laws of war, see Haines, ‘The Developing Law of Weapons: Humanity, Distinction, and Precautions in Attack’, in Clapham and Gaeta (eds),

The Oxford Handbook of International Law in Armed Conflict (2014) 273–95 at 283–84 fn 27.

222 The most recent manual on cyber operations reiterates the point that ‘an attack against a civilian object would be unlawful even if it shortened the course of the conflict and thereby saved civilian lives’: Schmitt (ed), *Tallinn Manual 2.0* (n 55) at 422.

223 The practices developed in the Second World War, seen through the phenomenon of total war, led Hersch Lauterpacht, writing in 1952, to consider that the distinction between combatants and civilians had been reduced to a ‘hollow phrase’, and that the role played by the ‘economic weapons’ in modern war rendered it ‘practically impossible’ to differentiate ‘between civilians and combatants’: ‘The Problem with the Revision of the Law of War’, 29 *BYBIL* (1952) 360–82 at 364.

224 For the reasoning deployed in the United Kingdom and the background legal norms, see Best, *Humanity in Warfare* (n 183) 262–85; for a discussion of why this topic has often been suppressed, see Maier, ‘Targeting the City: Debates and Silences about the Aerial Bombing of World War II’, 87 *IRRC* (2005) 429–43; Addison and Crang (eds), *Firestorm: The Bombing of Dresden* (2006); Grayling, *Among the Dead Cities* (2007), Overy, *The Bombing War* (2014); see also Henderson, ‘The Firebombing of Tokyo and Other Japanese Cities’, in Tanaka, McCormack and Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (2010) 311–21.

225 See Witt, *Lincoln’s Code* (2012) at 184, 278–90; The Lieber Code, General Orders No 100, 1863, Art 29, famously stated ‘The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.’

226 See Cassese, *Violence and Law in the Modern Age* (1988) 17–21.

227 See Parks, ‘The Protection of Civilians From Air Warfare’, 27 *Israel Yearbook on Human Rights* (1997) 65–111 at 77–84; this is a longstanding debate, but even in 1938 the position was clearly stated by the British Prime Minister, Neville Chamberlain: ‘[W]e cannot too strongly condemn any declaration on the part of anybody, wherever it may be made and on whatever side it may be made, that it should be part of a deliberate policy to try and win a war by demoralising the civilian population through a process of bombing from the air. That is absolutely contrary to international law . . .’ *Hansard*, HC Deb 21 June 1938, vol 337, col 934.

(p. 129) 6 Means of Combat*

Introductory Remarks

1. The study of means of combat under international humanitarian law has a solid tradition in legal scholarship.¹ This Chapter offers an overview of some treaty and customary international law rules applicable to means of combat, taking into account the different normative strata that developed over the decades. Rules that are relevant for the present analysis are embodied in a number of agreements, which are examined where relevant in this Chapter, as well as in customary international humanitarian law.²

2. This Chapter employs ‘means of combat’ and ‘means of warfare’ as synonyms. Although the expressions ‘means of warfare’ and ‘weapons’ are often seen as exchangeable, the former includes military equipment as well.³ ‘Weapon’ includes arms, munitions, and any other devices, components, or mechanisms that are (i) apt to kill, disable, or injury the enemy personnel; or (ii) apt to destroy or damage the enemy equipment or property.⁴ Moreover, ‘weapon’ also encompasses devices that are apt to temporarily incapacitate persons or objects.⁵

I. General Rules

6.01

While the general principles of international humanitarian law (see above, Chapter 4) fully apply to the use of any means of combat, a prohibition of the development, production, stockpiling, transfer, or use of a particular weapon requires an explicit rule.

(p. 130) 1. Chapter 4 of this Handbook has explored the basic principles governing the legality of means of combat under international humanitarian law, and, in particular, the fact that the right of the belligerents to choose methods of warfare is not unlimited.⁶ Rather, it is specifically prohibited to employ means or methods that are intended or of a nature to cause superfluous injury or unnecessary suffering⁷ and which are indiscriminate in nature.⁸ This Section explores additional specific prohibitions existing in treaties or customary law. These prohibitions apply to certain kinds of means of combat, which are unlawful as such, irrespective of any consideration of the legality of those means under the general principles explored in Chapter 4.

2. If a means of combat is not specifically prohibited by one of the rules analysed in this Chapter, and is not unlawful under one of the principles explored in Chapter 4, then that means of combat must be considered lawful in principle. Accordingly, a belligerent does not violate international humanitarian law in relation to the development, production, stockpiling, transfer, or use of such a weapon, but rather, international humanitarian law governs the way in which that weapon is employed. This assumption is particularly relevant for the development of new weapons, which should be considered permissible unless they are in conflict with an existing rule of international law.⁹

3. The theoretical basis supporting this view rests in the largely prohibitive nature of international humanitarian law rules on means of combat.¹⁰ Belligerents do not need an authorization from international humanitarian law in relation to a specific means of combat; rather, they are free to develop, produce, stockpile, transfer, or use any particular weapon, except for those cases in which a prohibitive rule of international humanitarian law—both in the form of one of the fundamental principles addressed in Chapter 4 or as a specific ban—dictates to the contrary.¹¹ Paraphrasing the famous principle, the fact that ‘the right of the parties to an armed conflict to choose means of warfare is not unlimited’ does not mean

that belligerents can choose only means of warfare that are explicitly permitted by international humanitarian law. The International Court of Justice (ICJ) has confirmed this idea, stating that 'the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition'.¹²

6.02

In the study, development, acquisition, or adoption of new means or methods of combat it shall be determined whether these means and methods are compatible with the rules of international law (Article 36 AP I).

1. In order to guarantee effective implementation of the prohibition of certain means and methods of warfare emanating from the principles described above it is necessary to provide for an efficient procedure to ensure the legality of new weapons.¹³ This procedure is (p. 131) preventive in nature and aims at providing the belligerents with means of combat that do not violate international law prohibitions.

2. Although some states had already created such procedures prior to the elaboration of the Additional Protocols (e.g., the Federal Republic of Germany, the US, Sweden),¹⁴ such a form of preventive control was a novel institution for most states in 1977. Originally, states had considered an internationalized procedure of control.¹⁵ However, due to the legitimate requirements of secrecy that surround the development of new weapons, states agreed to rely on the already established procedures of national control of legality, which were made obligatory.¹⁶

3. The rule embodied in Article 36 AP I is customary in nature,¹⁷ as demonstrated by the review mechanisms established by states that are not parties to the AP I or prior to their accession to the AP I.¹⁸ This rule applies to means of combat to be employed in international and non-international armed conflicts alike.¹⁹

II. Certain Conventional Weapons

6.03

It is prohibited to employ poison and poisoned weapons (Article 23 lit. a HagueReg; Article 8, para. 2 lit b, xvii-xviii, and lit e, xiii-xiv, ICC Statute).

The prohibition against poison and poisoned weapons originated in the late Middle Ages and is probably the most ancient prohibition on a means of combat under international law.²⁰ Effectively, it has been defined as the oldest 'taboo' against the use of weapons in the law of armed conflict.²¹ Article 23, lit. a HagueReg codified this firmly established prohibition, which encompasses also the ban on using poisoned foodstuff and drinking water.²² The prohibition on poison and poisoned weapons is still valid today, as confirmed by the current criminalization of the employment of these means of warfare under the ICC Statute.²³

(p. 132) 6.04

In the 1868 St Petersburg Declaration the use of explosive and incendiary projectiles weighing under 400 g was prohibited, since these projectiles were deemed to cause disproportionately severe injury to soldiers, which is not necessary to put them out of action. This prohibition is now only of limited importance, since it is reduced by customary law to the use of explosive and incendiary projectiles of a weight significantly lower than 400 g which can disable only the individual directly concerned but not any other

persons. 20 mm high-explosive grenades and projectiles of a similar calibre are not prohibited.

1. The 1868 St Petersburg Declaration was the first treaty to outlaw specific weapons.²⁴ In the Preamble, states parties accepted the obligation to restrict the use of certain projectiles, considering that 'the progress of civilization should have the effect of alleviating as much as possible the calamities of war' and that 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy'. For this purpose, the preamble of the St Petersburg Declaration considers that it is sufficient 'to disable the greatest possible number of men'; this object would be exceeded 'by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable', not to mention that 'the employment of such arms would be contrary to the laws of humanity'. The only legitimate purpose of any use of weapons is the disabling of enemy combatants.²⁵

2. According to the judgment of the International Military Commission that adopted the Declaration, the use of explosive projectiles against infantry failed to meet this standard.²⁶ The laws of war, as the principles 'at which the necessities of war ought to yield to the requirements of humanity', should not prohibit the use of explosive projectiles per se. The use of such projectiles as artillery munitions had already been long established and was perceived to be militarily necessary.²⁷ However, their use against individual combatants was seen to be avoidable in military terms, and therefore superfluous. As observed by a Japanese court, the very use of a projectile weighing under 400 g is in itself sufficient to wound or kill the enemy, so that its explosive or incendiary character would be unnecessary and, thus, prohibited.²⁸

3. The weight limit used to distinguish between infantry and artillery munitions (400 g) was set rather arbitrarily since artillery projectiles of the time were considerably heavier, whereas infantry munitions were much lighter than 400 g. The absolute weight limit set in 1868 should, therefore, not be taken too strictly.²⁹ The basic principle of the Declaration has, therefore, been transformed not into customary law as a prohibition of explosive projectiles weighing under 400 g, but into a prohibition against infantry munitions with explosive or inflammable effects.³⁰ According to the UK Military Manual, the weight limit has become obsolete, as states have developed 20 mm and 25 mm combined-effects munitions which weigh less than 400 grams.³¹ Such modern artillery munitions are, therefore, legally permissible under international customary law (as a Convention provision, (p. 133) the St Petersburg Declaration is scarcely ever applicable, due to its general participation clause).

4. The ban on explosive bullets is inapplicable to air warfare. According to Article 18 of the (non-binding) 1923 Hague Rules of Air Warfare, states, even if they are parties to the St Petersburg Declaration, may use 'tracer projectiles, whether incendiary or explosive'.

6.05

It is prohibited to use bullets which expand or flatten easily in the human body (Dum-Dum Bullets HagueDecl 1899; Article 8, para. 2 lit b, xix, and lit e, xv, ICC Statute). This applies also to the use of shotguns, since its shot causes similar suffering unjustified from the military point of view. It is also prohibited to use projectiles of a nature:

- to burst or deform while penetrating the human body;**
- to tumble early in the human body; or**

— to cause shock waves leading to extensive tissue damage or even lethal shock (Articles 35, para. 2, and 51, para. 4, lit. c, AP I; Article 23, lit. e, HagueReg).

1. The Declaration Concerning Expanding Bullets adopted at the Hague Peace Conference in 1899 continued the attempt to outlaw excessively cruel weapons, which was the basis of the 1868 St Petersburg Declaration.³² The intended object of the prohibition was the projectile developed by the British Army for use against guerilla fighters in India, which had become known as the ‘Dum-Dum bullet’.³³ The declaration must be seen as an undertaking parallel to the aforementioned prohibitions against the use of poison or poisonous weapons and to the (admittedly rather general) prohibition of ‘arms, projectiles, or material calculated to cause unnecessary suffering’ in Article 23, lit. e, HagueReg (see above, Chapter 4). Today, Article 8, para. 2, lit. b (xix), ICC Statute criminalizes the use of bullets ‘which expand or flatten easily in the body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions’ in international armed conflicts, whereas Article 8, para. 2, lit. e (xv), ICC Statute punishes the same crime in non-international armed conflicts.

2. The prohibition of ‘arms, projectiles, or material calculated to cause unnecessary suffering’ in Article 23, lit. e, HagueReg can be applied to other weapons that are similar to dum-dum bullets, although what exactly is covered by the prohibition against (in the original French version) ‘*maux superflus*’ remains in doubt. One could reasonably argue, as e.g. the German administration does, that the use of shotguns has essentially to be regarded as prohibited under the ‘*maux superflus*’ principle, since its shot inflicts extremely painful wounds, which cause grave difficulties in medical treatment, but is not much more efficient in its effects than normal infantry munitions. Nevertheless, no real consensus has developed on this issue.³⁴

3. The same could be said of other variants of recently developed infantry weapons and munitions which cause excessive injuries without achieving particularly impressive military advantages: projectiles which burst or deform while penetrating the human body; projectiles which tumble early in the human body (causing particularly severe internal injuries); and weapons and munitions which cause shock waves leading to extensive tissue damage or even lethal shock. The analogy with the dum-dum bullets outlawed in 1899 is (p. 134) obvious, but, although a prohibition on the general ground of ‘excessive suffering’ would be reasonable,³⁵ an explicit prohibition anchored in treaty law has not yet been agreed upon. Also, far from easy to evaluate is the question of precisely which new weapons are covered by the prohibitions in Article 23, lit. e, HagueReg and Article 35, para. 2, AP I. That discussions on modern small-calibre high-velocity weapons systems over the last decades has produced no agreement is telling in that respect.³⁶

6.06

It is also prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays (NonDetectableFragmentsProt; Article 8, para. 2 lit b, xxviii, and lit e, xvii ICC Statute).

1. The prohibition laid down in the NonDetectableFragmentsProt is a specific ban of a weapon in the tradition of the St Petersburg Declaration and Article 23, lit. e, HagueReg, which met with unanimous approval by state representatives at the meetings of experts in Lucerne and Lugano in the 1970s, and then at the concluding UN Weapons Conference of Geneva in 1980.³⁷ As Protocol No. I, it was annexed to the Inhumane WeaponsConv.³⁸ Recently, the ICC Statute was amended so that ‘employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays’ is

today a war crime, both in international and non-international armed conflicts, under Article 8 (2) (b) (xxviii) and Article 8 (2) (e) (xvii).³⁹

2. The prohibition in the Protocol is formulated restrictively, being deemed to cover only weapons the primary effects of which lie in the spread of non-detectable fragments ('weapons which were *designed* to injure by such fragments', according to the report of the working group).⁴⁰ Consequently, if a weapon spreads non-detectable fragments but it was not designed primarily to achieve this result, then that weapon is not covered by this prohibition, such as in the case of some non-metallic portions of munitions.⁴¹ The legality of such a weapon, nonetheless, should be examined under the principle of superfluous injury.⁴²

3. The prohibition covers only the extreme cases of fragments not readily detectable, namely those not detectable even by X-rays. This means, in particular, fragments of plastic, wood, or glass that cause unnecessarily severe suffering because medical care is impeded and long periods of rehabilitation become unavoidable if such weapons are used.⁴³ However, weapons that contain plastic or other non-metallic parts for purposes (p. 135) other than those aimed at by Protocol No. I, such as grenades or mines with plastic detonators, are not covered.⁴⁴

6.07

Treaty law prohibits to use anti-personnel mines, to develop, produce, acquire, stockpile, retain, or transfer them. All existing anti-personnel mines shall be destroyed (Article 1 LandMinesConv). 'Anti-personnel mine' means a mine designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons (Article 2, para. 1, LandMinesConv).

1. The 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on their Destruction entered into force on 1 March 1999. The global campaign for the adoption of the Convention thus bore fruit; the International Campaign to Ban Landmines (ICBL), the ICRC, and numerous states supporting the initiative had considered the 1996 amendments of the Protocol II to the Weapons Convention (Mines Protocol, see the following sections) as insufficient.⁴⁵ In their view, only a complete ban of anti-personnel mines would effectively counter the indiscriminate effects of these mines and their long-lasting impairments of civil life. The Convention has been ratified by 164 states as of 2 December 2019. At the moment, the UK and France are the only permanent members of the Security Council that have ratified the Convention. The US refused to sign the treaty primarily because its request for a geographical exception for the use of mines in South Korea had not been granted.⁴⁶

2. The Convention establishes a comprehensive ban on anti-personnel mines. According to Article 1, their use, development, production, acquisition, stockpiling, retention, and transfer is prohibited; the parties also undertake never to assist, encourage or induce anyone to engage in any of these activities. Moreover, they are obligated to destroy or ensure the destruction of all stockpiled and cleared anti-personnel mines.

3. An anti-personnel mine is defined by the treaty as a mine 'designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped' (Article 2, para. 1). Thus, the prohibition covers all dual-purpose mines as long as one of its functions is to be detonated by a person; in contrast, the relevant definition of anti-personnel mines in the Mines Protocol confines its scope of application to mines '*primarily* designed ...', provoking thereby one of its criticized weaknesses (see Section 6.14).⁴⁷ The sole exception (p. 136) to

the prohibition of dual-purpose mines admitted by the Ottawa Convention applies to anti-vehicle mines equipped with an anti-handling device.

4. Whereas in the recent past there has been no evidence of use of anti-personnel mines by LandMinesConv states parties, some non-party states (especially Myanmar) and non-state armed groups continue to use or to produce these mines.⁴⁸ Therefore, the specific prohibitions in the LandMinesConv have not crystallized into customary law so far.⁴⁹ As anti-tank and other anti-vehicle mines are out of the scope of application of the Convention, the MinesProt also maintains importance for states parties to both of the treaties.

6.08

Under the Convention on Cluster Munitions, states parties undertake never under any circumstances to use or develop, produce, otherwise acquire, stockpile, retain, or transfer to anyone, directly or indirectly, cluster munitions, and to co-operate in munition clearance and destruction, victim assistance, and risk education programmes.

1. The 2008 Convention on Cluster Munitions, which entered into force on 1 August 2010, is the result of another open and time-bound diplomatic process that included states, civil society, the ICRC, and the UN (so-called Oslo Process). At the same time, some states initiated an attempt to weaken the Convention on Cluster Munitions under the auspices of the UN Convention on Conventional Weapons, by allowing in its Protocol VI the usage of some cluster munitions produced after 1980. However, during the 2011 review conference of the UN Convention on Conventional Weapons, member states did not reach consensus on the adoption of Protocol VI. Thus, the outcome of the Oslo Process is still the only valid and broad regulation of cluster munition.

2. Under Article 2, para. 2, 'cluster munition' refers to a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kg, and includes those explosive submunitions. Nuclear, chemical, or biological weapons included in submunitions are not addressed.⁵⁰ The definition does not encompass munition or submunition designed to dispense flares, smoke, pyrotechnics, or chaff; or a munition designed exclusively for an air defence role; munition or submunition designed to produce electrical or electronic effects; or munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics: (a) each munition contains fewer than ten explosive submunitions; (b) each explosive submunition weighs more than 4 kg; (c) each explosive submunition is designed to detect and engage a single target object; (d) each explosive submunition is equipped with an electronic self-destruction mechanism; and (e) each explosive submunition is equipped with an electronic self-deactivating feature.

3. Customary international humanitarian law does not prohibit cluster munitions as such,⁵¹ even though their use in densely populated areas may result in indiscriminate attacks.⁵²

6.09

(p. 137)

The use of other mines and other devices on land is, in principle, permissible (Article 1 MinesProt). The following definitions apply:

— 'mine' means any device placed—or remotely delivered—under, on, or near the ground or other surface area and designed to be detonated

or exploded by the presence, proximity, or contact of a person or vehicle (Article 2, No. 1, MinesProt);

— ‘other devices’ means manually emplaced munitions or devices designed to kill, injure, or damage and which are actuated by remote control or automatically after a lapse of time (Article 2, No. 5, MinesProt).

1. Contrary to Protocol I (on non-detectable fragments), the 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices’ did not use the prohibition against unnecessary suffering as its starting point, but the prohibition against indiscriminate warfare and against weapons with indiscriminate results. The Protocol only prohibits the possession or even the use of mines and booby traps in certain situations, where the danger of indiscriminate effects is particularly grave,⁵³ therefore recognizing, in principle, the legality of the use of mines in common practice. When the Protocol was amended in 1996, despite the widespread support for a total ban, the negotiating states parties failed to agree upon a general prohibition against anti-personnel landmines.⁵⁴ Rather, states adopted a highly complicated instrument, introducing further restrictions on the use of mines and booby traps, including several specific prohibitions in respect of anti-personnel mines.⁵⁵ The amended Protocol does not proscribe the use of detectable anti-personnel mines equipped with a self-deactivation device or placed in an area marked, fenced, and monitored by military personnel.⁵⁶ The Protocol also contains absolute prohibitions against the use of mines equipped with an anti-detection mechanism and of certain perfidiously hidden explosive devices (booby traps) which are often deployed for the sake of terrorizing the civilian population in order to break its will to resist (as demonstrated especially in, e.g., the war in Afghanistan during the 1980s).⁵⁷ In relation to mines that can be remotely delivered deep into the enemy hinterland by the use of mortars, rockets, or air vehicles, the Protocol dictates certain safeguarding measures to reduce as far as possible the dangers linked to such uncontrolled minefields.⁵⁸

2. According to Article 2 MinesProt, a ‘mine’ is any ‘munition placed under, on, or near the ground or other surface area and designed to be exploded by the presence, proximity, or contact of a person or vehicle’. The essential point in the definition is the explosion of the device by an action of a third person or vehicle. Such third-party intervention is the characteristic that distinguishes ‘mines’ from ‘other devices’, which are detonated by remote control or delayed-action cap.

6.10

It is prohibited to direct the above-mentioned munitions—even by way of reprisals—against the civilian population as such or against individual civilians (Article 3, para. (p. 138) 7, MinesProt). Any indiscriminate use of these weapons is prohibited (Article 3, para. 8, MinesProt).

1. Article 3, paras 7–8, MinesProt prohibits the use of any of the weapons covered by the Protocol (mines, booby traps, and other devices) against the civilian population or against individual civilians⁵⁹ in any circumstances, whether offensive, defensive, or by way of reprisal. All forms of indiscriminate use are likewise prohibited, that is, any use that is not specifically directed against a military objective, which employs a weapon or means of delivery which cannot be limited in its effects to military objectives, or which is likely to cause disproportionate collateral damage.⁶⁰

2. The elementary safeguards embodied in Article 3 are in line with the principle of distinction and the prohibition against indiscriminate warfare, codified in the provisions of Articles 48 and 51 AP I (see Sections 7.12–7.19). This is made explicit, in particular, by Article 3, para. 8 MinesProt (prohibition of indiscriminate use) which adopts almost verbatim the wording of Article 51, para. 4, AP I⁶¹ and includes in the amended version of the Protocol the presumption of the civilian purpose of an object laid down in Article 52, para. 3, AP I (see Section 7.05). The specific regulation of the MinesProt constitutes a concretization of the basic principles of distinction and the prohibition against ‘indiscriminate warfare’ which were in any event applicable to mine warfare.⁶² Therefore, even when parties to a conflict are not bound by the UN Weapons Convention, they will be bound by most of the specific provisions of the MinesProt which reflect the customary rules embodied in Article 51 AP I.⁶³

3. These principles also apply to non-international armed conflicts, pursuant to Article 1, para. 2, of the amended MinesProt and Article 1, para. 2, Inhumane WeaponsConv, as of 21 December 2001 with the same extension for the whole of the Convention and its then four additional Protocols.⁶⁴ Indeed, serious difficulties concerning the implementation of the fundamental rules for the protection of the civilian population against the dangers of mines in non-international armed conflicts exist,⁶⁵ especially because such devices are today employed by a number of armed groups.

6.11

All feasible precautions shall be taken to protect civilians also from unintended effects of these munitions (Article 3, para. 10, MinesProt).

1. Article 3, para. 10, MinesProt repeats almost verbatim once again the fundamental rule of Article 57 AP I, with a specific orientation towards problems of mine warfare (see Section 7.18). The general explanations given above under Section 6.10 as to Article 3 MinesProt are valid also concerning this provision: the ‘active’ precautions required in general by Article 57 AP I (‘every precaution practically feasible’) must in principle always be taken by the responsible military leaders, including cases of mining operations. Precautions in relation to the employment of mines and booby traps is of particular importance in light of the particularly high dangers for the civilian population arising from such means of combat.

(p. 139) 2. Similarly to the principle of precaution under Article 57 AP I, the principle of precaution in the employment of certain weapons is an obligation of conduct governed by due diligence.⁶⁶ This characterization means that ‘a state cannot be under an obligation to succeed, whatever the circumstances’, in reaching a certain result, but rather, the obligation is ‘to employ all means reasonably available to them, so as to’ reach the desired result ‘so far as possible’.⁶⁷ Accordingly, a state ‘does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the state manifestly failed to take all measures [. . .] which were within its power’ to prevent the event.⁶⁸ Consequently, the belligerents that employ mines and booby traps must be able to demonstrate that they have undertaken ‘those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations’ (Article 3, para. 10, MinesProt). This provision goes on to list some examples of circumstances to be taken into account, namely: the short- and long-term effect of mines upon the local civilian population for the duration of the minefield, possible measures to protect civilians (e.g., fencing, signs, warning, and monitoring), the availability and feasibility of using alternatives, and the short- and long-term military requirements for a minefield. Similarly, the location of a minefield must be chosen with due regard to civilian protection; the location and pattern of the minefield should be recorded so that the mines may be removed as soon as they are no longer

needed, and the mines should be guarded and marked, as far as is feasible, to prevent unnecessary civilian casualties.

6.12

Booby traps and other devices shall not be used in any built-up area, or other area predominantly inhabited by civilians, in which there is no actual or imminent combat between ground forces (Article 7, para. 3, MinesProt).

Exceptions are permissible if:

- **these munitions are placed on or in the close vicinity of a military objective; or**
- **measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the provision of fences, or the issue of warnings (Article 7, paras 3, lit. a and b, MinesProt).**

1. The above rule repeats Article 7, para. 3, MinesProt. That provision contains special guidelines for the use of manually emplaced booby traps and explosive devices in towns, villages, or other areas with a similar population density of civilians, to the extent that such use is not a compelling military necessity arising immediately out of situations of combat (which can only be the case when combat between ground forces takes place or appears to be imminent directly in the zone of a settlement).⁶⁹ Inside such zones or settlements, the use of booby traps has in practice been shown to pose particularly serious dangers.⁷⁰

(p. 140) **2.** The use of booby traps in densely populated areas, however, is exceptionally admissible under Article 7, para. 3 if booby traps are employed directly to protect a military installation, or for combat against an enemy military objective (placed directly ‘on or in the close vicinity of a military objective’⁷¹), or when precautionary measures have been taken which reduce the risk for the civilian population to a tolerable degree.⁷² Accordingly, the preventive placement of booby traps and other devices is permitted even in conurbations and settlements⁷³ if they are guarded and secured against intrusion by civilians, where the dangers for the civilian population are limited.⁷⁴

3. In contrast to the original 1980 MinesProt, the amended provision in Article 7, para. 3, does not cover the emplacement of mines.⁷⁵ Thus, it might be argued that this fundamental prohibition against the use of weapons in densely populated areas and settlements does no longer apply to mines. Contrary to this view, the general prohibition against ‘indiscriminate warfare’ which was reaffirmed in respect of the use of all mines, booby traps and other devices by Article 3, para. 8 of the amended MinesProt leads to the same conclusions as were explicitly drawn by Article 4 of the original Protocol. The employment of mines in densely populated areas poses extremely high risks to the civilian population if the minefields are not marked or controlled or guarded. Accordingly, given the prohibition against indiscriminate warfare, it is difficult to conceive how mines could be used in densely populated areas, unless the civilian population has fled or has been evacuated.

6.13

It is prohibited to use mines, booby traps, or other devices equipped with a mechanism designed to detonate the munition by the presence of commonly available mine detectors during normal use in detection operations (Article 3, para. 5, MinesProt). The use of a self-deactivating mine equipped with an anti-handling device capable of functioning after the mine has ceased to be capable of functioning is prohibited (Article 3, para. 6, MinesProt).

Article 3, paras 5 and 6 MinesProt embodies two additional prohibitions introduced by the 1996 amendment to facilitate detection operations and to reduce the risks to mine-clearance personnel.⁷⁶ Article 3, para. 5, proscribes the use of mines and other devices designed to explode as a result of a normal detection operation.⁷⁷ The other prohibition concerns the use of self-deactivating mines equipped with an anti-handling device which is designed to be actuated by a handling attempt even after the mine has self-deactivated. Such a device with a lifetime greater than that of the self-deactivation mechanism endangers for an extended period both mine-clearance personnel and the civilian population.⁷⁸

6.14

The use of anti-personnel mines which are not detectable is prohibited (Article 4 MinesProt). Anti-personnel mines other than remotely delivered mines must either be equipped with a self-destruction mechanism and a self-deactivation device or be placed in an area marked, fenced, and monitored by military personnel (Article 5 MinesProt).

(p. 141) **1.** The 1996 amendment of the MinesProt introduced several specific restrictions with respect to anti-personnel mines. Article 2, para. 3 defines what constitutes such a mine, considering that ‘ “Anti-personnel mine” means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.’ The insertion of the word ‘primarily’ has been heavily criticized, as it allows an interpretation excluding all ‘dual use’ mines from the scope of application: the ICRC published a list of mine technologies which could be said to have another ‘primary’ purpose, even though they are in fact designed to explode upon contact with a person and are designed to kill or injure persons. The list includes mines designed with both anti-personnel and anti-vehicle or anti-helicopter capabilities, anti-handling mechanisms on anti-tank mines, and ‘runway denial’ submunitions.⁷⁹ Germany, acting on behalf of several other states, declared that the term ‘primarily’ was solely inserted to ensure that ‘mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped’,⁸⁰ anticipating thus in identical wording the exception made in Article 2, para. 1, LandMinesConv (see Section 6.07).

2. Article 4 of the amended MinesProt prohibits the use of anti-personnel mines which are not detectable, as specified in para. 2 of the Technical Annex. The provision aims to ban the employment of plastic mines that can escape detection by standard mine-detection equipment and thus present a severe risk to mine-clearance personnel, as well as to civilians.⁸¹ According to the Technical Annex, all anti-personnel mines shall incorporate (as regards mines produced after 1 January 1997) or have at least attached (as regards mines produced before) a material rendering the mine detectable by commonly available mine-detection equipment and providing a response signal equivalent to a signal from 8 g or more of iron. With respect to anti-personnel mines produced before 1 January 1997, the Protocol offers a deferral period of nine years from its entry into force.⁸² In light of the concept of the best feasible protection of civilians after the end of hostilities, one can argue that—irrespective of this prohibition laid down in the amended Mines Protocol—the use of non-metallic anti-personnel mines outside recorded minefields should be regarded as illegal under the customary prohibition against indiscriminate warfare.

3. Article 5 imposes further restrictions on the use of anti-personnel mines, except for the remotely delivered anti-personnel mines that fall under the particular provisions of Article 6 (see Section 6.15). Under Article 5, para. 2, the use of such weapons is prohibited unless they are equipped with a self-destruction and self-deactivation device as specified in the Technical Annex or they are placed in an area marked and fenced and monitored by military

personnel to ensure the effective exclusion of civilians from the area. The Technical Annex requires a self-destruction within thirty days of emplacement (p. 142) with a reliability of 90 per cent and a self-deactivation within 120 days with a combined reliability of 99.9 per cent.⁸³ Regarding the placement in marked and protected areas, Article 5, para. 3, provides an exception for certain situations, including where direct enemy military action made it impossible to comply.⁸⁴

4. It is particularly due to the complicated restrictions imposed on anti-personnel mines that the amendment of the MinesProt was subject to severe criticism leading to the adoption of the LandMinesConv. However, as a considerable number of states involved in the production, transfer, or use of mines have not ratified the latter instrument yet, the MinesProt remains of importance, constraining to a certain degree the use of anti-personnel mines.

6.15

The use of remotely delivered mines is prohibited unless such mines are equipped with an effective self-deactivation device (Article 6, paras 2 and 3, MinesProt). After emplacement, their location shall be accurately recorded (Article 6, para. 1, MinesProt). Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit this (Article 6, para. 4, MinesProt).

1. The particular problem of remotely delivered mines was fiercely debated during the preparatory meetings of Lucerne and Lugano, as well as at the 1980 Weapons Conference.⁸⁵ While many states (particularly developing countries) had demanded the inclusion in Protocol II of a total prohibition against remotely delivered mines, other states argued that a complete prohibition would be in total contradiction with requirements of military necessity. In particular, NATO states claimed that the possibility of employing mines in enemy territory to hamper the enemy's operations in its hinterland and to block deployment areas was militarily absolutely necessary.⁸⁶ The compromise finally agreed upon has been supplemented by further restrictions introduced by the 1996 amendment. Article 6 does not completely ban the use of remotely delivered mines, but it requires the parties to the treaty to take far-reaching precautionary measures and technical safeguards against the risks to the civilian population resulting from such devices, imposing particular limits regarding anti-personnel mines.

2. Thus, the use of remotely delivered mines is prohibited unless they are recorded with the utmost possible precision, specifying the estimated location and area by co-ordinates of reference points and ascertaining and marking it on the ground at the earliest opportunity.⁸⁷ Whereas the legitimacy of the use of remotely delivered anti-personnel mines depends invariably on their compliance with the provisions of self-destruction and self-deactivation laid down in the Technical Annex (see in detail the Commentary to Section 6.14),⁸⁸ other remotely delivered mines are only required, 'to the extent feasible', to be (p. 143) equipped with an effective self-destruction or self-neutralization mechanism and to have a back-up self-deactivation feature.⁸⁹

3. The amended Protocol has not adopted the original rule of Article 5, para. 1, requiring that remotely delivered mines may only be employed within an area which itself constitutes a military objective or which contains military objectives. As to the problem what constitutes a military objective, the UK has declared that 'a specific area of land may be a military objective if, because of its location or other reasons specified in this article, its total or partial destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage'.⁹⁰ Although the general prohibition against 'indiscriminate warfare', reaffirmed by Article 3, para. 8, lit. b, leads to the same

conclusion, a maintenance of the original provision would have clarified that a purely preventive placement of minefields with a view to potential future operations remains prohibited under the amended Protocol.

4. The party responsible for the use of remotely delivered mines is obliged to give an effective advance warning if the civilian population actually risks damage by such mines.⁹¹ This warning may only be omitted if the specific circumstances of the operation make it impossible (as to the warning prior to an attack in general, see Section 7.14). While some authors argue that tactical necessities, such as ensuring surprise or the necessity to protect the delivering airplane, may justify a deviation from the basic rule of Article 6, para. 4 MinesProt,⁹² it would be better to interpret this provision more restrictively, taking more into account the need to protect civilians.

6.16

It is prohibited in all circumstances to use:

- a) any booby trap in the form of an apparently harmless portable object (Articles 2, para. 4, and 7, para. 2, MinesProt);**
- b) booby traps which are in any way attached to or associated with:**
 - **internationally recognized protective emblems, signs, or signals;**
 - **sick, wounded, or dead persons;**
 - **burial or cremation sites or graves;**
 - **medical facilities, transportation, equipment, or supplies;**
 - **food or drink;**
 - **objects of a religious nature;**
 - **cultural objects;**
 - **children's toys and all other objects related to children;**
 - **animals or their carcasses (Article 7, para. 1, MinesProt); or**
- c) any mine, booby trap, or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering (Article 3, para. 3, MinesProt).**

Article 7 MinesProt lays down an absolute prohibition against the use of certain types of booby traps, that is, devices that are constructed to kill or injure by an explosion initiated unexpectedly 'when a person disturbs or approaches an apparently harmless object or performs an apparently safe act'.⁹³ Due to their apparent harmlessness, booby traps are (p. 144) extremely dangerous for the civilian population. Article 7, para. 1, MinesProt enumerates some of the most repellent variants of booby traps, the express prohibition of which is the product of the imperative to conduct hostilities in a humane manner.⁹⁴ The same is true for the general principle embodied in Article 3, para. 3, which repeats the fundamental prohibition of *maux superflus* in respect of the employment of all weapons covered by the MinesProt, and which was already embodied in the 1980 version of the Protocol expressly for booby traps.⁹⁵

6.17

This prohibition does not apply to fixed demolition appliances or to portable demolition devices lacking any harmless appearance.

The admissibility of the use of other explosive devices results from the basic approach of Article 7, paras 1 and 2, MinesProt by way of an *argumentum a contrario*. All fixed demolition appliances, and portable demolition devices not disguised as harmless objects, are permitted, provided that they are immediately recognizable as dangerous devices and have not been heavily camouflaged.⁹⁶ Even these demolition devices, however, fall under the general rules of Articles 3 and 7, para. 3, on the prohibition against indiscriminate warfare as well as against weapons and munitions which have indiscriminate effects, not to mention the strict limitations on the use of explosive devices in populated areas. In particular, with camouflaged demolition devices that function by an actuating mechanism such as a trip wire, the belligerent parties must take strict precautionary measures, in most cases probably by guarding the appliances in order to prevent triggering of the device by civilian persons not involved in combat.

6.18

The location of minefields, mines, booby traps, and explosive remnants of war shall be recorded. The parties to the conflict shall retain these records and, whenever possible, by mutual agreement, provide for their publication (Article 9 MinesProt, Article 4 ERWProt).

1. The 1996 amendment strengthens the obligation to record the existence of minefields and booby traps since Article 9, para. 1, MinesProt requires the belligerents to record the location of all mines, booby traps, and other devices in all circumstances, and not only in the case of pre-planned minefields and of large-scale pre-planned booby traps.⁹⁷

Furthermore, the minimum standards of recording are now laid down in a binding 'Technical Annex' to the Protocol,⁹⁸ limiting the required information no longer to the geographic location of minefields, booby traps, and demolition appliances,⁹⁹ but including specifications such as to the type, number, and lifetime of the weapons laid.¹⁰⁰

2. The creation of records not only about location, but also nature, quantity, and patterns of delivery, will normally be in the military interest of the parties to the conflict since systematic mining documentation enables the parties to protect their own armed forces against the dangers arising from uncontrolled minefields.¹⁰¹ Without solid (p. 145) documentation, even removal of one's own minefields may endanger engineer units, especially when more than one belligerent lays mines.

3. After the end of hostilities, the parties are required to take protective measures specified in Article 9, para. 2, MinesProt. In areas under their control, the parties to a conflict must take all feasible measures, including the use of records, to protect the civilian population against danger from minefields and other explosive devices; the military authorities of the occupying powers must mark the minefields, warn the civilian population, and in some cases guard minefields. On the other hand, in relation to the areas no longer under their control, the parties shall make available to each other and to the UN Secretary-General all available information concerning the location of minefields, mines, and booby traps laid by them in these territories. By imposing this obligation even if parties to the conflict are still in occupation of enemy territory, the amendment has improved the required exchange of information. In these cases, however, the Protocol still allows the parties to withhold such information, subject to reciprocity, as far and as long as security interests require such withholding, at the most until complete withdrawal. In the meantime, they shall seek, 'by mutual agreement, to provide for the release of such information at the

earliest possible time in a manner consistent with the security interests of each party' (Article 9, para. 2).

4. Apart from the obligation of recording under the Mines Protocol, comparable requirements have recently been laid down in the 2003 ERWProt for the so-called 'explosive remnants of war'.¹⁰² This instrument aims to reduce the civilian casualties and to minimize the socio-economic consequences caused by explosive munitions that remain after the end of an armed conflict.¹⁰³ It refers to both international and non-international conflicts and applies to explosive munitions that have been fired, dropped, or otherwise delivered during fighting but have failed to explode, as well as to explosive ordnance that has not been used during fighting and has been left behind, abandoning the control by the party (Article 2, paras 2–3, ERWProt).¹⁰⁴ Artillery shells, hand grenades, and cluster-bomb submunitions are only some examples of these weapons often found in war-affected countries such as, in the recent past, Iraq after Operation Iraqi Freedom, and Kosovo.¹⁰⁵ By establishing post-war responsibilities for parties who have used such weapons, the Protocol complements pre-existing instruments which were designed to reduce the serious dangers faced by the civilian population in post-conflict countries, such as the Amended MinesProt and the LandMinesConv.¹⁰⁶ However, the new instrument reveals some potential weaknesses by specifying a considerable number of obligations in a non-binding 'Technical Annex'¹⁰⁷ and employing in many of its key provisions qualifying phrases such as 'as far as feasible' and 'where feasible'. Although these phrases are only intended to provide guidance on the way these obligations of conduct must be (p. 146) implemented, the possible abuse of these clauses risks to affect the effective implementation of the provisions.¹⁰⁸

5. Article 4, para. 1, ERWProt requires the parties to the conflict to record and retain information on the use or abandonment of explosive ordnance to the maximum extent possible and as far as practicable. The aforementioned 'Technical Annex' specifies the minimum standards of recording, including location, types, and number of the explosive ordnance used or abandoned. Article 4, para. 2 imposes on the parties to make available such information to the parties in control of the affected area 'without delay after the cessation of active hostilities and as far as practicable, subject to these parties' legitimate security interests'. With respect to the territory under their own control, the parties have to take all feasible precautions to protect the civilian population from the risks and effects of explosive remnants of war, including warnings, risk education to the civilian population, marking, fencing, and monitoring of the affected territory (Article 5).

6.19

When a UN force or mission performs peacekeeping, observation, or similar functions, each party to the conflict shall, if requested:

- **render harmless all mines or booby traps (Article 12, para. 2, lit. b(ii), MinesProt);**
- **take such measures as may be necessary to protect the force or mission from the effect of mines, booby traps, and explosive remnants of war while carrying out its duties (Article 12, para. 2, lit. b(i) MinesProt, Article 6, para. 1, lit. a, ERWProt); and**
- **make available to the head of the force or mission all pertinent information in the party's possession (Article 12, para. 2, lit. b(iii), MinesProt; Article 6, para. 1, lit. B, ERWProt).**

Likewise, humanitarian and fact-finding missions of the UN System as well as missions of impartial humanitarian organizations shall be protected from

the effect of mines, booby traps, and other devices and shall be provided with safe passage (Article 12, paras 3-5, MinesProt).

The MinesProt also includes provisions concerning the duty of parties to co-operate with UN forces and missions in respect of mines, introducing new obligations to protect UN forces and missions against dangers resulting from mines.¹⁰⁹ The 1996 amendment extended this protection to missions of the ICRC, of national Red Cross and Red Crescent Societies as well as of other impartial humanitarian organizations.¹¹⁰ In a much simpler format, Article 6 ERWProt equally requires the parties to safeguard, 'as far as feasible', humanitarian missions and organizations from the effects of explosive remnants of war.¹¹¹ Practical experience has shown that peacekeeping forces and UN observer missions, as well as personnel of humanitarian organizations, are particularly endangered by minefields and booby traps, since these units and missions must often move between the lines of the adverse armed forces. The MinesProt does not refer to UN enforcement operations under Chapter VII, which are probably not protected,¹¹² as confirmed by the explicit reference to UN missions established under Chapter VIII in Article 12, para. 2, lit. a(ii). Of particular relevance is the general duty of the parties to provide to the head of the UN (p. 147) force or mission all available information on the location of minefields, mines, and booby traps in the area concerned.

6.20

After the cessation of an international armed conflict, the parties to the conflict shall, both among themselves and, where appropriate, with other states or international organizations, exchange information and technical assistance necessary to remove or otherwise render ineffective minefields, mines, booby traps, and explosive remnants of war (Article 10 MinesProt, Article 3 ERWProt).

Article 10 of the amended MinesProt underlines the responsibility of the parties to a conflict for the clearance, removal, destruction, or maintenance of all mines, booby traps, and other devices in areas under their control (para. 2), and provides for international co-operation in the removal of minefields after the cessation of active hostilities. The amended provision identifies an explicit responsibility of the users of mines and other devices laid in areas over which they no longer exercise control to provide to the party in control of the area technical and material assistance in the clearance and removal of such weapons (para. 3). Moreover, the parties shall endeavour to agree (both among themselves and, where appropriate, with other states and with international organizations) on co-operation in the neutralization and removal of minefields, mines, and booby traps (para. 4). This agreement should cover the provision of information on the location and nature of minefields and booby traps, and provision of technical and material assistance in the clearance of minefields and the removal of mines and booby traps, including in appropriate circumstances joint operations for removal.¹¹³ Similar requirements are laid down in Article 3 ERWProt with respect to explosive remnants of war.¹¹⁴ The civilian population benefits mostly from the realization of these objectives, especially in international armed conflicts, since securing implementation and compliance from non-state actors in non-international armed conflicts has been a major challenge.¹¹⁵ How far customary law prohibiting indiscriminate warfare also entails responsibilities for the clearance of mines and explosive remnants of war remains open to debate.¹¹⁶

6.21

Incendiary weapons are weapons or munitions primarily designed to set fire to materials or objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof. Examples are: flame-throwers, fougasses (hand-held weapons containing liquid incendiaries), shells, rockets, grenades, mines, bombs, and other containers of incendiary substances (Article 1, para. 1, lit. a, IncendiariesProt).

One of the main topics of the 1980 UN Weapons Conference was the issue of incendiary weapons since the US Air Force use of napalm bombs in Vietnam was still fresh in the memory.¹¹⁷ Some states (including Sweden, Mexico, and the majority of the non-aligned states) demanded a complete ban on incendiary weapons, arguing that these weapons always cause unnecessary suffering and generally also have indiscriminate effects;¹¹⁸ nonetheless, the superpowers, led by the US and the USSR, openly declared that—due to the military importance of incendiary weapons—they would accept, at the maximum, a few (and limited) restrictions on the use of such weapons.¹¹⁹ These weapons were thought to be absolutely necessary to attack certain (p. 148) objectives, particularly in relation to specific operations such as ‘close air support’ in the combat zone against immediately adjacent enemy positions.¹²⁰ A compromise only became possible when the delegation of the US began to request a prohibition of all air-launched attacks by incendiary weapons (including napalm) in settlements and populated areas, thus providing an opening for the resumption of the stalled negotiations.¹²¹ The resulting definition of the incendiary weapons covered by Protocol III of the WeaponsConv is extremely broad, since it includes not only incendiary materials based on hydrocarbon (like napalm) but also all means of combat designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof.¹²² The only important factor in the definition is the causation of burns through chemical reaction of a substance brought on the target.

6.22

Incendiary weapons do not include:

- **munitions which may have incidental incendiary effects (e.g. illuminants, tracers, smoke, or signalling systems, Article 1, para. 1, lit. b(i), IncendiariesProt); or**
- **munitions designed to combine penetration, blast, or fragmentation effects with an additional incendiary effect (e.g. armour-piercing projectiles, fragmentation shells, explosive bombs). The incendiary effect shall only be used against military objectives (Article 1, para. 1, lit. b (ii), IncendiariesProt).**

Article 1, para. 1, of the Protocol excludes from its definition of ‘incendiary weapons’ all means of combat which produce burns only as a side effect of a different primary objective (like illuminants, smoke, or signalling systems).¹²³ It also excludes weapons which cause burns only as part of an integrated mode of action mainly involving other mechanisms, that is munitions not specifically designed to cause burn injury to persons (like anti-tank munitions with an armour-piercing projectile working by extremely high temperature, or fragmentation shells and explosive bombs which combine penetration, blast, or fragmentation effects with an additional incendiary effect).¹²⁴ The exclusion of such munitions makes sense since they are normally used for operation against ‘hard’ military targets, and not against persons.¹²⁵

6.23

When incendiary weapons are used, all precautions shall be taken which are practicable or practically possible, taking into account all the current circumstances, including humanitarian and military considerations (Article 1, para. 5, IncendiariesProt).

Belligerents are already obliged, under the customary rules on means of combat, to take all precautions that are practically possible in order to protect civilians or civilian objects from unnecessary damage (Article 57 AP I; see Section 7.18). Article 1, para. 5, IncendiariesProt, defines exactly what are 'practically possible precautions': namely, those precautions which are 'practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations'. Responsible military leaders must take diligently such precautions before an attack. Article 2, para. 3, IncendiariesProt, in relation to attacks on settlements and other concentrations of civilian population, requires explicitly that parties take 'all feasible precautions'. However, attacks with incendiary weapons *outside* any (p. 149) concentration of civilians also requires a considerable degree of diligence, even if the IncendiariesProt is not intended to protect combatants.

6.24

The civilian population, individual civilians, and civilian objects shall be granted special protection. They shall not be made the object of attack by incendiary weapons (Article 2, para. 1, IncendiariesProt).

Article 2, para. 1, IncendiariesProt repeats the prohibition of deliberate attacks on civilians and civilian objects (particularly, the prohibition of terrorizing attacks) and directs this general prohibition explicitly to the use of incendiary weapons. Thus, the provision merely repeats elementary minimum standards of modern humanitarian law, which can be deduced directly from Article 51, para. 2, AP I¹²⁶ (see Section 7.12).

6.25

It is prohibited under any circumstances to make any military objective located within a concentration of civilians the object of attack by incendiary weapons (Article 2, paras 2 and 3, IncendiariesProt).

1. The IncendiariesProt distinguishes between incendiary weapons delivered by the air (e.g. the notorious napalm bombs) and other incendiary weapons used on land. Concerning attacks with air-delivered incendiary weapons, Article 2, para. 2 sets up an absolute prohibition against attacks on any objective located within a concentration of civilian population.¹²⁷ Attacks with other incendiary weapons are, in principle, also prohibited inside settlements and other concentrations of civilian population; however, under certain conditions specified in Article 2, para. 3, they remain admissible (namely insofar as the attack is directed against a military objective which is clearly separate from the concentration of civilians, and provided that all feasible precautions are taken to limit the incendiary effects so that they damage only the military objective, and to avoid, or to minimize, incidental loss of life and incidental damage to civilian objects).¹²⁸

2. The restrictions on the use of incendiary weapons undoubtedly constitute the core of the Protocol. The civilian population is protected against attacks by incendiary weapons (and, in particular, by incendiary bombs) within its cities, villages, and comparable settlements. The object of protection is not defined in purely spatial terms, but taking into account qualitative aspects too, so that not every area of a settlement is protected, but rather, only a concentration of civilians. This means that attacks on important military objectives are permitted under certain conditions, even if they are located within inhabited areas, as long

as these military objectives are not inseparably linked to real concentrations of civilian population.¹²⁹

6.26

It is further prohibited to use incendiary weapons against forests or other kinds of plant cover except when such natural elements are used by the adversary to cover, conceal, or camouflage a military objective, or are themselves military objectives (Article 2, para. 4, IncendiariesProt).

Article 2, para. 4, IncendiariesProt, adopted upon a proposal by the URSS, is not based on the prohibitions against unnecessary suffering and indiscriminate warfare, but rather protects certain kinds of natural plant cover, in particular forests.¹³⁰ The (p. 150) provision excludes protection in all cases in which flora is used to conceal military objectives, or in which natural cover itself constitutes a military objective.¹³¹ The provision exceeds even the scope of Articles 35, para. 3, and 55, para. 1, AP I and the provisions of the ENMOD Convention, in that it is designed to cover isolated attacks on the natural environment even if these are spatially limited, in contrast to the general prohibitions of environmentally damaging warfare (*see below*, Sections 10.02–10.03).

6.27

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision (Article 1 LasersProt and Article 8, para. 2 *lit. b*, xxix, and *lit. e*, xviii ICC Statute).

1. The 1995 Protocol on Blinding Laser Weapons (as Protocol IV to the 1980 Weapons Convention) is the first instrument after the 1868 St Petersburg Declaration banning a weapon of military interest before being used on the battlefield. Although laser systems have become prevalently used for functions such as target marking or projectile guidance, laser beams may hit human eyes and cause a temporary or permanent blinding effect.¹³² The prohibition laid down in the LasersProt rests on the assumption that permanent blinding is not justified under military necessity, but rather, inflicts superfluous injury or unnecessary suffering.¹³³ Due to the amendment of Article 1, para. 2, Inhumane WeaponsConv as of 21 December 2001, the Protocol also applies to non-international conflicts.

2. According to Article 1, the employment and transfer of laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is, to the naked eye or to the eye with corrective eyesight devices, is prohibited.¹³⁴ ‘Permanent blindness’ is defined in Article 4 as ‘irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery’. Article 3 states that blinding as an incidental or collateral effect of the employment of laser systems, including systems used against optical equipment, is not covered by the prohibition.¹³⁵ However, Article 2 requires the contracting parties to take all feasible precautions, including training of their armed forces, to avoid the incidence of permanent blindness to unenhanced vision.

3. The ICRC took the view that the prohibition on these weapons is grounded in customary international law.¹³⁶ Although some observers disagree due to a lack of corresponding state practice and *opinio juris* in 2005,¹³⁷ in light of more recent developments, today, the ban on laser weapons has reached customary status.¹³⁸

(p. 151) 4. Recently, states have included the employment of ‘laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices’ in the list of war crimes under the ICC Statute (Article 8, para. 2 lit b, xxix, and lit e, xviii).¹³⁹

6.28

Unmanned aerial vehicles (drones) are not prohibited as such, but must be used in compliance with international law, in particular international humanitarian law and its rules on means and methods of warfare.

1. The expression ‘drone’ is commonly employed in relation to ‘unmanned aerial vehicles’ remotely piloted by human operators.¹⁴⁰ Drones can be used both in intelligence activities (such as surveillance and reconnaissance missions) and in targeting operations. In spite of the perception of drones as relatively recent phenomena, Nikola Tesla created a prototype of a drone in 1898.¹⁴¹ The use of drones has increased dramatically in recent years since it has the advantage to remove human operators from the theatre of the hostilities, guaranteeing the security of the individuals involved in the operations.¹⁴² Although drones were once used only by technologically advanced armies, today they are commonplace among armed forces and armed groups.¹⁴³

2. Even though the legality of the use of drones has been questioned, international humanitarian law does not outlaw drones as prohibited weapons.¹⁴⁴ Indeed, there is no specific ban on drones in treaty or customary international humanitarian law, drones are not inherently unable to discriminate between different targets, as a such do not cause superfluous injury or unnecessary suffering, and are not inherently inhuman. As a result, most states consider that drones are lawful means of combat.¹⁴⁵

3. Caution is necessary in relation to the conclusion that international humanitarian law does not ban drones as such in any circumstances. Indeed, since drones are platforms, they can be armed with forbidden missiles.¹⁴⁶ Accordingly, the considerations on the inherent legality of drones do not absolve belligerents from the respect of the rules on lawful munitions.¹⁴⁷

4. The discourse on the legality of the use of drones should not focus on the drones as weapons, but rather on the necessity that drone warfare complies with applicable (p. 152) international law rules (Section 7.40). This is particularly relevant in relation to the rules on targeting.

6.29

The use of cyber malware as means of combat is not prohibited as such by international humanitarian law, but it is subject to applicable provisions of international law, the general rules governing means of combat (see above, Section 6.01 and 6.02), and the rules on methods of combat (see below, Section 7.35).

1. In the last decades, states have expressed the idea that cyber capabilities may be classified as weapons on a number of occasions.¹⁴⁸ Nonetheless, at the moment, there is no agreed definition of ‘cyber weapon’ or ‘cyber means of combat’. The authoritative—if not binding¹⁴⁹—Tallinn Manual 2.0 considers that ‘“means of cyber warfare” are cyber weapons and their associated cyber system’.¹⁵⁰ The Manual’s commentary specifies that ‘cyber weapons are cyber means of warfare that are used, designed, or intended to be used to cause injury to or death of, persons or damage to, or destruction of, objects’.¹⁵¹ According to the Manual, means of cyber combat ‘encompasses both cyber weapons and cyber weapons systems’¹⁵² so that cyber means of combat include ‘any cyber device,

materiel, instrument, mechanism, equipment, or software used, designed, or intended to be used to conduct a cyber attack'.¹⁵³ As confirmed by state practice,¹⁵⁴ these useful definitions should be read as encompassing cyber devices causing loss of functionality.¹⁵⁵ Scholars have been debated whether the loss of functionality should be accompanied by physical consequence on the targeted system: although the majority of experts who drafted the Tallinn Manual require physical consequences,¹⁵⁶ it is more correct to affirm that cyber devices causing loss of functionality without physical consequences are weapons.¹⁵⁷

2. By their nature, compared with drones, cyber weapons involve an even further regression in the location of the combatant, with a resulting reduction of risks for the human operators involved.¹⁵⁸ Cyber weapons usually comprise a delivery system, such as an email or a malicious link in websites, a navigation system, which offers entry points for the payload by enabling unauthorized access to the system, and a payload, which (p. 153) is the component that causes the actual damage.¹⁵⁹ Cyber devices that do not execute a payload—such as programmes that infiltrate systems only to copy information and data—cannot be considered to be weapons.¹⁶⁰

3. There is general consensus on the applicability of international humanitarian law to cyber weapons¹⁶¹ since the ICJ has affirmed that international humanitarian law applies 'to all forms of warfare, and to all kinds of weapons, those of the past, those of the present and those of the future'.¹⁶² Currently, states have concluded no treaty to regulate cyber weapons,¹⁶³ which are not prohibited by any specific extant rule of international law.¹⁶⁴ Accordingly, their legality depends on the specific features of a specific cyber weapon: for instance, a cyber weapon that is inherently indiscriminate, such as a malware that is programmed to spread and destroy uncontrollably civilian systems, would be unlawful.¹⁶⁵ Similarly, a cyber means of combat is unlawful if it is of such a nature to cause superfluous injury or unnecessary suffering¹⁶⁶—a less likely scenario.¹⁶⁷ Finally, a cyber weapon might be unlawful if it falls into the definition of another prohibited means of combat: e.g., it is possible to envisage the employment of forbidden cyber booby-traps (*see* Section 7.35), which can take the form of a kill switch embedded in malware planted into an enemy computer system and which operates unexpectedly when that computer system undertakes a usually safe task.¹⁶⁸

4. All in all, it is impossible to characterize cyber weapons as lawful or unlawful in principle, but each specific cyber weapon should be analysed case-by-case to determine its legality under the international humanitarian law rules applicable to means of combat.¹⁶⁹ Moreover, the method of combat called 'cyber operation', which usually involves the use of cyber means of combat, must comply with applicable rules of international humanitarian law (*see* Section 7.35).

6.30

Autonomous weapons or robotics are not prohibited as such, but like all means of warfare, they must be capable of being used in compliance with international humanitarian law. In particular, they must be programmed in a way that allows for compliance with the principles of distinction, proportionality, and precaution. The responsibility for the respect of these principles rests on the human programmers and operators.

(p. 154) 1. In recent years, there has been a significant debate regarding the legality under international humanitarian law of autonomous weapons and autonomous weapon systems, which remove further the human operators from the theatre of military operations.¹⁷⁰ Letting aside the position that would rule out the employment of such weapons for ethical

reasons,¹⁷¹ states and commentators have presented extremely different views on many legal issues pertaining to autonomous weapons.

2. The very definition of autonomous weapons is a source of disagreement. According to the US, 'autonomous weapons' refer to 'a weapon system that, once activated, can select and engage targets without further intervention by a human operator. This includes human-supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation.'¹⁷² This Chapter employs as a reference the ICRC's working definition of autonomous weapons system, which encompasses 'any weapon system with autonomy in its critical functions. That is, a weapon system that can select (i.e. search for or detect, identify, track, select) and attack (i.e. use force against, neutralize, damage or destroy) targets without human intervention.'¹⁷³ On the basis of the consideration that 'autonomy is a spectrum, rather than an absolute term',¹⁷⁴ some authors distinguish between semi-autonomous weapons, where a human operator can intervene and override the autonomous targeting decisions of the weapon, and fully autonomous weapons, where there is no override capability reserved to human review.¹⁷⁵

3. In practice, weapons and weapon systems with different degrees of autonomy, both employed in defence and in attacks, are already used by armies around the world,¹⁷⁶ and more sophisticated autonomous weapons are under development.¹⁷⁷ Some states have pointed out that the legality of autonomous weapons is not a new phenomenon since antipersonnel mines¹⁷⁸ and booby-traps¹⁷⁹ are rudimentary autonomous weapons that have existed for several decades. Moreover, one author has suggested that the human combatant is a fully autonomous weapon.¹⁸⁰ However, such a provocative view that blurs the differences between weapons and combatants should be disregarded because states have agreed that international humanitarian law binds states and individuals rather than weapons.¹⁸¹

(p. 155) **4.** Proponents of the illegality of autonomous weapons and autonomous weapon systems consider that these devices are inherently indiscriminate since they would not be able to comply with the rules on targeting—in particular the principles of precaution, distinction, and proportionality, especially in asymmetric scenarios. This inability would be the consequence of the lack of human capacity to discern the target and to weight the decision whether to engage it, which is based on the moral and emotive charges that are typical of human beings only.¹⁸² On the other hand, supporters of the legality of such weapons emphasize that the lack of emotions may be a positive aspects in light of the atrocities committed in armed conflict by emotionally driven persons ('robots do not rape' is often employed as a slogan), at the same time pointing out the potential of enhanced precision in targeting operations decided entirely by machines and the advantages of removing the need to protect the combatants from targeting considerations.¹⁸³

5. Since it is impossible to address here all the relevant positions offered by states and other relevant actors, suffice it to say that it is well-established that international humanitarian law applies to autonomous weapons¹⁸⁴ and that there is no ban on them under international humanitarian law *de lege lata*.¹⁸⁵ However, such weapons would be unlawful if they are of a nature to cause superfluous injury or unnecessary suffering, as well as if they are inherently indiscriminate. States agree that autonomous weapons and weapon systems are not inherently indiscriminate if they are placed under meaningful human control, even though there is no unanimity on the latitude of such an expression.¹⁸⁶ States must ensure that the autonomous weapons they employ are able to respect international humanitarian law, and in particular the principles of distinction, precaution, proportionality, and the ban on superfluous injury or unnecessary suffering.¹⁸⁷ States must ensure that autonomous weapons and weapon systems are developed and programmed so as to minimize the risks of international humanitarian law violations, exercising the required control in the phases of developing and programming:¹⁸⁸ if the achievement of such a result

is not possible due to current technical limitations, states should refrain from employing autonomous weapons until technology would allow them to comply with international humanitarian law.¹⁸⁹ To this end, the mechanism envisaged by Article 36 of the AP I should be applied to govern the development of these systems.¹⁹⁰ In any case, the (p. 156) humans responsible of the programming and activation of such weapons and the states to which these activities are attributable maintain their responsibility in relation to compliance with international humanitarian law.¹⁹¹

6. In conclusion, the legality of autonomous weapons and autonomous weapon systems depends on the development of the technology that is applied to them. At least as long as states do not agree to ban them under treaty law, if these weapons are programmed in such a way as to be able to comply with international humanitarian law, then they should be considered lawful. However, if the programmers could not meet this requirement, and operators would be unable to rule this out, these weapons should be considered prohibited.

III. Weapons of Mass Destruction

1. Nuclear Weapons

6.31

Numerous multilateral and bilateral treaties already exist which are designed to prohibit the proliferation of nuclear weapons, to restrict the testing of nuclear weapons, to prohibit the stationing of nuclear weapons, to provide for nuclear weapon-free zones, to limit the scope of nuclear armament, and to prevent the outbreak of nuclear war. These include the following:

- **Treaty on the Non-Proliferation of Nuclear Weapons (NPT) of 1 July 1968;**
- **Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and under Water (Partial Nuclear Test Ban Treaty) of 5 August 1963;**
- **Comprehensive Nuclear-Test-Ban Treaty of 24 September 1996 (not yet in force);**
- **Antarctic Treaty of 1 December 1959;**
- **Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) of 27 January 1967;**
- **Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) of 14 February 1967;**
- **Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof (Seabed Treaty) of 11 February 1971;**
- **Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War between the United States of America and the Union of Soviet Socialist Republics (30 September 1971);**
- **South Pacific Nuclear-Free Zone Treaty (Treaty of Rarotonga) of 6 August 1985;**
- **Treaty on the Southeast Asia Nuclear Weapon-Free Zone (Treaty of Bangkok) of 15 December 1995;**

- **African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) of 11 April 1996;**
- **Agreement concerning the Future Consultation Procedure for Implementation of the Agreement between the United States and the Union of Soviet Socialist Republics of September 30, 1971 on Measures to Reduce the Risk of Outbreak of Nuclear War (25 June 2004); and**
- **Treaty on a Nuclear-Weapon-Free Zone in Central Asia (Treaty of Semipalatinsk) of 8 September 2006.**

(p. 157) **1.** In 1948, the Commission for Conventional Armaments determined that weapons of mass destruction should be defined as 'atomic explosive weapons, radio-active material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above.'¹⁹² Today, WMD are simply defined as nuclear, chemical, and biological weapons.¹⁹³ While the production, possession, and use of chemical weapons and biological weapons is prohibited under treaty law (see below, Sections 6.40–6.42 and 6.43–6.44), the legal status of nuclear weapons is more complex.

2. Five states (United States, United Kingdom, France, Russia, and China) are recognized under the NPT as nuclear-weapon states and still consider nuclear deterrence as an important element of the maintenance of peace and security, an opinion shared by a larger number of states seeking their external security under the umbrella of one or more nuclear-weapon states. All states parties to the NPT are committed under Art. VI of that Treaty

to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

3. Four additional nuclear-armed states not party to the NPT (India, Israel, Democratic People's Republic of Korea, and Pakistan) are maintaining nuclear arsenals without sharing a treaty commitment to nuclear disarmament.

4. A possible use of nuclear weapons would have catastrophic long-term and irreversible effects, notably because of the radiation released by a nuclear explosion.¹⁹⁴

5. Over the last decades, states have concluded a whole network of treaties concerning nuclear arms control and disarmament; banning nuclear weapons tests; and establishing in particular nuclear-weapon-free zones covering uninhabited territories or areas, regional zones consisting of clusters of states or entire continents, and singular countries.¹⁹⁵

6.32

The Treaty on the Prohibition of Nuclear Weapons (TPNW) of 7 July 2017 was adopted by non-nuclear armed states.

1. The TPNW is the first legally binding instrument that prohibits the development, production, use, and threat of using nuclear weapons or other nuclear explosive devices. (p. 158) It has been negotiated on request by the UN General Assembly.¹⁹⁶ No nuclear-armed state participated in the negotiations. The text,¹⁹⁷ adopted with a vote of 122-1-1 states and welcomed by the General Assembly has entered into force on 22 January 2021, after the quorum of fifty ratifications or accessions was reached.¹⁹⁸ It is unlikely that any nuclear-armed state or any state seeking its external security under the umbrella of a nuclear power will accept it. Under the law of treaties, obligations arise only by formal acceptance

and without binding effect on third states. Article 16 TPNW, which provides that none of its provisions may be subject to reservations, puts strict limits on acceptance. The political impact of the TPNW notwithstanding, its contents thus opens controversies rather than solving them.¹⁹⁹

2. A comprehensive nuclear weapons convention remains necessary. That convention should be negotiated together with nuclear-armed States. It should prohibit the development, production, stockpiling, and use or threat of use of nuclear weapons, and regulate their destruction in a verifiable manner under strict and effective international control.

6.33

The international law in force does not contain any explicit prohibition against the use of nuclear weapons, nor can any such prohibition be derived from current treaty or customary law.

1. This is probably the most delicate issue of current international law. For decades, the question of whether the use of nuclear weapons is permissible has placed international legal doctrine in a stalemate, leaving unresolved the problem of whether international humanitarian law implicitly answers the question of legality of possession, and especially the threat of use of nuclear weapons.²⁰⁰ Customary law imposes limitations on the use of weapons in specific situations, but it is not clear whether this entails a comprehensive prohibition of nuclear weapons as such. While many scholars have advocated for an absolute prohibition on the use of nuclear weapons,²⁰¹ in the light of current state (p. 159) practice and *opinio juris* such prohibition remains open for doubt *de lege lata*. Neither the claim that there exists a customary prohibition nor the attempt to derive a general prohibition from existing treaty law, such as the ban on the use of poisonous gases in the Hague Regulations (Article 23a) and the Geneva Gas Protocol of 1925²⁰² is really convincing. This position has been confirmed by the ICJ in its Advisory Opinion on *Nuclear Weapons*, as the Court—particularly by referring to ‘the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake’—did not consider itself in a position ‘to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance’.²⁰³ It confirmed that any use of nuclear weapons must be compatible with the *jus ad bellum* and the *jus in bello*, even without being able to elaborate in detail whether such use, in the particular circumstances, would be likely to cause disproportionate civilian casualties.²⁰⁴

2. The argument that a customary prohibition on the use of nuclear weapons exists has two important weaknesses. *First*, the principle of distinction between combatants and civilians and the corresponding prohibition of indiscriminate warfare, which were rooted solely in customary law until their codification in AP I, present rather blurred contours in practice (see below, Sections 7.01, 7.12, and 7.15–7.18). It is hopelessly disputed, how far the normative effects of the principle of distinction reach and to what extent it effectively prohibits belligerents from using certain weapons. Even the general prohibition on indiscriminate target-area bombardment, affirmed in principle by so many authors, has always remained in dispute in that a real consensus has never been reached on the extent of permissible collateral damages.²⁰⁵ *Second*, the argument that the use of nuclear weapons *per se* constitutes prohibited indiscriminate warfare is founded on an image of nuclear war which perhaps had some justification in the era of the doctrine of ‘massive retaliation’, but it fails to appreciate the current options of use, which include militarily targeted employment of precision-guided warheads. A use of precision-guided nuclear warheads in limited operations against military objectives would result in consequences which cannot be adequately dealt with by a broad reference to principles such as the prohibition of (p. 160)

indiscriminate warfare and the protection of the civilian population. The damage to be expected from modern conventional weapons might create comparable explosive force.²⁰⁶

3. As a consequence, even taking into consideration the implications of the Nuclear Weapons Advisory Opinion, the claimed customary prohibition on the use of nuclear weapons is more an aspiration *de lege ferenda* founded in natural law theory and moral philosophy than a definite provision of positive customary international law derived from state practice and *opinio juris*.²⁰⁷ This does not mean, however, that no legal limitations to the use of nuclear weapons follow from the prohibition of 'indiscriminate attack': on the contrary it must be stressed that legal limits *in concreto* may be deduced from the general rules on means and methods of warfare, notwithstanding that these limits are only relevant as to the concrete mode in which the weapons are employed, and do not constitute an absolute prohibition on any one category of weapons.²⁰⁸

4. Comparable objections should be raised against broad generalizations which assume that nuclear weapons always qualify as 'poisonous weapons' in the sense of Article 23, lit. a, HagueReg, or as 'poisonous gases' in the sense of the Geneva Protocol of 1925.²⁰⁹ Admittedly, both notions were deliberately expressed in an 'open' fashion, in order to cover future advances in weapons technology. At the same time, however, it is beyond doubt that new means of combat were intended to be covered by these 'open' provisions only to the extent that the physical effects of such weapons are subject to the same principles as the means of warfare originally covered by the ban. However, it is precisely this comparability of operating principles which may be doubted with plausible arguments concerning nuclear weapons. The physical destruction of enemy objectives by nuclear weapons relies on the same effects as the operation of conventional explosive warheads, namely the results of the explosion (i.e. the pressure wave and subsequent burn effects), whereas the release of poison is an unintended side effect. In this respect, the use of nuclear weapons is different from the use of 'poison' or 'poisonous gases' which are by definition intentionally designed to cause poisoning.²¹⁰

(p. 161) **6.34**

International humanitarian law imposes the same general limits on the use of nuclear weapons as on the use of conventional weapons: it is prohibited to make the civilian population the object of attack. A distinction shall at all times be made between persons who take part in hostilities and members of the civilian population, who are to be granted maximum protection.

1. To conclude that the general rules of customary and treaty law impose no absolute prohibition on the use of nuclear weapons is not to say that the use of nuclear weapons is free of all legal limitation. On the contrary: nobody has ever claimed seriously that the traditional principles concerning warfare and weapons have been derogated as regards nuclear weapons; such a claim could not be argued plausibly.²¹¹ This leads to the conclusion that the above-mentioned general rules of customary law are applicable also to the use of nuclear weapons. The most important consequence of this is that the general prohibition of indiscriminate warfare must cover the use of nuclear weapons.

2. Nuclear weapons may be employed only under strictly specified conditions and only after taking restrictive precautions. Care must always be taken to ensure that the pressure wave, the consequent burn effects, and the radioactive fallout cause the minimum possible damage or injury to the civilian population as well as to the environment.²¹²

6.35

The new rules introduced by Additional Protocol I were intended to apply to conventional weapons, irrespective of other rules of international law applicable to other types of weapons. They do not influence, regulate, or prohibit the use of nuclear weapons.

1. When the original draft of the 1977 Additional Protocols was presented, and during the later negotiations at the Diplomatic Conference in Geneva 1974–1977, there was intense controversy over whether AP I should also cover the use of nuclear weapons. The position of the ICRC and that of the most important military powers was, from the beginning, that the Additional Protocols should not affect nuclear weaponry.²¹³ Accordingly, at the opening of the negotiations in 1974 the mandate of the Diplomatic Conference had been restricted to conventional weapons.

2. The ICRC had stated at the beginning of the negotiations: ‘Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Protocols the ICRC does not intend to broach these problems.’²¹⁴

(p. 162) 3. In the course of the Diplomatic Conference of 1974–1977, the US, UK, and France repeatedly stressed the limitation of the negotiations, while other states openly attempted to extend the scope of Additional Protocol I to include express regulation concerning nuclear weapons. However, those attempts to take up the question of nuclear warfare finally failed. Nevertheless, no formal agreement on the scope of application could be reached until the end of the conference, which was why the US and UK annexed their declarations to the Treaty on the occasion of its signature.²¹⁵ These declarations were not contested by any other state. Thus a ‘nuclear consensus’ has become directly relevant to the interpretation of the Treaty.

4. Most of the NATO allies have stressed this precondition of consent by submitting corresponding declarations upon ratification of AP I.²¹⁶ These declarations confirm the ‘nuclear consensus’ which existed since the outset of the negotiations,²¹⁷ a general understanding which purported to exclude nuclear weapons from the negotiations.

5. According to Article 31, para. 1, of the Vienna Convention on the Law of Treaties (23 May 1969), treaties are to be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context’. Pursuant to Article 31, para. 2, lit. b, of that Convention the context includes ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty’. The declarations which were deposited by the US and the UK are such instruments, and are directly connected to the text of the Treaty.²¹⁸ It is undisputed that they were made on the occasion of the conclusion of the Treaty. It should also be indisputable—although this was questioned by some authors²¹⁹—that the declarations were accepted by the other parties as an instrument related to the treaty. Acceptance by the other parties, referred to in Article 31, para. 2 (b) of the Vienna Convention, requires only a consensus on the connection with the treaty, not a consensus on the substantial content of the declaration.²²⁰ Those authors who argue to the contrary misunderstand that basic principle if they contend that the so-called ‘nuclear consensus’ is irrelevant in the light of the ‘unequivocal’ wording of the Additional Protocol, and that the preparatory work of the Treaty and the circumstances of its conclusion are relevant only as a supplementary means of interpretation, pursuant to Article 32 Vienna Convention, if on the textual interpretation the meaning is ambiguous or obscure.²²¹ An interpretation based on these assumptions is plausible only if the declarations do not belong to the ‘general means of interpretation’ in the sense of Article 31 (p. 163) Vienna Convention. Yet, the exclusion of Article 31, para. 2, lit. b, can be argued only if it is mistakenly assumed that instruments according to Article 31, para. 2, lit. b, require a consensus on the correctness of the substance of the declaration.²²² The correct construction of the declarations of the

Western nuclear powers is that they are complementary instruments in accordance with Article 31, para. 2, lit. b, Vienna Convention. Accordingly, to clarify the question of whether AP I covers the use of nuclear weapons, one must rely upon the preparatory work and the circumstances of conclusion of AP I, which sources in turn prove that the question of use of nuclear weapons was excluded from the scope of the Treaty.²²³

6. It follows that the new rules introduced by the AP I are not applicable as treaty law on the use of nuclear weapons, whereas the customary rules, reaffirmed by the provisions of the Protocol, are.²²⁴ Indeed, various provisions can be considered as exceeding traditional customary law. Although intended only to give more concrete shape to the customary prohibition of indiscriminate warfare, they in fact contain a decisive element of new law. It may be difficult to distinguish the expression of pre-existing rules from the more innovative elements, particularly in a codification of pre-existing customary rules that are not fixed with sufficient precision in written form. There is inevitably, as the Henri Meyrowitz has expressed it: 'a mixture ... of elements of the *lex lata* and of the *lex ferenda*'.²²⁵ As well explained by Frits Kalshoven, new rules introduced by AP I are in particular the rules elaborating the principle of proportionality in the protection of the civilian population (Arts 57, 58 AP I), the prohibition of reprisals against the civilian population (Art. 51, para. 6 AP I), and the prohibition of widespread, long-term and severe damage to the environment (Arts. 35, para. 3, and 55 AP I).²²⁶

6.36

As weapons of last resort, nuclear weapons continue to fulfil an essential role to prevent war by ensuring that there are no circumstances in which the possibility of nuclear retaliation in response to military action might be discounted.

1. It is difficult to evaluate the repercussions of customary law rules on the strategic planning of nuclear-weapons states and alliances such as the North Atlantic Alliance. This is mainly due to the fact that such repercussions can be discussed in practical terms only concerning the concrete details of operational planning. On an abstract level, one can only state that a strategy of 'massive retaliation'—at least in the form of a threat of first strike or of escalation—is not compatible with the general principles of distinction and the prohibition of indiscriminate warfare.²²⁷

(p. 164) 2. However, the operational planning for the use of nuclear weapons for self-defence purposes, including deterrence of attack, cannot be considered as an unlawful threat in every case. The ICJ itself refers to the policy of deterrence as an established practice of states.²²⁸ Attacks with tactical nuclear weapons (and perhaps also with precision-guided strategic weapons) could be legally permissible if they are specifically aimed at military objectives and they are also proportionate, with collateral damage to civilian objects being commensurate with the military purpose intended.²²⁹ It is, however, absolutely necessary in these cases that the requirements of distinction and proportionality are strictly observed.²³⁰

3. An assessment of nuclear weapons doctrines remains essential, as this issue is of high relevance for global security and there are important gaps of regulation in all nuclear-armed states.²³¹ Although NATO commits itself to a world without nuclear weapons, it reconfirmed its reliance on nuclear deterrence 'as long as nuclear weapons exist'.²³² Nuclear and conventional weapons will both remain an essential part in the future strategy of the Alliance.²³³ 'The supreme guarantee of the security of the Allies is provided by the strategic nuclear forces of the Alliance.'²³⁴ It is true that in the light of changed security situations, the Alliance has taken a series of de-escalating steps. It has 'dramatically

reduced the number of nuclear weapons stationed in Europe'.²³⁵ Additionally, the Alliance has reduced the reliance on nuclear weapons in its strategy.

4. The threat to use nuclear weapons continues to be regarded by all nuclear-armed states as an essential instrument for the prevention of war. If exercised within the principles of necessity and proportionality, such threat may be justified in self-defence during an ongoing armed conflict, and as well if it is designed to prevent an attack by way of deterrence.²³⁶ The alarming fact that nuclear-armed states are still far from taking effective measures towards nuclear disarmament underlines a need for continued nuclear deterrence and at the same time points to a continued risk of unintended or accidental use of nuclear weapons. To overcome this situation, political efforts have to be taken to enhance pacific settlement of disputes as mandatory under Chapter VI of the UN Charter. While artificial intelligence, offensive cyber operations, and enhanced non-nuclear weapons with strategic impact might render nuclear deterrents ineffective or even counter-productive,²³⁷ the assumption that these might help to avoid security risks is (p. 165) speculative and still appears less than realistic. A departure from nuclear deterrence policies can only be achieved by co-operative efforts.

6.37

The threat and use of nuclear weapons are subject to political control, which shall observe the principle of proportionality, limiting damage on the territory of the enemy as well as the risk of damage on friendly territory.

Decisions on whether to use nuclear weapons are not purely military. On the contrary, nuclear forces have a primarily political character. Their purpose is primarily to keep a balance of mutual deterrence, not intervention in combat operation. Accordingly, decisions on the use of such weapons cannot be left to the military alone. Nuclear strikes have such far-reaching political implications that they must be authorized by the highest political authorities. This is true not only for all states which possess nuclear weapons, but also for states on whose territory nuclear weapons are deployed. The political decision to use such weapons should be taken with due regard to the question of legal justification of the operation, and its concrete modalities, and in strict observance of the relevant legal rules. These legal considerations are of the utmost importance since the boundary between legally permissible combat and prohibited indiscriminate attack can easily be overstepped in nuclear warfare. The criteria of proportionality, of limiting damage on the territory of the enemy as well as limiting the risk of damage on friendly territory, are of paramount importance.

2. Chemical Weapons

6.38

The use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or similar devices is prohibited (GasProt; Article 23, lit. a, HagueReg). This prohibition also applies to toxic contamination of water-supply installations and foodstuffs (Article 54, para. 2, AP I; Article 14 AP II) and the use of irritant agents for military purposes. This prohibition does not apply to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions.

1. There is no dispute as to the basic rule: the use of chemical weapons is prohibited.²³⁸ A prohibition on wartime use of potentially lethal substances which cause asphyxiation or poisoning effects had already been codified in Article 23, lit. a, HagueReg (prohibition against using poison or poisoned weapons, *see supra*, Section 6.03). Despite that regulatory safeguard, massive military use was made of poisonous gases in World War I. After the war it was therefore felt that the prohibition should be reaffirmed. The Geneva Protocol of 17

June 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare thus consolidated the general prohibition of poisonous weapons in 1925 and explicitly outlawed all use of the gas weapon which had been so common during World War I.²³⁹

2. The general prohibition against the use of poisonous gases—which now constitutes a rule of customary law²⁴⁰—applies not only to their direct use against enemy combatants, but extends also to the toxic contamination of water-supply installations and foodstuffs. This could in theory be deduced from the pre-existing general prohibition of poison (p. 166) and poisoned weapons in Article 23, lit. a, HagueReg; nowadays it is expressly provided for in Article 54, para. 2, AP I and Article 14 AP II on the protection of objects and installations indispensable to the survival of the civilian population (see below, Section 7.24). As the analogous regulation in Additional Protocols I and II already indicates, the prohibition on the use of chemical weapons is applicable irrespective of whether the conflict is international or non-international. Even in internal conflicts it is prohibited to use chemical agents to place members of armed forces *hors de combat* or to terrorize the civilian population;²⁴¹ contaminating water supplies and foodstuffs is only one example of such illicit chemical warfare the primary goal of which is to spread terror among the ‘enemy population’ (as demonstrated most strikingly by Iraq’s ‘Operation Anfal’ against its Kurdish population).²⁴²

3. Concerning the category of ‘irritant agents’, which is included in the scope of the prohibition by sentence 2 of Section 6.40, it should be noted that a serious dispute continues as to whether these substances were covered by the traditional prohibition of chemical weapons. State practice was not unequivocal in that regard; one thinks of the US operations in Vietnam.²⁴³ Article 1, para. 5, of the Chemical Weapons Convention of 1993 now settles the controversy by explicitly prohibiting the use of ‘irritant agents’ in warfare (under the notion ‘riot control agents’).²⁴⁴ In addition, the Preamble of the new Convention also refers to herbicides,²⁴⁵ although the reference is not as clear as the explicit prohibition of ‘irritant agents’. The most important point concerning all these disputes about the definition of ‘poisonous gases’ (clarified to a large extent by the new Chemical Weapons Convention) is the intentional design of a weapon in order to inflict poisoning as a means of combat. Only in so far as the poisoning effect is the intended result of the use of the substances concerned does the use of such munitions qualify as a use of ‘poisonous gases’. If the asphyxiating or poisoning effect is merely a side effect of a physical mechanism intended principally to cause totally different results (as, e.g., the use of nuclear weapons), then the relevant munition does not constitute a ‘poisonous gas’. Nuclear weapons, for example, are not prohibited as ‘poisonous weapons’ although they cause asphyxiation and poisoning as secondary effects.

6.39

The scope of this prohibition was restricted by the fact that, when signing the Geneva Gas Protocol, numerous states declared that this Protocol should cease to be binding in regard to any enemy state whose armed forces fail to respect the prohibition embodied in the Protocol. According to the principle of reciprocity, states which did not record such a reservation will also not be legally bound by the Protocol with respect (p. 167) to a follow-on use of chemical weapons against states which launch, support, or assist in planning an attack by chemical weapons contrary to international law.

1. Nearly all military powers have lodged reservations to the Geneva Gas Protocol which limit the Protocol to a prohibition only against first use and/or restrict the effects of the prohibition as between the contracting parties.²⁴⁶ The results of such reservations must be judged according to the general rules on legal effects of reservations in Article 21 of the Vienna Convention on the Law of Treaties. Accordingly, a reservation modifies the

provisions of the treaty to which it relates also for the other contracting parties as far as their convention relations with the reserving state are concerned. This means in effect that in the treaty relations with the major military powers the prohibition of chemical weapons is generally reduced to a prohibition against first use.²⁴⁷ Even beyond the technical effects of reservations, the general principle of reciprocity applies in that (prohibited) first use by one contracting party would entitle the adversary to make subsequent use of chemical weapons by way of military reprisal, as long as the subsequent use is not proscribed by specific prohibitions against reprisals.

2. The use of chemical weapons is also subject to the general customary rules on weapons and warfare, and particularly the basic principle of military necessity and the prohibition of indiscriminate warfare.²⁴⁸ Retaliatory use is justifiable only under the aspect of reprisal, and the legal limits of the law of reprisals must also be observed, in particular the requirement that reprisals be restricted to measures absolutely necessary in order to put an end to the infringement of law by the state who first violated the law (by making first use of chemical weapons). The specific prohibition of reprisals in Article 51, para. 6, AP I, however, does not in principle apply to the use of chemical weapons (as in the case of nuclear weapons), since the so-called ‘nuclear consensus’—which was an agreement to leave out of consideration the whole complex of ABC weapons—leads to the non-applicability of the new rules of Additional Protocol I, *inter alia* Article 51, para. 6, AP I.²⁴⁹

3. Today, restrictions to the prohibition of chemical weapons no longer apply, as confirmed by the 1993 Convention on Chemical Weapons (*see below*, Section 6.40) and a progressive development of customary law (*see for instance* the reactions of states after chemical attacks in Syria 2018).

6.40

The Convention on Chemical Weapons of 13 January 1993 includes comprehensive prohibitions of any development, production, stockpiling, transfer, and use of chemical weapons, as well as provisions on international control of compliance with these provisions.

1. For decades the member states of the UN have negotiated within the framework of the UN Conference on Disarmament in order to reach agreement on a treaty prohibiting not only the use, but also the production and stockpiling of chemical weapons.²⁵⁰ In 1992, they finally succeeded in concluding the new Chemical Weapons Convention. The Convention comprehensively bans all development, production, stockpiling, and transfer (p. 168) of chemical weapons and provides for a detailed regulatory framework on the destruction of stockpiled resources,²⁵¹ thus going far beyond what had been provided for in the 1925 Geneva Gas Protocol which had prohibited only the *use* of chemical weapons. Since the Biological Weapons Convention of 1972 (*see below*, Sections 6.41 and 6.42) the new treaty was the second to outlaw completely a specific category of weapons. The ICC Statute, as amended on 10 June 2010, defines the use of poison or poisoned weapons²⁵² and asphyxiating, poisonous, or other gases or analogous liquids, materials, and devices²⁵³ as war crimes both in international and non-international armed conflicts.

2. One characteristic decisively distinguishes the new Chemical Weapons Convention from the Biological Weapons Convention of 1972, however, and that is its comprehensive verification regime,²⁵⁴ the preparation of which was the major impediment during decades of negotiations.²⁵⁵ Under the new verification regime there has been established for the first time in history a far-reaching system not only of routine inspections, but also of ‘challenge inspections’ at the request of a state party, to investigate allegations of non-

compliance. Even the private chemical industry is included in the system of on-site inspections.²⁵⁶

3. Bacteriological (Biological) and Toxin Weapons

6.41

The use of bacteriological weapons is prohibited (GasProt).

The prohibition of use laid down in the Geneva Gas Protocol is not limited to ‘poisonous gases’ in a strict sense; the wording of the Treaty covers also bacteriological weapons.²⁵⁷ Under customary law, too, one must assume an absolute prohibition of any use of bacteriological weapons,²⁵⁸ be it in international or internal conflicts.

6.42

The development, manufacture, acquisition, and stockpiling of bacteriological (biological) and toxin weapons is prohibited (BiologicalWeaponsConv). These prohibitions apply both to biotechnological and synthetic procedures serving other than peaceful purposes. They also include genetic engineering procedures and the alteration of micro-organisms through genetic engineering.

1. The Biological Weapons Convention of 1972 was the first universal treaty to codify the prohibition of an entire category of weapons.²⁵⁹ According to the Convention, the development, manufacture, acquisition, or stockpiling of bacteriological weapons, as well as their use in any military conflict, are prohibited. Article 8. Para. 2 (b) (xxvii) and (e) (xvi) of the ICC Statute, as amended on 14 December 2017, defines ‘weapons which (p. 169) use microbial and other biological agents or toxins, whatever their origin or method of production’ as war crimes both in international and non-international armed conflicts.²⁶⁰
2. The BiologicalWeaponsConv requires the complete destruction of all such weapons—without, however, providing for a specific regime of verification. In 1994, member states had created an ‘Ad Hoc Group’ in an effort to establish a compliance system laid down in a binding protocol to the Convention; however, the negotiations were brought to a halt in 2001 by the US who rejected the draft protocol.²⁶¹ The Convention also refrains from defining exactly what constitutes bacteriological (biological) weapons.²⁶² Nevertheless, there seems to exist general agreement that all living organisms fall under the Treaty which could be used to cause or spread diseases, or which are intended to cause the death of humans, animals, or plants, in so far as these organisms are designed to be used for hostile purposes in armed conflicts. Such organisms may be bacteria, microbes, viruses, fungi, or rickettsiae, or other living organisms damaging to other organisms. The notion ‘biological weapons’ covers also so-called ‘toxins’, that is all substances extracted from living organisms designed to be used for hostile purposes.²⁶³

Footnotes:

* This chapter updates and expands Stefan Oeter’s commentary to Sections 405–41 in the third edition of this *Handbook*.

¹ See, e.g., F. Kalshoven ‘Arms, Armaments and International Law’ (1985) 191 *RdC* 183; N. Sitaropoulos, ‘Weapons and Superfluous Injury or Unnecessary Suffering in International Humanitarian Law’ (2001) 54 *Revue Hellénique de Droit International* 71; A. Cannone, *Armi vietate, diritto internazionale dei conflitti armati e crimini di guerra* (Cacucci, 2013); S. Casey-Maslen (ed.), *Weapons Under International Human Rights Law* (CUP, 2014); S. Haines, ‘The Developing Law of Weapons’, in A. Clapham and P. Gaeta (eds), *International*

Law in Armed Conflict (OUP, 2015), 237; W. H. Boothby, *Weapons and the Law of Armed Conflict*, 2nd edn (OUP, 2016).

² See J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP, 2005) (hereinafter: 'CIHL').

³ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (CUP, 2016), 2.

⁴ Ibid.

⁵ US Air Force, *Instruction 51-402*, 27 July 2011, 6 (including in the definition of 'weapons' also devices that can temporarily incapacitate people, property or material); Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016), 336.

⁶ Art. 35(1) AP I.

⁷ Art. 23 lit. e HagueReg; Article 35, para. 2, AP I.

⁸ Art. 51, paras 4 and 5, AP I.

⁹ See Tokyo District Court, *Shimoda et al v The State* (1963) 32 *ILR* 626, 628-9.

¹⁰ See R. Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar, 2014), 17-21; M. Sassòli, *International Humanitarian Law* (Edward Elgar, 2019), 486-95.

¹¹ Kolb, above (n. 10), 20-1; Sassòli, above (n. 10), 380-1.

¹² ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 *ICJ Reports* 247, para. 52. See also US Department of Defense, *Law of War Manual* (2016), section 6.2.1.

¹³ See M. Bothe, K. J. Partsch, and W. A. Solf, *New Rules for Victims of Armed Conflicts* (Nijhoff, 1982), 199; Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff, 1987), 421-5.

¹⁴ See Bothe/Partsch/Solf, above (n. 13), 199; Sandoz/Swinarski/Zimmermann, above (n. 13), 423.

¹⁵ Bothe/Partsch/Solf, above (n. 13), 200.

¹⁶ R. Domínguez-Matés, 'New Weaponry Technologies and International Humanitarian Law: Their Consequences on the Human Being and the Environment', in P. A. Fernández-Sánchez (ed.), *The New Challenges of Humanitarian Law in Armed Conflicts* (Nijhoff, 2005), 91, 116-17. On the relevant standards of control, see also I. Daoust, R. Coupland, and R. Ishoey, 'New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare' (2002) 84 *IRRC* 345; Sandoz/Swinarski/Zimmermann, above (n. 13), 425; J. McClelland, 'The Review of Weapons in Accordance with Article 36 of Additional Protocol I' (2003) 85 *IRRC* 397.

¹⁷ See S. Casey-Maslen, N. Corney, and A. Dymond-Bass, 'The Review of Weapons under International Humanitarian and Human Rights Law', in Casey-Maslen, above (n. 1), 411, 414-15; Boothby, above (n. 1), 342-3.

¹⁸ Such mechanisms have been established, e.g., by Australia, Belgium, Canada, Denmark, Germany, Netherlands, Norway, Sweden, the United Kingdom, and the United States (see *CIHL* Vol. I, 250).

¹⁹ M. Roscini, *Cyber Operations and the Use of Force in International Law* (OUP, 2014), 171; T. Chengeta, 'Are Autonomous Weapons Systems the Subject of Article 36 of Additional Protocol I to the Geneva Conventions' (2016) 23 *UC Davis Journal of International Law & Policy* 65, 70. It has been suggested that in cases of different regulations of means of combat in non-international and international armed conflicts, the review should apply the

standard that is relevant in the specific context in which a weapon is to be employed (W. H. Parks, 'Conventional Weapons and Weapons Reviews' (2005) 8 *YIHL* 55, 121-2).

²⁰ See Y. Sandoz, *Des armes interdites en droit de la guerre* (Genève: Grounauer, 1975), 11-14; L. C. Green, *The Contemporary Law of Armed Conflict*, 3rd edn (Manchester University Press, 2008), 167; Boothby, above (n. 1), 104.

²¹ Dinstein, above (n. 3), 78.

²² On what constitutes 'poison', see Sandoz, above (n. 20), 27-8.

²³ Art. 8 (2) (b) (xvii) and Art. 8 (2) (e) (xiii) ICC Statute.

²⁴ For the historical background see Kalshoven, above (n. 1), 205-13.

²⁵ *Ibid.*, 212.

²⁶ *Ibid.*, 205-8, 212-13.

²⁷ St Petersburg Declaration, preamble.

²⁸ Tokyo District Court, *Shimoda et al v. The State*, above (n. 9), 634.

²⁹ Kalshoven, above (n. 1), 207; Sitaropoulos, above (n. 1), 86-7; Dinstein, above (n. 3), 79.

³⁰ See, e.g., Kalshoven, above (n. 1) 222-3; cf. Sandoz, above (n. 20) 18-19; Rule 78 *CIHL* vol. I.

³¹ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, 2004), 110.

³² As to its historical background, see Kalshoven, above (n. 1), 213-17; Boothby, above (n. 1), 138-9.

³³ Dinstein, above (n. 3), 79-80.

³⁴ *Ibid.*, 77.

³⁵ See Boothby, above (n. 1), 146-7.

³⁶ See Kalshoven, above (n. 1), 259-61; Boothby, above (n. 1), 146-7.

³⁷ See Kalshoven, above (n. 1) 241-4, 251-3.

³⁸ As to the framework agreement of the UN Weapons Convention system, see J. A. Roach, 'Certain Conventional Weapons Convention: Arms Control or Humanitarian Law' (1984) 105 *Military Law Review* 3, 16-68; W. J. Fenrick, 'The Conventional Weapons Convention: A Modest but Useful Treaty' (1990) 72 *IRRC* 498.

³⁹ ICC Statute, Amendment to Article 8 (Weapons the Primary Effect of which is to Injure by Fragments Undetectable by X-Rays in the Human Body), C.N.125.2018.TREATIES-XVIII.10 (Depositary Notification of 8 March 2018).

⁴⁰ Roach, above (n. 38), 69-70.

⁴¹ See N. Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016), 113; US Department of Defense, above (n. 12), section 6.11.1.

⁴² E. David, *Principes de droit des conflits armés*, 6th edn (Bruylant, 2019), 497.

⁴³ See the Memorandum of the German Government annexed to the draft of an approving statute to the Weapons Convention, BR-Drs. 117/92, 25.

⁴⁴ *Ibid.*

⁴⁵ ICRC, *Banning Anti-Personnel Mines: The Ottawa Treaty Explained* (ICRC, 1998), 3; F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn (ICRC, 2001), 187; S. Maslen, *Commentaries on Arms Control Treaties, Vol. I, The Convention on the Prohibition of the Use, Stockpiling,*

Production, and Transfer of Anti-personnel Mines and on their Destruction (OUP, 2004), 21–44.

⁴⁶ Ibid., 39–43. On 31 January 2020 US President Donald Trump has cancelled the Obama Administration’s policy to prohibit United States military forces from employing anti-personnel landmines outside of the Korean Peninsula, see White House press statement, <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-107/>. Germany has deplored the new US policy on anti-personnel landmines; see the declaration of the Minister of State at the Federal Foreign Office, 1 February 2020, and that of the spokesperson for the Federal Government, 3 February 2020, quoted in <https://gpil.jura.uni-bonn.de/2020/02/germany-critical-of-new-u-s-anti-personnel-landmine-policy/>.

⁴⁷ ICRC, above (n. 45), 5; S. Maslen and P. Herby, ‘An International Ban on Anti-Personnel Mines: History and Negotiation of the “Ottawa Treaty” ’ (1998) 38 *IRRC* 693, 700–1; Dinstein, above (n. 3), 84.

⁴⁸ International Campaign to Ban Landmines (ICBL), ‘Landmine Monitor 2019’, 8.

⁴⁹ EECC, *Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 22*, 28 April 2004, XXVI *RIAA* 129, para. 24; *CIHL*, Vol. I, 282.

⁵⁰ G. Nystuen and S. Casey-Maslen, *The Convention on Cluster Munition: A Commentary* (OUP, 2010), section 2.109.

⁵¹ Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, vol. II (2009), 338.

⁵² ICTY, *Prosecutor v Martić*, IT-95-11-T, Judgment, 12 June 2007, para. 463.

⁵³ For technical details of the MinesProt, see B. M. Carnahan, ‘The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons’ (1984) 105 *Military Law Review* 73.

⁵⁴ David, above (n. 42), 504.

⁵⁵ Ibid., 504–7. See also Kalshoven/Zegveld, above (n. 45), 181–3; Boothby, above (n. 1), 159–69.

⁵⁶ Dinstein, above (n. 3), 72–3.

⁵⁷ See Memorandum of the German Government, above (n. 12), 25.

⁵⁸ David, above (n. 42), 506. For the relevant debate during the negotiations, see E. Rauch, ‘The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines’ (1981) 24 *GYIL* 262, 269–80; Carnahan, above (n. 53), 79–80.

⁵⁹ Cf. also Kalshoven/Zegveld, above (n. 45), 175–6.

⁶⁰ For the parallel legal consequences resulting from Art. 51, para. 4, AP I, see *ibid.*, 175–6.

⁶¹ Ibid., 175.

⁶² See *ibid.*, 175–6.

⁶³ See *ibid.*, 176.

⁶⁴ In force since 18 May 2004.

⁶⁵ Kalshoven/Zegveld, above (n. 45), 181.

⁶⁶ On due diligence and obligations of conduct in general, see R. Pisillo Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 35 *GYIL* 9; J. Kulesza, *Due Diligence in International Law* (Brill, 2016). On due diligence obligations in international humanitarian law, see M. Longobardo, ‘The Relevance of the

Concept of Due Diligence for International Humanitarian Law' (2019) 32 *Wisconsin International Law Journal* 43.

⁶⁷ *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Judgment, 2007 ICJ Reports 43, para. 430.

⁶⁸ Ibid.

⁶⁹ For a criticism of the distinction between combat zone and hinterland, see Rauch, above (n. 58), 280–1.

⁷⁰ See the Memorandum of the German Government, above (n. 12), 26.

⁷¹ On this expression, see Rauch, above (n. 58), 278–9.

⁷² For the debate on this formula, see Carnahan above (n. 53), 81–2.

⁷³ *Contra* see Rauch, above (n. 58), 281–2.

⁷⁴ See the Memorandum of the German Government, above (n. 12), 26.

⁷⁵ Kalshoven/Zegveld, above (n. 45), 182.

⁷⁶ M. J. Matheson, 'The Revision of the Mines Protocol' (1997) 91 *AJIL* 158, 164.

⁷⁷ See, generally, M. Bettati, 'L'interdiction ou la limitation d'emploi des mines (Le Protocole de Genève du 3 mai 1996)' (1996) 42 *AFDI* 187, 193.

⁷⁸ Ibid.; Matheson, above (n. 76), 164.

⁷⁹ ICRC, *Expert Meeting on the Convention for the Prohibition of Anti-personnel Mines*, 12 February 1997, <https://www.icrc.org/en/doc/resources/documents/statement/57jnf9.htm>; Bettati, above (n. 77), 199.

⁸⁰ P. Herby, 'Third Session of the Review Conference of States Parties to the 1980 United Nations Convention on Certain Conventional Weapons (CCW)' (1996) 36 *IRRC* 361, 363; Maslen, above (n. 45), 108.

⁸¹ Matheson, above (n. 76), 163. On non-metallic anti-personnel mines, see the observations based on the experience of the Falklands War made by A. P. V. Rogers, 'Mines, Booby-traps and Other Device' (1990) 72 *IRRC* 521, 530, and the technical remarks by G. C. Cauderay, 'Anti-Personnel Mines' (1993) 33 *IRRC* 273.

⁸² Bettati, above (n. 77), 193; Matheson, above (n. 76), 163–4.

⁸³ As to the technical distinction between self-destruction and self-deactivation, see Bettati, above (n. 77), 193–4; Matheson, above (n. 76), 162.

⁸⁴ Maslen, above (n. 45), 22.

⁸⁵ See Carnahan, above (n. 53), 79–80; Rauch, above (n. 58), 269–80.

⁸⁶ See the Memorandum of the German Government, above (n. 12), 26 mentioning the necessity to retain the option of disturbing and delaying the advance of the second and third attack formation of Warsaw Pact armies.

⁸⁷ Article 1, lit. b of the Technical Annex; cf. Bettati, above (n. 77), 194.

⁸⁸ Article 6, para. 2, MinesProt. See also Matheson, above (n. 76), 161–2.

⁸⁹ Article 6, para. 3, MinesProt.

⁹⁰ British declaration on ratification of MinesProt, quoted by Boothby, above (n. 1), 154.

⁹¹ See A. P. V. Rogers, *Law on the Battlefield*, 3rd edn (Manchester University Press, 2012), 138–9.

- ⁹² *Ibid.*, 139.
- ⁹³ Article 2, para. 4, MinesProt. On this definition, *see* Carnahan, above (n. 53), 89–90; Boothby, above (n. 1), 152.
- ⁹⁴ *See* Carnahan, above (n. 53), 89–90; Kalshoven, above (n. 1), 255.
- ⁹⁵ *See* Carnahan, above (n. 53), 90; Fenrick, above (n. 38), 505; Sitaropoulos, above (n. 1), 95.
- ⁹⁶ *See* US Department of Defense, above (n. 12), section 6.12.4.8. *See*, also, Green, above (n. 20), 164; Dinstein, above (n. 3), 81.
- ⁹⁷ On the lack of an agreed definition of ‘pre-planned minefields’, *see* Boothby, above (n. 1), 155.
- ⁹⁸ Concerning the preceding non-binding Technical Annex, *see* Carnahan, above (n. 53), 84–5.
- ⁹⁹ *Ibid.*, 84.
- ¹⁰⁰ Article 1, lit. a(iii) Technical Annex of the MinesProt; Bettati, above (n. 77), 195. *See* Section 6.14 for a discussion on the recording of remotely delivered mines.
- ¹⁰¹ *See* Fenrick, above (n. 38), 506.
- ¹⁰² Entry into force on 12 November 2006. 96 ratifications in January 2020.
- ¹⁰³ L. Maresca, ‘A New Protocol on Explosive Remnants of War: The History and Negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons’ (2004) 86 *IRRC* 815.
- ¹⁰⁴ *Ibid.*, 815–16, 823–5.
- ¹⁰⁵ P. Herby and A. R. Nuiten, ‘Explosive Remnants of War: Protecting Civilians through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons’ (2001) 83 *IRRC* 195, 198–201; Maresca, above (n. 103), 816–18.
- ¹⁰⁶ However, the Protocol does not contain a prohibition of the use of cluster bombs, which has been adopted later in 2008 (*see* below, Section 6.08).
- ¹⁰⁷ Maresca, above (n. 103), 823, 828.
- ¹⁰⁸ *Ibid.*, 834.
- ¹⁰⁹ *See* Carnahan, above (n. 53), 94–5.
- ¹¹⁰ Herby, above (n. 80), 363.
- ¹¹¹ Maresca, above (n. 103), 829–30.
- ¹¹² (*see* Carnahan, above (n. 53), 95). The explicit reference to missions established under Chapter VIII in Article 12, para. 2, lit. a(ii), of the amended MinesProt also supports this interpretation.
- ¹¹³ For examples of such agreements *see* Carnahan, above (n. 53), 82–3.
- ¹¹⁴ Maresca, above (n. 103) 825–7; Boothby, above (n. 1), 308–10.
- ¹¹⁵ Maresca, above (n. 103), 835.
- ¹¹⁶ *See* Rule 83 *CIHL*; Maresca, above (n. 103), 826–33.
- ¹¹⁷ *See* Boothby, above (n. 1), 193.

- 118** See, e.g., the Memorandum of the German Government, above (n. 12), 27. See also Fenrick, above (n. 38), 506–7; Kalshoven, above (n. 1) 256–7; W. H. Parks, ‘The Protocol on Incendiary Weapons’ (1990) 30 *IRRC* 535, 537–8.
- 119** Ibid.
- 120** See, in particular, Fenrick, above (n. 38), 508; Sitaropoulos, above (n. 1), 96.
- 121** See, e.g., the Memorandum of the German Government, above (n. 12), 27 and Fenrick, above (n. 38), 506–7.
- 122** On the definition of Article 1, para. 1, see Kalshoven, above (n. 1); Fenrick, above (n. 38), 507; Parks, above (n. 118), 543–54; Boothby, above (n. 1), 195.
- 123** Fenrick, above (n. 38), 507; Parks, above (n. 118), 544–5; Dinstein, above (n. 3), 88.
- 124** See, e.g., Fenrick, above (n. 38), 507; Kalshoven/Zegveld, above (n. 45), 179; Parks, above (n. 118), 545.
- 125** See, e.g., the Memorandum of the German Government, above (n. 12), 27.
- 126** Parks, above (n. 118), 547.
- 127** On the drafting history of this provision, see Kalshoven, above (n. 1), 258–9; Fenrick, above (n. 38), 507–8; Parks, above (n. 118), 548–9.
- 128** See, e.g., the Memorandum of the German Government, above (n. 12), 28; Parks, above (n. 118), 549.
- 129** See Fenrick, above (n. 38), 508; Green, above (n. 20), 166.
- 130** See Fenrick, above (n. 38), 508; cf. also the Memorandum of the German Government, above (n. 12), 28.
- 131** Ibid., 28.
- 132** B. M. Carnahan and M. Robertson, ‘The Protocol on “Blinding Laser Weapons”: A New Direction for International Humanitarian Law’ (1996) 90 *AJIL* 484; Kalshoven/Zegveld, above (n. 45), 180.
- 133** Dinstein, above (n. 3), 90.
- 134** On the expression ‘specifically designed’, see, generally, Boothby, above (n. 1), 203.
- 135** The scope of this exception remains disputed, as discussed by L. Doswald-Beck, ‘New Protocol on Blinding Laser Weapons’ (1996) 36 *IRRC* 272, 290–4.
- 136** Rule 86, *CIHL* Vol. I.
- 137** See, e.g., D. Turns, ‘Weapons in the ICRC Study on Customary International Humanitarian Law’ (2006) 11 *JCSL* 201, 233–4.
- 138** Boothby, above (n. 1), 206.
- 139** ICC Statute, Amendment to Article 8 (Blinding Laser Weapons), C.N. 126-2018.TREATIES-XVIII-10 (Depositary Notification of 8 March 2018).
- 140** They are also called remotely piloted aircraft (see US Department of Defense, above (n. 12), section 6.5.8). The legality of fully autonomous aerial vehicles is analysed below (Section 6.30).
- 141** See C. Jenks, ‘Drones’, in D. Djukić and N. Pons (eds), *The Companion to International Humanitarian Law* (Brill, 2018), 309.

- 142** On this and other tactical advantages offered by drones, see J. D. Ohlin, 'Remoteness and Reciprocal Risk', in Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 15, 22.
- 143** See Jenks, above (n. 141), 311.
- 144** S. Casey-Maslen, 'The Use of Armed Drones', in Casey-Maslen (ed.), above (n. 1), 382, 400; J. Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2014) 96 *IRRC* 67, 69–70; Boothby, above (n. 1), 246; David, above (n. 42), 455.
- 145** E.g. the Netherlands (N. van Amstel and M. Zwanenburg, 'Online Correspondents' Reports – Netherlands' (2013) 16 *YIHL* 1, 3) and the US Department of Defense, above (n. 12), section 6.5.8). See also Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Killing, Philip Alston* (Addendum, Study on Targeting Killings), 28 May 2010, UN Doc A/HRC/14/24/Add.6, para. 79.
- 146** Casey-Maslen, above (n. 144), 400.
- 147** Ibid.
- 148** States that have expressed this view include Belarus, Cuba, Kazakhstan, Panama, Russia, Spain, the UK, and the US (see Roscini, above (n. 19), 50–1, 170).
- 149** For some criticisms to the first edition of the Manual, see D. Fleck, 'Searching for International Rules Applicable to Cyber Warfare—A Critical First Assessment of the New *Tallinn Manual*' (2013) 18 *JCSL* 331. On the second edition, see M. Lismonde, 'Étude critique du manuel de Tallinn sur la participation directe aux hostilités: du partage d'informations militaires sur les réseaux sociaux' (2018) 47 *RBDI* 583.
- 150** M. N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP, 2017), 452, Rule 103 (hereinafter: *Tallinn Manual 2.0*).
- 151** Ibid., 452.
- 152** Ibid.
- 153** Ibid., 452–3.
- 154** US Air Force, above (n. 5), 6; Danish Ministry of Defence, above (n. 5), 336 (with no specific reference to cyber weapons).
- 155** Roscini, above (n. 19), 168–9; J. T. Biller and M. N. Schmitt, 'Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare' (2019) 95 *International Law Studies* 179, 210–18. The Tallinn Manual indirectly acknowledges this view: although the Manual does not refer to reduction of functionality in its definition of cyber weapons, loss of functionality is mentioned in the definition of cyber attack (*Tallinn Manual 2.0*, 417–18), which is relevant to define cyber weapons as well (ibid., 452).
- 156** Ibid., 417 ('interference with functionality qualifies as damage if restoration of functionality requires replacement of physical components').
- 157** See Th. Rid & P. McBurney, 'Cyber-Weapons' (2012) 157 *The RUSI Journal* 6, 7; Roscini, above (n. 19), 168–9.
- 158** Ohlin, above (n. 142), 27–33.
- 159** M. Roscini, 'To What Degree do the Difficulties in Tracing the Author of the Attack and Assessing the Extent of the Effects Remain a Challenge for Addressing the Legal Issues Raised by "Cyber-Weapons"?', in B. De Vidts and G. L. Beruto (eds), *Weapons and the International Rule of Law* (Franco Angeli, 2017), 227, 227–8.

- 160** Ibid., 228. For more on the exfiltration of information through cyber means in armed conflict, see M. Longobardo, '(New) Cyber Exploitation and (Old) International Humanitarian Law' (2017) 77 *ZaöRV* 809.
- 161** ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2011), 36–7.
- 162** ICJ, *Nuclear Weapons* opinion, above (n. 12), para. 86.
- 163** For a proposal, see L. Arimatsu, 'A Treaty for Governing Cyber-Weapons: Potential Benefits and Practical Limitations', in C. Czosseck, R. Ottis, and K. Ziolkowski (eds), *4th International Conference on Cyber Conflict* (NATO CCD COE, 2012), 91.
- 164** US Department of Defense, above (n. 12), section 16.6.
- 165** Roscini, above (n. 19), 175; *Tallinn Manual 2.0*, 455, Rule 105; US Department of Defense, above (n. 12), section 16.6.
- 166** *Tallinn Manual 2.0*, 453, Rule 104.
- 167** Ibid., 455.
- 168** See the discussion in W. H. Boothby, 'Methods and Means of Cyber Warfare' (2013) 89 *ILS* 387, 398–9; *Tallinn Manual 2.0*, 457–9.
- 169** Roscini, above (n. 19), 175–6.
- 170** See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/23/47, 9 April 2013, para. 27; Ohlin, above (n. 142), 33.
- 171** See the interplay between legal and ethical concerns in ICRC, *Ethics and Autonomous Weapon Systems: An Ethical basis for Human Control?* (2018).
- 172** US Department of Defense, *Directive 3000.09*, 21 November 2012, 13–14.
- 173** ICRC, *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons. Expert meeting* (2016), 8.
- 174** E. Liebllich and E. Benvenisti, 'The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapons Systems Are Unlawful', in N. Bhuta et al. (eds), *Autonomous Weapons Systems: Law, Ethics, Policy* (OUP, 2016), 245, 248.
- 175** M. N. Schmitt, 'Autonomous Weapons Systems and International Humanitarian Law: A Reply to the Critics' (2013) 1 *Harvard National Security Journal Features* 1, 5; Dinstein, above (n. 3), 98.
- 176** See the overview offered by the ICRC, above (n. 173), 10–14.
- 177** Ibid., 14–15.
- 178** US Department of Defense, above (n. 12), section 6.5.9.1.
- 179** Israel, Statement at Group of Governmental Experts meeting on Lethal Autonomous Weapons Systems, CCW, 11 April 2018, 2.
- 180** G. S. Corn, 'Autonomous Weapons Systems: Managing the Inevitability of "Taking the Man Out of the Loop"', in Bhuta et al. (eds), above (n. 174), 209, 212, 221.
- 181** US Department of Defense, above (n. 12), section 6.5.9.3; CCW/GGE.1/2019/CRP.1/Rev. 2, 21 August 2019, para. 17 (b).
- 182** See, e.g., P. Asaro, 'On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making' (2013) 94 *IRRC* 687; Liebllich/Benvenisti, above (n. 174), 269–81; D. Amoroso, '*Jus in Bello* and *Jus ad Bellum*

Arguments against Autonomy in Weapons Systems: A Re-appraisal' (2017) 43 *Zoom-In, Questions of International Law* 5, 12–17.

183 See, e.g., Schmitt, above (n. 175) 11–14; J. S. Thurnher, 'Feasible Precautions in Attack and Autonomous Weapons', in W. Heintschel von Heinegg *et al.* (eds), *Dehumanization of Warfare* (Springer, 2018), 99; Sassòli, above (n. 10), 522.

184 N. van Amstel and M. Zwanenburg, 'Online Correspondents' Reports – Netherlands' (2013) 16 *YIHL* 1, 4.

185 US Department of Defense, above (n. 12), section 6.5.9.

186 N. van Amstel and M. Zwanenburg, 'Online Correspondents' Reports – Netherlands' (2016) 19 *YIHL* 1, 2; C. Kittelmann, 'Online Correspondents' Reports – UK' (2014) 17 *YIHL* 1, 7; CCW/GGE.1/2019/CRP.1/Rev.2, above (n. 181), para. 17 (d)–(e).

187 *Ibid.*, paras 16(a) and 17(f)–(h).

188 N. Ronzitti, *Diritto internazionale dei conflitti armati*, 6th edn (Giappichelli, 2017), 201.

189 Corn, above (n. 180), 226; Boothby, above (n. 1), 253.

190 See van Amstel/Zwanenburg, above (n. 186), 2–3; Corn, above (n. 180), 227–8. See, also, from a precautionary perspective, N. Bhuta and S.-E. Pantazopoulos, 'Autonomy and Uncertainty: Increasingly Autonomous Weapons Systems and the International Legal Regulation of Risk', in Bhuta *et al.* (eds), above (n. 174), 284, 297–9.

191 Dinstein, above (n. 3), 99; Sassòli, above (n. 10), 526–8.

192 Cf. UN Doc. A/RES/32/84B of 12 December 1977.

193 H. A. Strydom, 'Weapons of Mass Destruction', *MPEPIL*, para. 2,

194 See in particular the Conferences on the Humanitarian Impact of Nuclear Weapons, held in 2013 and 2014, <https://www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/>.

195 See St. Casey-Maslen and T. Vestner, *A Guide to International Disarmament Law* (Routledge, 2019). For a comprehensive study on the legal aspects of nuclear arms control, see International Law Association, *Final Report of the Committee on Arms Control and Disarmament Law* (Berlin, 2004); International Law Association, *Reports of the Committee on Nuclear Weapons, Non-Proliferation and Contemporary International Law* (Washington, 2014; Johannesburg, 2016; Sydney, 2018); J. Black-Branch and D. Fleck (eds), *Nuclear Non-Proliferation in International Law* (Vol. I with Foreword by Mohamed ElBaradei; Vol. II *Verification and Compliance*; Vol. III *Legal Aspects of the Use of Nuclear Energy for Peaceful Purposes*; Vol. IV *Human Perspectives on the Development and Use of Nuclear Energy*; Vol. V *Legal Challenges for Nuclear Security and Deterrence* (Asser Press/Springer, 2014, 2015, 2016, 2019, and 2020); Vol. VI *Nuclear Disarmament and Security at Risk—Legal Challenges in a Shifting Nuclear World* (forthcoming in 2021).

196 UNGA Res 71/258 (23 December 2016) Taking forward multinational nuclear disarmament negotiations.

197 729 UNTS 161, UN Doc A/CONF.229/2017/8 (7 July 2017); reprinted in Treaty on the Prohibition of Nuclear Weapons, with Foreword by Peter Maurer, President of the ICRC (Geneva: ICRC, 2019).

198 UNGA Res 72/31 (11 December 2017) Taking forward multinational nuclear disarmament negotiations; UNODA, Treaty on the Prohibition of Nuclear Weapons, <http://disarmament.un.org/treaties/t/tpnw>.

- 199** See *inter alia* J. A. Camilleri, M. Hamel-Green, and F. Yoshida (eds), *The 2017 Nuclear Ban Treaty: A New Path to Nuclear Disarmament* (London: Routledge, 2018); S. Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons. A Commentary* (Oxford University Press, 2019); D. Fleck, 'The Treaty on the Prohibition of Nuclear Weapons: Challenges for International Law and Security', in J. Black-Branch and D. Fleck (eds), *Nuclear Non-Proliferation in International Law*, Vol. IV (Asser Press/Springer, 2019), 395–415; M. Subritzky, 'An Analysis of the Treaty on the Prohibition of Nuclear Weapons in Light of its Form as a Framework Agreement' (2019) 9(2) *Goettingen Journal of International Law* 367–84.
- 200** See the instructive presentation by F. Kalshoven, 'Arms, Armament and International Law' (1985 II) 191 *RdC* 183–341, at 271–83.
- 201** See in particular G. Schwarzenberger, *The Legality of Nuclear Weapons* (London: Stevens, 1958), 35–49; I. Brownlie, 'Some Legal Aspects of the Use of Nuclear Weapons' (1965) 14 *ICLQ* 437–51; E. Castrén, 'The Illegality of Nuclear Weapons' (1971) 3 *University of Toledo Law Review* 89–98; R. Falk, H. Meyrowitz, and J. Sanderson, 'Nuclear Weapons and International Law' (1980) 20 *Indian Journal of International Law* 561–95; N. Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, 2nd edn (Nijhoff, 1989), 313–19; R. Kolb, *Ius in Bello*, 2nd edn (Helbing Lichtenhahn/Bruylant, 2009), 302–5; C. J. Moxley, *Nuclear Weapons and International Law in the Post Cold War World* (Austin & Winfield, 2000), 651–727; D. Thürer and M. Zobl, 'Are Nuclear Weapons Really Legal? Thoughts on the Sources of International Law and A Conception of the Law imperio rationis instead of ratione imperii', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP, 2011), 184–97.
- 202** See below, para. 4.
- 203** ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion—UNGA Request (8 July 1996), *ICJ Reports* 1996, 226, paras 95–7, 105 (2) E); for general discussions of the Advisory Opinion, see D. Akande, 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court' (1997) 68 *BYIL* 165–217; Y. Dinstein, *War, Aggression and Self-Defence*, 6th edn (CUP, 2017), 182–4; L. Boisson de Chazournes and Ph. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP, 1999); M. J. Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons' (1997) 91 *AJIL* 417–35; V. P. Nanda and D. Krieger (eds), *Nuclear Weapons and the World Court* (Transnational Publishers, 1998); M. N. Schmitt, 'The International Court of Justice and the Use of Nuclear Weapons' (1998) 51 *Naval War College Review* 91–116; D. Thürer, 'The Legality of the Threat or Use of Nuclear Weapons: The ICJ Advisory Opinion Reconsidered' (2012) *Revista do Instituto Brasileiro de Direitos Humanos* 85–94.
- 204** Chr. Greenwood, 'Jus ad bellum and jus in bello in the Nuclear Weapons Advisory Opinion', in Boisson de Chazournes/Sands, above (n. 203), 247–66, at 261–2.
- 205** See J. M. Spaight, *Air Power and War Rights*, 3rd edn (Longmans, 1947), 270–8, 280–1; J. Stone, *Legal Controls of International Conflict* (Stevens, 1954), 627–31; M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959), 336; H. Blix, 'Area Bombardment: Rules and Reasons' (1978) *IXL BYIL* 54–61.
- 206** As to the compatibility of certain uses of nuclear weapons with the general humanitarian requirement to distinguish between combatants and civilians, see M. C. Ney, *Der Einsatz von Atomwaffen im Lichte des Völkerrechts* (Frankfurt a. M.: Lang, 1985), 276–81, 285, 292–8; H. Meyrowitz, 'Quel droit de la guerre pour l'OTAN?' (1986) 17 *Etudes*

Internationales 549–69 at 560–2; Fleck, ‘NATO-Strategie und Völkerrecht’ (1987) 29 *NZWehrr* 221–9.

207 To the same conclusion come H. Lauterpacht (ed.), *Oppenheim’s International Law*, Vol. II: *Disputes, War and Neutrality*, 7th edn (David McKay, 1952), 351; Stone, above (n. 205), 343–8; R. Tucker, *The Law of War and Neutrality at Sea* (US Government Printing Office, 1957), 50–5; M. S. McDougal and J. P. Feliciano, ‘International Coercion and World Public Order: The General Principles of the Law of War’ (1958) 67 *Yale Law Journal* 771–845, at 830–1; Ney, above (n. 206) 292–3; Kalshoven, above (n. 200), 286–8; C. Pilloud and J. S. Pictet, in *ICRC Commentary to AP I*, para. 1857; O. E. Bring and H. B. Reimann, ‘Redressing a Wrong Question: The 1977 Protocols Additional to the 1949 Geneva Conventions and the Issue of Nuclear Weapons’ (1986) 33 *Netherlands International Law Review* 99; L. C. Green, ‘Nuclear Weapons and the Law of Armed Conflict’ (1988) 17 *Denver Journal of International Law and Policy* 1–27; C. Greenwood, ‘Jus ad bellum and jus in bello in the Nuclear Weapons Advisory Opinion’, in Boisson de Chazournes, above (n. 203), 247–66, at 264–6.

208 See esp. Bring/Reimann, 99–105; cf. Kalshoven, above (n. 200), 286–7; Green, *Essays on the Modern Law of War*, 2nd edn (Transnational Publishers, 1999), 161; Matheson, above (n. 203), 428.

209 So argue, e.g., Schwarzenberger, above (n. 201), 48; Falk/Meyrowitz/Sanderson, above (n. 201), 561 *et seq.*; Singh/McWhinney, above (n. 201), 307–12.

210 For the same conclusions, see Kalshoven, above (n. 200), 283–4; Matheson, above (n. 203), 424–5; ICJ, *Nuclear Weapons* (paras 54–6).

211 See Meyrowitz, above (n. 206), 553–5; H. Fujita, ‘Au sujet de l’avis consultatif de la Cour internationale de Justice rendu sur la licéité des armes nucléaires’ (1997) 79 *RIC* 60–9, at 61–2; Greenwood, above (n. 207) 259; ICJ, *Nuclear Weapons* (paras 85–6).

212 For comparable conclusions, see ICJ, *Nuclear Weapons*, para. 105; Greenwood, above (n. 208), at 264–6; R. Müllerson, in Boisson de Chazournes/Sands, above (n. 203), 267–74. For the significance of the environment, see Akande, above (n. 203), 182–9; D. Momtaz, ‘The use of nuclear weapons and the protection of the environment: the contribution of the International Court of Justice’, in Boisson de Chazournes/Sands, above (n. 203) 354–74; M. N. Schmitt, ‘Future War and the Principle of Discrimination’ (1998) 28 *IsrYHR* 59–60.

213 For a description of the historical background, see Kalshoven, above (n. 200), 278–83 and Pilloud/Pictet, *ICRC Commentary on the Additional Protocols*, paras 1842–6.

214 Printed in M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts* (Nijhoff, 1982), 188–9; as to the background of the exclusion of NBC weapons from the negotiations, see Kalshoven, above (n. 200), 271–82.

215 Printed in *DoD Manual*, 6.18.3. On the history of the negotiations see Solf, in Bothe/Partscht/Solf, 188–92; Ney, above (n. 206), 193–209; Pilloud/Pictet, in *ICRC Commentary on the Additional Protocols*, paras 1839–51.

216 See *UK Manual*, 6.17; German *BGBI* 1991 II, 968.

217 See H. Meyrowitz, ‘Le statut des armes nucléaires en droit international’ (1982) 25 *GYIL* 229–37, and Kalshoven, above (n. 200), 282–3.

218 The same is argued by Solf, in Bothe/Partscht/Solf, above (n. 214), 191.

219 See H. Fischer, *Der Einsatz von Nuklearwaffen nach Art.51 des I. Zusatzprotokolls zu den Genfer Konventionen von 1949* (Duncker & Humblot, 1985), 155–60.

- 220** See R. Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Verträgen* (Springer, 1986), 37 (with further references) and M. Pechstein, 'Die Ratifizierung der Zusatzprotokolle zu den Genfer Konventionen durch die Bundesrepublik Deutschland' (1992) 30 AVR 292.
- 221** See Fischer, above (n. 219), 167–72; E. Rauch, 'L'emploi d'armes nucléaires et la réaffirmation et le développement du droit international humanitaire applicables dans les conflits armés' (1980) 33 *Revue Hellénique du droit international* 1–60, at 53–60.
- 222** Fischer, above (n. 219), 156–8.
- 223** With the same result, see H. Meyrowitz, 'La stratégie nucléaire et le Protocole additionnel I aux Conventions de Genève de 1949' (1979) 83 *RGDIP* 904–61, at 933–8; G. Aldrich, 'New Life for the Laws of War' (1981) 75 *AJIL* 764–83, at 781–2; Solf, in Bothe/Partsch/Solf, above (n. 214), 188–92; Ney, above (n. 206), 193–209; Kalshoven, above (n. 200), 283; Pilloud/Pictet, in *ICRC Commentary on the Additional Protocols*, paras 1852, 1858; Fleck, above (n. 206), 227.
- 224** See also Pilloud/Pictet, in *ICRC Commentary on the Additional Protocols*, para. 1852; Green, above (n. 208), 157.
- 225** Meyrowitz, above (n. 206), 554.
- 226** Kalshoven, above (n. 200), 287; see also F. Kalshoven and L. Zegveld, *Constraints on the Waging of War*, 4th edn, (CUP, 2011), 118.
- 227** As to the repercussions of the general rules on methods of war on the legality of strategies of massive retaliation, see Meyrowitz, above (n. 206), 560.
- 228** *ICJ Nuclear Weapons*, 254, 263 (paras 67, 96); see Fujita, above (n. 211); Matheson, above (n. 203), 431.
- 229** See Kalshoven, above (n. 200), 287.
- 230** As to the problems resulting from such principles, see Meyrowitz, above (n. 206), 560–3.
- 231** See D. Fleck, 'Legal Aspects of Nuclear Weapons Doctrines', in J. Black-Branch and D. Fleck (eds), *Nuclear Non-Proliferation in International Law*, Vol. V (Asser Press/Springer, 2020), 351–93.
- 232** 'Nuclear weapons are a core component of NATO's overall capabilities for deterrence and defence alongside conventional and missile defence forces. The circumstances in which any use of nuclear weapons might have to be contemplated are extremely remote', cf. Deterrence and Defence Posture Review, adopted by Heads of State and Government participating in the meeting of the North Atlantic Council in Chicago on 20 May 2012, http://www.nato.int/cps/en/SID-BC1BD788-68E2C019/natolive/official_texts_87597.htm, paras 8 and 9.
- 233** NATO 2010 Strategic Concept 'Active Engagement, Modern Defence', para. 17.
- 234** NATO 2010 Strategic Concept, para. 18.
- 235** NATO 2010 Strategic Concept, para. 26.
- 236** See N. Stürchler, *The Threat of Force in International Law* (CUP, 2007), at 273. A. N. Smith, 'Post-1996 Scholarly Interpretations of the Legal Status of Threat of Force (Lawyers Committee of Nuclear Policy, 2018), at 41, acknowledges that threats of force that 'may have textual justification for legality' include 'those offered in narrow circumstances of self-

defence', but concludes without explanation that *any* envisaged use of nuclear weapons would be contrary to humanitarian law and thus be illegal.

237 S. Casey-Maslen, 'The Status of Nuclear Deterrence Under International Law in Light of the Treaty on the Prohibition of Nuclear Weapons' (2018) 21 *Yearbook of International Law Humanitarian* 23-57, at 51-2.

238 W. H. Boothby, *Weapons and the Law of Armed Conflict*, 2nd edn (OUP, 2016), Chapter 9.4.

239 See M. Bothe, *Das völkerrechtliche Verbot des Einsatzes chemischer und bakteriologischer Waffen* (Köln: Heymann, 1973); Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (CUP, 2016), 78, 91-2.

240 Rule 74 *CIHL*; see Bothe, above (n. 239), 39-47.

241 ICTY, *Prosecutor v Tadić* (Case IT-94-1, Appeals Chamber), 2 October 1995, *ILM* 105 (1997), 519, para. 124.

242 See the reports on human rights in Iraq, prepared by the Special Rapporteur of the UN Commission on Human Rights, Max van der Stoep, UN Doc.A/46/647, paras 22, 23, 74, and 75; UN Doc. E/CN.4/1993/45 of 18 February 1992, paras 49, 50, 102; UN Doc. E/CN.4/1993/45 (19 February 1993), paras 89-97.

243 Concerning the problem of 'irritant agents' see Bothe, above (n. 239) 49-61; Kalshoven, above (n. 200), 268; DoD Manual, 6.16; and *US Naval Manual*, para 10.3.2.

244 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris (13 January 1993); W. Krutzsch, E. Myjer, and R. Trapp, *A Commentary on the Chemical Weapons Convention* (OUP, 1994); see also Rule 75 *CIHL*.

245 On the dispute concerning herbicides, see A. Gioia, 'The Chemical Weapons Convention and its application in time of armed conflict', in M. Bothe, N. Ronzitti and A. Rosas (eds), *The New Chemical Weapons Convention—Implementation and Prospects* (Kluwer, 1998), 387-90.

246 As to the reciprocity of reservations, see Bothe, above (n. 239), 66-78; F. Kalshoven, 'Belligerent Reprisals Revisited' (1990) 21 *NYIL* 43-80, at 73-4.

247 See Kalshoven, *ibid.*, 74.

248 T. Marauhn, 'Chemical Weapons and Warfare', *MPEPIL*.

249 See Solf, in Bothe/Parts/Solf, above (n. 214), 188-91.

250 Concerning the course of negotiations see the detailed analysis in Bothe/Ronzitti/Rosas (eds), above (n. 245).

251 On the final phase of the negotiations, see Th. Bernauer, *The Chemistry of Regime Formation: Explaining International Co-operation for a Comprehensive Ban on Chemical Weapons* (Dartmouth, 1993), 27-30.

252 Art. 8 (2) (b) (xvii) and (e) (xiii) ICC Statute.

253 Art. 8 (2) (b) (xviii) and (e) (xiv) ICC Statute.

254 See Bernauer, *The Projected Chemical Weapons Convention: A Guide to the Negotiations in the Conference on Disarmament* (UN Doc. UNIDIR/90/7, 1990), 119 *et seq.*, 164 *et seq.*, 173 *et seq.*; W. Lang, 'Compliance with Disarmament Obligations' (1995) 55 *ZaöRV* 69-88, at 84-6.

255 As to the course of negotiations see Bernauer, above (n. 251), 18-59.

- 256** See Bernauer, above (n. 254), at 38-9; Krutzsch *et al.*, above (n. 244).
- 257** See Bothe, above (n. 239) 25.
- 258** Bothe, above (n. 239), 48-9; Rule 73 *CIHL*.
- 259** Concerning the substance of the Convention see the brief description by Bothe, above (n. 239), 36-8, and the detailed analysis of the Convention's legal regime by E. Stein, 'Impacts of New Weapons Technology on International Law' (1971 II) 133 *RdC* 223-388, at 337 *et seq.*, 358 *et seq.*; Boothby, above (n. 238), Chapter 9.3.
- 260** ICC Statute, Amendment to Article 8 (Weapons which use microbial and other biological agents or toxins), C.N.116.2018.TREATIES-XVIII.10 (Depositary Notification of 8 March 2018).
- 261** A. Kelle, K. Nixdorff, and M. Dando, *Controlling Biochemical Weapons: Adapting Multilateral Arms Control for the 21st Century* (Palgrave Macmillan, 2006), 48-59.
- 262** See Bothe, above (n. 239), 37.
- 263** See D. Švarc, 'Biological Weapons and Warfare', *MPEPIL*, para. 1.

(p. 170) 7 Methods of Combat

Introductory Remarks

1. The concern to protect the civilian population, as well as combatants, against excessive and exceptionally cruel violence might have been the beginning of all moral and philosophical attempts to mitigate the horrors of war. The ancient civilizations experienced—as did the cultures of the Far East, India, and Islam¹—religiously motivated efforts to set bounds to the spread of belligerent violence. These attempts to control war, however, succeeded only to a limited degree.

Like all ‘modern international law’ the contemporary law of war has its roots primarily in European history since the Middle Ages.² Christian moral theology and the natural law theories of early modern times made intense efforts to alleviate the sufferings of war but they failed to find real resonance in the belligerent practice of medieval feuds or the religious wars of the sixteenth and seventeenth centuries.³ The code of honour of European chivalry had imposed certain ritual limits on the permitted forms of combat towards ‘equal’ enemies, but did little to protect the hostile ‘civilian population’.⁴ Combat to the prejudice of the peasant and urban population reached a sad climax in the Thirty Years War of 1618–48, when a third of Central Europe’s population fell victim to the excesses of unlimited warfare.

This background must be kept in mind when dealing with the desperate endeavours of the classical authors of international law to achieve a legal limitation of belligerent practice. The famous work of Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, was primarily a treatise on laws of war founded on natural law theory. ‘*Necessaria ad finem belli*’ for Grotius was the ultimate limit of admissible use of force in war.⁵ The rise of disciplined professional armies, the monopolization of the means of force in the hands of the developing state bureaucracy, and the ‘nationalization of war’ by the absolutist regimes of Europe were the basic conditions of the ongoing process of ‘delimitation’ of permissible (p. 171) means of use of force, as well as of the connected concept that war constitutes a struggle between states but does not create a relation of enmity between its citizens.⁶

2. The fundamental idea underlying all humanitarian rules on methods and means of warfare has since that time always been the concept of *military necessity*. According to the traditional approach, only the use of those means and methods of combat which is necessary to attain the military purposes of war, purposes based on the ultimate goal of overpowering the enemy armed forces,⁷ are permitted. Accordingly, the civilian population and civilian objects do not constitute legitimate military targets, as was recognized by the Lieber Code of 1863;⁸ equally prohibited is the deliberately cruel killing of enemy combatants by weapons which uselessly aggravate suffering, a principle codified at around the same time in the St. Petersburg Declaration of 1868.⁹ Because these principles of ‘limited warfare’ which were formed during the nineteenth century became the nucleus of the (originally customary) laws of war, *opinio juris* and the practice of the nineteenth century have had a decisive impact on the shaping of modern humanitarian law.¹⁰

Nevertheless, the attempt at codification of these humanitarian rules by the two Hague Peace Conferences of 1899 and 1907¹¹ proved unsuccessful. The Hague Regulations were scarcely ever applicable as treaty law, due to the extreme form of the general participation clause.¹² Moreover, the substantive provisions of the Hague Regulations proved to be too cautious, and in a sense also fragmentary, since to a large degree they were oriented towards the problems of the past. Article 22 HagueReg had of course explicitly settled the basic principle that ‘The right of belligerents to adopt means of injuring the enemy is not unlimited’. The same article also stated that it was prohibited ‘to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the

necessities of war'. The proper prohibition of indiscriminate warfare, however, had only found a rather imperfect echo in the treaty provisions on the laws of war; Article 25 HagueReg merely prohibited the 'attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended'. The most important achievement of the Hague Conferences was probably the so-called 'Martens clause' which was included in the Preamble of the Fourth Hague Convention, a dynamic reference to customary law not affected by the Conventions and to the 'principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience'.¹³

(p. 172) **3.** The most serious problem of rapidly developing modern warfare soon proved to be the use of the air force. In less than three decades the air weapon became an important military instrument. An early attempt to regulate the ensuing problems of air warfare were the HRAW 1923.¹⁴ They failed, however, because the consent of the states concerned was lacking; this abortive attempt never found a successor, and the (draft) Hague Air Rules unfortunately remained without a parallel. In addition to the frustration of attempts to codify the rules of air warfare, technical developments in warfare on land (the emergence of gas warfare is an example) brought increased risks for the civilian population in its wake.

World War II finally demonstrated the immense discrepancy between the noble but lofty principles of customary law and a practice which had been barbarized by technological changes and ideological polarization.¹⁵ The killing of civilians and widespread destruction of civilian objects (in particular at the Eastern, Russian, front and in the territories occupied by Nazi Germany) took place on a massive scale, while air warfare was taken to horrifying excesses, consigning almost to oblivion the basic principle that the civilian population should be protected as far as possible.¹⁶ In World War I civilian casualties amounted to some 5 per cent of those killed, whereas in World War II they rose to nearly 50 per cent.¹⁷ The indiscriminate use of the air force, which made terrorizing the civilian population the dominant purpose of air warfare, threatened to bury all restrictions on the use of force which were derived from the guiding principle of military necessity.¹⁸ Unleashed by the German side, the practice of total disdain for all the traditional customary principles quickly became a widespread practice of all parties.¹⁹ At the instigation of the Allied Powers the violation of the principle of discrimination was excluded from the charges brought at the Nuremberg trials.²⁰

4. The main question concerning the regulation of weapons and means of warfare, an adjustment of warfare to the principles of military necessity and humanity, was subsequently also excluded from the work of the Red Cross meetings which preceded the Geneva Conventions, although the Geneva Red Cross Conventions of 1949 made an effort to regulate most of the problems that had arisen in the wake of World War II (and to fill the gaps which had become obvious in earlier treaties).²¹ The Fourth Geneva Convention developed a rather detailed legal regime for the problems of military occupation, but the questions of possible limits on air warfare and on arms that cause unnecessary suffering (p. 173) (which were at least as delicate as the problem of occupied territories) were left to customary law with all its inherent lacunae and vagueness.

5. Eventually, during the decades after 1945 there appeared on the scene the third (and most recent) complex of problems of humanitarian law, namely the question of weapons and methods of warfare affecting the environment (see below Chapter 10). Not only did lawyers pay attention to the (rather dated) problem of collateral effects of warfare damaging the environment, but also to the possibility of deliberate destruction of the environment as a means of weakening the enemy. The large-scale deforestation carried out by the US Army in the course of the war in Vietnam²² and then by the Soviet campaign in Afghanistan which, at least in part, deliberately destroyed the environment of peasant regions which resisted,²³ demonstrated that the question of environmental modification is not merely a question of pure theory, but now constitutes a part of military reality. The deliberate employment of

burning oil-wells as an environmental weapon in the Kuwait War in 1991 thus represents only a sad climax of a practice which has developed over many decades.²⁴

6. The concern that these hitherto neglected problems needed to be addressed on a solid basis in treaty law dominated the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 until 1977.²⁵ At the conference it soon became clear how difficult a practicable codification of the traditional principles of customary law would be, if one wanted to give the principles some concrete contours. With the provisions of Article 51 AP I on the protection of the civilian population and of Articles 52–56 AP I on the protection of civilian objects an attempt was nevertheless made to achieve such a concretization and specification of customary rules, although it remains open to debate to what extent these provisions constitute a pure codification of (pre-)existing customary law and to what extent they constitute further development or even creation of new rules. The provisions accordingly were heavily attacked by some military experts, and—in connection with the absolute prohibition against reprisals against the civilian population contained in AP I—they are probably the main reason why important military powers still refuse to ratify the First Additional Protocol. In particular, on the hotly disputed question of the legal status of nuclear weapons, which has repeatedly provoked doubts about the compatibility of the traditional doctrines of nuclear deterrence with the new regime of AP I (see above, Chapter 6 III), the treaty's provisions have often been perceived as constituting too radical a shift, to the detriment of the requirement of military necessity.(p. 174)

With regard to the prohibition against excessive damage to the environment, however, AP I regulates only a part of the question, namely the issue of collateral damage. The international community (at the same time as the Geneva Diplomatic Conference) concluded a special treaty, the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) to deal with the problem of environmental damage as a deliberate means of warfare.

I. Military Objectives

7.01

Attacks, i.e. any acts of violence against the adversary, whether in offence or in defence (Article 49, para. 1, AP I), shall be limited exclusively to military objectives.

1. The basic principle laid down in Section 7.01 is an attempt to codify the customary requirement of distinction and to transform it into a specific rule of combat. Military use of force is only permissible—such is the basic requirement of customary law—against an objective which constitutes a military objective by virtue of its being part of the military endeavours of the adversary. Only for the purpose of combat against such objectives does the regulation of customary international law recognize military necessity.²⁶ Whether the conflict is international in character or non-international makes no difference, because even in internal conflicts states are obliged under customary law to spare the civilian population and civilian objects; state practice has shown a marked tendency to assimilate rules on the protection of civilians applicable in international armed conflicts also to non-international armed conflicts.²⁷

2. Article 48 AP I, which explicitly lays down such a maxim of 'limited warfare', makes use of the rather untechnical term 'operations' ('... shall direct their operations only against military objectives'). Article 49, para. 1, AP I goes on to give an express definition of what constitutes an 'attack' in the technical sense of the Protocol: 'Attacks' are all 'acts of violence against the adversary, whether in offence or in defence'. This definition raises another question, however: namely whether the term 'attacks'—which must be understood

as identical with 'acts of violence against the adversary'—has a narrower meaning than the rather wide term 'military operations'. The answer must be yes, since many types of military operations are carried out without any direct violence against the adversary. Such military operations performed without the direct use of violence do not need any limitation concerning legitimate objectives of attack, i.e. 'military objectives', since they entail no risk of direct violence for the civilian population.²⁸

(p. 175) **3.** The Protocol's use of the term 'attacks' to include all acts of violence against the adversary has been severely criticized by some military writers. The main point of criticism has been that such an interpretation removes the terminology of the Protocol too far from daily language (W. Hays Parks has claimed it to be 'etymologically inconsistent with its customary use' and even 'contrary to its ordinary meaning').²⁹ To label even a purely defensive operation an 'attack' on the basis that violence is employed—so claim the critics of AP I—is incomprehensible for the non-lawyer and places a pejorative value-judgment on any use of armed force.³⁰ This critique is certainly exaggerated; but it must be admitted that the all-embracing use of the term 'attack' as including all acts of violence can be quite confusing and does not always assist the understanding of the provisions of Additional Protocol I.³¹ On the other hand, the definition of the notion 'attack' is primarily intended to clarify that the point of departure of the provisions of the Protocol is the individual military operation of a specific unit,³² and not the entire network of all co-ordinated military operations of a party to the conflict. If the term 'attack' is understood as a short formula for any kind of 'combat action', the semantic combination of offensive and defensive operations in a single unitary concept has a striking advantage: it unmistakably brings home to commanders and soldiers in combat that the 'defensive character' of a specific act of violence does not exempt it from the provisions for the protection of the civilian population.³³ This applies under certain conditions even for a party's preventive operations in its own 'hinterland', as e.g. in the case of laying mines in anticipation of a future offensive by the adversary.³⁴

4. The same basic lesson is also given by para. 2 of Article 49 AP I which expressly provides that the provisions of the Protocol, particularly the provisions on protection of the civilian population, apply not only to operations on the territory of the adversary but also to combat operations on the national territory of a party, even if this is occupied by the adversary.³⁵ Thus the pretence is excluded that the safeguard provisions of humanitarian law should be seen to protect only the enemy civilian population and not a party's own population. Even the civilian population of a state which comes under the control of the adversary in the course of the armed conflict enjoys the protection of the Protocol against actions by its national armed forces.³⁶ Thus, a party to the conflict may not mount attacks on objects which are indispensable to the survival of the population in its own territory being occupied by the adversary, but it may destroy, in case of imperative military necessity, such objects in territory still under its own control in order to counter the invasion. Such destructive acts by a belligerent on his own territory will often not even (p. 176) constitute an 'attack', for they may be acts of violence which are not mounted 'against the adversary'.³⁷

5. Paragraph 3 of Article 49 regulates the scope of the Protocol's provisions on the protection of the civilian population. Included are attacks by sea or air against objectives on land, and also any air or sea warfare which may affect the civilian population or civilian objects on land. By contrast, armed conflict at sea or in the air with no consequences for the area protected under Part IV of the Protocol (which refers uniquely to land territory) is not covered by Article 49, para. 3, AP I.³⁸ However, these operations are covered by the relevant general rules of customary law. As paragraph 4 of Article 49 expressly states, the provisions of the Protocol are *additional to* the other rules concerning humanitarian protection contained in the Fourth Geneva Convention and in other international

agreements as well as to the customary rules relating to the protection of civilians; those rules are not replaced by the provisions of the new Protocol.³⁹

7.02

Military objectives are armed forces—with paratroops in descent (Article 42, para. 3, AP I) but not crew members parachuting from an aircraft in distress (Article 42, para. 1, AP I)—and also objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offer a definite military advantage (Article 52, para. 2, AP I).

1. The attempt to define exactly what constitutes a military objective is an essential step in making the principle of distinction operative. For a long time belligerent practice tended to leave uncertain the precise contours of the notion. Accordingly, belligerents were often tempted to manipulate the rules by choosing—according to the situation—either a restrictive or an extensive definition of the term ‘military objective’.⁴⁰
2. Since time immemorial enemy combatants have constituted the principal ‘military objective’.⁴¹ The category of ‘combatants’ includes units of land armies, navies, and air forces, also under certain conditions guerilla fighters as well as the civilian population of an invaded territory taking part in hostilities in the wake of a *levée en masse*.⁴²
3. The specific problem of air force crews parachuting in distress merits attention. It has been disputed under what circumstances crew members of a military aircraft may be fired upon. Concerning parachute troops and airborne combat units it is beyond doubt that they constitute a lawful military objective, because in parachuting from aircraft they perform an offensive operation (an ‘attack’). Thus, even while parachuting they may be (p. 177) perceived and attacked as legitimate military objectives (Article 42, para. 3 AP I).⁴³ One exception, however, was stated by the rapporteur of the Diplomatic Conference in that regard: when a plane has been shot down, i.e. in cases of emergency descent outside the target area of the intended attack, even airborne troops should not be counted as military objectives.⁴⁴ Nevertheless, this exception probably will be of no relevance in practice. The land troops of the adversary will not normally know when parachuting results from an emergency, and will have to assume that enemy parachute troops are carrying out an attack operation. Accordingly, they will treat airborne troops as a military objective unless it is obvious that they are *enemies hors de combat*, either from signs that they have no hostile intent or from surrender (which would bring them under the protection of Article 41 AP I).
4. The contrary applies to crew members of an aircraft in distress, according to Article 42, paras 1 and 2, AP I. For some time it was not clear whether crew members parachuting in distress should still be treated as military objectives—as during a flight which constitutes an attack—or whether during their descent they qualify as persons *hors de combat*.⁴⁵ Article 42, para. 1, AP I now settles the question by providing that with the descent from an aircraft in distress the ‘combat action’ of its crew is terminated and they may no longer be attacked.⁴⁶ Having landed, it is presumed that they constitute persons *hors de combat* who have no hostile intent. The adversary must give them an opportunity to surrender and may continue to attack them as a military objective only if it becomes obvious by their commission of a hostile action that they intend to continue combat.⁴⁷
5. The definition of the boundary between military objectives and civilian objects remains a critical problem. By Article 52, para. 2, AP I the international community has attempted to clarify the question of how to distinguish between these categories.⁴⁸ The general definition of ‘military objectives’ in Article 52, para. 2, AP I, however, constitutes one of the most heavily debated provisions of the Additional Protocol and, in particular, military circles in Western countries have been extremely hostile to it.⁴⁹ The background to this

condemnation is the restrictive nature of the definition, which purports radically to limit the category of legitimate objectives of military operations.⁵⁰ For that purpose the provision uses two basic elements which are combined with one another.⁵¹ First, Article 52, para. 2, AP I requires that military objectives should be objects 'which by their (p. 178) nature, location, purpose, or use make an effective contribution to military action'.⁵² The formula used constitutes a general criterion the existence of which can be judged *in abstracto*. Under the category of 'military objectives' therefore are installations, buildings, or ground sectors which are directly involved in the military endeavour of the enemy, i.e. which make an effective contribution to the military operations due to their inclusion in the military dispositions of the adversary. Such effective contribution may stem from the nature of the objects concerned, from the specific location, the purpose for which the object is used or its actual use. 'Nature' of the object relates to its intrinsic character, the object's qualities of a purely military function and designation.⁵³ Of a military 'nature' are clearly arms and ammunition, military platforms for the delivery of arms and ammunition, but also military installations that have a design of a purely military use. Even such objects may be sometimes transformed in a civilian use, such as a deserted barrack used for sheltering refugees.⁵⁴ Lines of communication are not military in nature as such, but can become military objectives due to their location, use, or purpose.⁵⁵ Political leadership and the linked infrastructure of government buildings (except Ministries of Defence and related command authorities) will not have a military 'nature' as an intrinsic feature.⁵⁶ 'Location' refers to a geographic feature—a specific site, such as a bridge, hill, mountain pass, or trail through difficult terrain, may become of utmost importance in the course of an operation, since its control will significantly advance one's own operations and hinder the enemy's operations.⁵⁷ 'Use' concerns the current function of an object in the context of military operations.⁵⁸ Virtually every civilian object may be used 'by the enemy in a manner effectively contributing to military action'.⁵⁹ Objects of a purely civilian designation, such as places of worship, civilian dwellings, schools, or hospitals, may thus be transformed into military objectives due to being used by the military.⁶⁰ The dominant consideration ought to be not the original disposition of the object but its actual role in 'the circumstances ruling at the time'.⁶¹ 'Purpose' means the intended future use of an object for military needs, which involves more than the mere potential for use by a belligerent.⁶² There must exist clear indications of a concrete planning or intention of such use.⁶³

6. In essence this is a return to the restrictive definitional approach of the Hague Rules of Air Warfare, with the corresponding purpose of repressing the subsequent (and extremely broad) construction of 'military objectives' favoured by the proponents of 'strategic air warfare'.⁶⁴ Almost boundless interpretations of 'military objective' have been adopted in (p. 179) doctrines of 'total warfare', such as that advanced by Air Marshall Trenchard in 1928, 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'.⁶⁵ These are now replaced by the more recent doctrine of 'limited warfare'. It must be admitted that such an approach considerably limits the military opportunities for a belligerent and is therefore not without problems, since successful modern warfare requires great strategic and tactical flexibility.⁶⁶ The purpose of any military action must always be to influence the political will of the adversary,⁶⁷ especially in defence where the enemy's determination to pursue its goals by violence must be broken; the destruction of the enemy's military apparatus is thus never an end in itself. Therefore, the United States have substituted the words 'military action' in its regulations and manuals by the phrase 'war-sustaining capability'.⁶⁸ Though, such an interpretation would allow to declare nearly every civilian activity as indirectly sustaining the war effort and thus goes too far.⁶⁹ For the protection of civilian populations requires a basic limitation of violence, a restriction on the use of force against the enemy's military organization. If the intention directly to influence the enemy population's determination to fight were recognized as a legitimate objective for military force, then no limit to warfare would remain. This is what

happened in World War II. The limitation of admissible military objectives is accordingly a step of the utmost importance for the implementation of the principle of non-combatant immunity. The legitimate interest of states to preserve strategic and tactical manoeuvring space can be taken into account only by interpreting and applying the inherent definition of 'military objectives', not by abandoning any limitation of lawful military objectives.

7. Article 52, para. 2, AP I combines this 'objective' element (concerning the capacity to contribute effectively to military operations) with a second 'subjective' criterion which refers to the military purposes of the acting state. It is not sufficient that the objective contributes to the military arrangements of the adversary; the destruction, capture, or neutralization of the objective must also offer the belligerent, in the specific circumstances obtaining at the time of the attack, a 'definite military advantage'.⁷⁰ This is both a 'situative' element, since Article 52, para. 2, refers expressly to the 'circumstances ruling at the time',⁷¹ and also a 'relative' criterion since the 'military advantage' can only be realistically evaluated in the light of the tactical and strategic goals of the belligerent.⁷² The attack must profit the armed forces using violence; to put it in extremely simple terms: it must be militarily necessary in order to reach a permissible operative goal. Attacks launched for (p. 180) the purpose of terrorizing the enemy civilian population, to break its determination to fight, are accordingly prohibited, as are attacks of a purely political purpose, whether to demonstrate military strength, or to intimidate the political leadership of the adversary.⁷³

8. The abstract definition laid down in Article 52, para. 2, AP I has a distinct advantage over the lists of admissible military objectives proposed earlier, namely the flexibility of its practical implementation, preserved by the abstraction of the formula. However, the same abstraction can be a disadvantage, in that it leaves a wide margin of interpretation which allows belligerents to construe it with completely different results according to their particular interest.⁷⁴ It also means that an officer, in determining whether a specific target is a lawful military objective, requires precise information as to the exact nature, purpose, and use of the objective concerned.⁷⁵ AP I appears to presuppose 'a greater certainty in the mind of an attacker as to the connection between a segment of a target system and military operations than an attacker normally would possess'.⁷⁶ Exact reconnaissance and the procurement of precise information by military intelligence services become key factors of lawful warfare. The technologically and institutionally highly developed military organizations of the industrial states could probably manage these requirements;⁷⁷ military actors without efficient means of reconnaissance and intelligence, however, will encounter serious difficulties in meeting the requirements of Article 52, para. 2, AP I.⁷⁸ However, these problems seem to be unavoidable if one wants to improve the protection of the civilian population by imposing legal restrictions on permissible means and methods of combat. The problems described result from the enormous complexity of the questions which need to be regulated, and not from a misguided politico-legal approach or a malicious conspiracy against specific military powers.

7.03

Military objectives include particularly:

- **armed forces;**
- **military aircraft and war ships;**
- **buildings and objects for combat service support; and**
- **commercial objectives which make an effective contribution to military action (transport facilities, industrial plants, etc.).**

The term ‘military advantage’ refers to the advantage which can be expected from an attack as a whole and not only from isolated or specific parts of the attack.

1. As explained above, the ICRC and the Diplomatic Conference employ an abstract definition in order to limit the scope of the term ‘military objective’. Such an approach has been criticized repeatedly, for it leaves a large margin of interpretation.⁷⁹ Ultimately, however, the Conference had no real choice but to take such an approach, since it would have been impossible for the delegations participating at the Conference to reach agreement (p. 181) on a detailed and exhaustive list of permissible military objectives.⁸⁰ There is, however, a precedent which could be used as an interpretative aid: the list of ‘military objectives’ drafted by the ICRC as an annex to the ‘Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War’ adopted in 1956 by the Red Cross Conference in New Delhi.⁸¹
2. At the heart of the category of military objectives are the armed forces of the adversary, including all military auxiliary organizations and paramilitary units fighting side by side with the regular armed forces. As well as the regular units of army, navy, and air force, and all militia and volunteer corps incorporated in the armed forces, that group also includes all other persons who, together with (or instead of) the armed forces fight against the adversary.⁸² This also includes any part of the population of a non-occupied territory who, on the approach of the enemy, spontaneously takes up arms to resist the invading forces (the so-called ‘*levée en masse*’, and also guerilla forces in occupied territories.⁸³ The group of ‘lawful combatants’ also includes paramilitary or armed law enforcement agencies which are incorporated to the armed forces in accordance with Article 43, para. 3 AP I. Most police forces, which in general serve to enforce law and order and in principle do not take part in hostilities, however, are not included in the category of legitimate ‘military objectives’; normally they do not possess arms suitable for military combat, being armed at most with small-arms and light equipment.⁸⁴ The only exception is needed for regular police in the enemy hinterland in the case of commando operations; police officers pursuing an enemy detachment become an admissible military objective.⁸⁵ In non-international armed conflicts, where no combatant status exists, persons ‘directly participating in hostilities’ serve as an equivalent to combatants, constituting legitimate ‘military objectives’.⁸⁶ The definition of what may be qualified as ‘direct participation’ has been heavily disputed over a long time⁸⁷. Even the ICRC Guidelines on that subject- (p. 182) matter⁸⁸ have not led to a common understanding (see also Section 8.17).
3. Also valid as a military objective is equipment serving a navy or air force for combat purposes, namely military aircraft (see Sections 5.26-5.28) and warships (see Sections 17.01-17.06, 17.21).
4. The installations and objects for immediate combat service support, which are usually regarded as having a military nature, such as barracks, fortifications, staff buildings, military command and control centres, military airfields, port facilities of the navy (also ministries of a military nature, e.g. of the Army, Navy, Air Force, National Defence, Supply) also constitute traditional military objectives.⁸⁹ Also included in that category are logistical bases of the armed forces, namely stores of arms or military supplies, munition dumps, fuel stores, military vehicle parks, etc.
5. The term ‘buildings and objects for combat service support’ has an additional layer of meaning which creates many more problems of delimitation than the case of buildings with an obvious military function. What is meant here is the category which is covered by the notion (in the terminology of the Red Cross list of 1956) of ‘positions, installations or constructions occupied by the forces’ and of ‘combat objectives’.⁹⁰ The term ‘positions, installations or constructions occupied by the forces’ prompts thoughts of civilian objects and ground positions temporarily used for military purposes by an armed force in the

course of its operations. These might be schools, hospitals, or residential premises used to lodge troops or to serve staff purposes; but they can also be buildings or installations where troops have entrenched themselves, where observation posts have been installed, or which serve military purposes in another way.⁹¹ The notion 'combat objectives' (or better: 'combatted objects') indicates objects or topographically exposed ground positions which in the course of a specific military operation suddenly become important for both sides, and the possession or destruction of which accordingly becomes decisive in achieving operative goals (e.g. church or other towers, hills, steep slopes, exposed farms, etc., the control of which both sides try to achieve). The German Government for instance, on ratification of the Additional Protocols, filed an interpreting declaration, according to which Germany construes Article 52 to mean 'that a specific area of land may also be a military objective if it meets all the requirements of Article 52, paragraph 2'.⁹²

(p. 183) **6.** The most delicate distinction between permissible military objectives and civilian objects concerns the 'commercial objectives which make an effective contribution to military action'. It has long been hotly disputed as to what exactly is covered by this category.⁹³ Even the different attempts to draw up specific lists of recognized 'military objectives' did not bring about a real clarification. The ICRC's 1956 list, for example, includes under this heading lines and means of communication, broadcasting and television stations, as well as telephone and telegraph installations, in so far as all these are of fundamental military importance, and also the 'industries of fundamental importance for the conduct of war'.⁹⁴ *In abstracto*, these categories seem to be capable of finding consensus. The difficulties begin when one attempts to delimit the permissible objectives of attack in detail. In April 1999 for example, NATO bombed the Serbian state television and radio station in Belgrade.⁹⁵ A committee of experts appointed by the Prosecutor of the ICTY assessed the attack as legally acceptable insofar as it actually was aimed at disrupting the command, control, and communications network; in contrast, had the attack been made because the station was part of the propaganda machinery, the legal basis was considered more debatable.⁹⁶ During the Operation 'Iraqi Freedom', the US forces attacked in March 2003 the main television station in Baghdad, asserting that the building was part of Iraq's military command and control system;⁹⁷ if these allegations were correct, the television station would have presented a legitimate military objective. Equally, certain lines of communication such as railway lines, roads, bridges, or tunnels may undoubtedly be of fundamental military importance, and as such would be legitimate objectives for attack.⁹⁸ The adversary belligerent, however, will be able to compensate for the destruction of such 'strategically important' lines of communication by switching to railway lines or roads which had previously been totally unimportant.⁹⁹ But does this not lead to the conclusion that such objects or lines which for the present seem 'unimportant' may be perceived as militarily important from the beginning, and may accordingly constitute relevant military objectives *ab initio*?¹⁰⁰ Concerning the attacks on bridges during the Kosovo air campaign in 1999, it remains disputed whether they constituted objects which made an effective contribution to military action.¹⁰¹ Comparable questions may (p. 184) be asked of networks of telecommunication. In the case of modern densely interlinked infrastructures of telecommunication, it may be doubted whether any 'unimportant' installation still exists (with the exception of the periphery of the network). The practice of the Kuwait 'Desert Storm' operation in 1991 demonstrated that an attacker nowadays must probably destroy a network of telecommunication *in toto* (or at least its central connection points) in order to paralyse the command and control structures of the enemy armed force, which in themselves clearly constitute a legitimate military objective.

7. Considerable problems are created also by the exact delimitation of what constitute 'industries of fundamental importance for the conduct of war'¹⁰². It is indisputable that industries for the production of armaments fall within this category, as also the heavy industries delivering the metallurgical, engineering, and chemical products upon which that industry relies, as well as storage and transport installations serving the armament industries and the heavy industries assimilated to it.¹⁰³ Also generally counted as undisputed 'military objectives' are the numerous installations for the production of electric energy for mainly military purposes (here again arises the above-mentioned problems of internetting and delimitation between military power supplies and 'purely civilian' energy installations¹⁰⁴), and finally the research and development facilities of the armaments sector.¹⁰⁵ There remain large uncertainties, however, concerning the supply industry of armaments production and subcontractors of the defence industry.¹⁰⁶ If those enterprises were also brought within the notion of 'industries of fundamental importance for the conduct of war', then nearly all areas in a highly developed industrial society with an elaborate division of labour in production would comprise lawful military objectives, thus undermining the overall attempt to limit warfare. Yet if such industries are excluded, there is created an enormous (and extremely dangerous) opportunity to 'immunize' armaments production by subcontracting, and decentralizing production into 'civilian' firms,¹⁰⁷ which would ultimately erode the basis of the entire system, tempting states to ignore the whole regulatory framework and to return to strategies of 'total war', aiming directly at the economic capacity of the adversary. This dilemma probably cannot be solved in the abstract. However, a careful implementation of the relevant rules by *bona fide* interpretation of the requirements of Article 52, para. 2, AP I should be capable of producing satisfactory results in individual cases.

8. The current asymmetries in military technology and resources and its repercussions on military strategies¹⁰⁸ have led to a fierce debate on the definition of 'military objectives'. An issue of particular concern is the tendency of the US military, in the context of the doctrine of 'effects based-operations', to extend the ambit of 'military objectives' (p. 185) to so-called 'war-sustaining' objects (primarily economic and political-administrative in nature).¹⁰⁹ Target of military operations here is not the military effort of the enemy any more, but the political command and control system and its resource basis. The requirement of a close nexus between the target and on-going military operations is given up in this approach.¹¹⁰ In this context, the legitimacy of Israel's attacks against power plants and water supply devices during the offensive in Lebanon in summer 2006 is disputed. While from one side, the attacks are justified with reference to the peculiarities of the asymmetric confrontation between the technologically advanced state Israel on the one hand and the non-state actor Hezbollah operating from Lebanon on the other hand,¹¹¹ other authors argue rightly that such a broad interpretation of the notion 'military objective' is going to put into question the entire differentiation between military objectives and civilian objects.¹¹²

9. AP I relies on a relatively specific concept of 'attack' (provided for in Article 49, para. 1, AP I) as an isolated ground operation by a specific unit. This notion is linked to that of the 'military objective', and both are relevant to the determination of the 'definite military advantage' which is to be expected from the attack concerned. The term 'definite military advantage' is usually understood in the sense that there must be a 'reasonable connection between the destruction of property and the overcoming of enemy forces'.¹¹³ Such connection may also be an indirect impact on the military operations—with the ensuing question how 'indirect' such a connection may still be to count as a 'definite military advantage'?¹¹⁴ Stressing the close connection between attacks (and its destructive effects), on the one hand, and overcoming the enemy armed forces, on the other hand, may suggest a very narrow idea of what constitutes a 'definite military advantage' under Article 52, para. 2. One could be tempted to conclude that a 'military advantage' which justifies classifying an object as a 'military objective' must result from the specific military operation which

constitutes the 'attack'.¹¹⁵ Such a construction, however, would ignore the problems resulting from modern strategies of warfare, which are invariably based on an integrated series of separate actions forming one ultimate compound operation. The separate action within an operation, that could be described as a specific 'attack', is hardly ever an end in itself. Normally such an action is directed towards a goal which lies outside the single action, as part of the complex mosaic of a bigger integrated operation conceived in a kind of division of labour, and thus depends in its purpose on the aggregate strategy of the party to the conflict.¹¹⁶ The aggregate military operation of the belligerent may not be divided up into too many individual actions, otherwise the operative purpose for which the overall operation was designed slips out of sight. Reference point in that regard should be the overall operation', as a 'finite event', not the campaign (p. 186) as a whole¹¹⁷. It is this elementary condition of any sensible interpretation of the concept of 'military advantage' which the German Government—in accordance with important voices in international legal literature¹¹⁸—took into account when it annexed like several other states¹¹⁹ to its ratification an interpreting declaration concerning the construction of what constitutes a 'definite military advantage'. The declaration is worded: 'In applying the rule of proportionality in Article 51 and Article 57, "military advantage" is understood to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack'.¹²⁰ Although the declaration expressly refers only to the rule of proportionality in Articles 51 and 57 AP I, it seems also to apply the same interpretation to the construction of what constitutes a 'definite military advantage' in the sense of Article 52, para. 2, AP I.

7.04

Civilians present in military objectives are not protected against attacks directed at those objectives; the presence of civilian workers in an arms production plant, for instance, will not prevent opposing armed forces from attacking this military objective.

1. Persons who are not combatants according to Article 4 GC III and Article 43 AP I must be seen as 'civilians'. Both the civilian population and individual civilians according to Article 51, para. 1, AP I enjoy 'general protection against dangers arising from military operations'; they shall not be made the object of an attack (Article 51, para. 2, AP I). Even the presence within the civilian population of individual combatants does not deprive the population of its civilian character, and thus it retains the protection accorded to it under Additional Protocol I.

2. Only if civilians fight side by side with the regular armed forces is the position different, and then only as long as they directly take part in hostilities (Article 51, para. 3).¹²¹ These civilians, by taking up arms against the enemy, become lawful military objectives. The same is true for civilians present in military objectives, i.e. civilian persons who are integrated into the military endeavours and logistics of a belligerent. The classic example of such integration is that of civilian workers in arms production plants (or, more extremely, the civilian personnel of armed forces who maintain military installations).¹²² These workers do not become combatants by working in arms factories or military installations; however, their workplace is a permissible military objective. The qualification of such an installation as a military objective is not changed by the presence of civilians who work in it, even if there are hundreds or thousands of them.¹²³ Even the deliberate use of parts of a civilian population as a 'human shield'¹²⁴ does not change the status of (p. 187) an installation (as a military objective), as long as it delivers an effective contribution to the military activity of the belligerent. The actions of Iraqi forces during 'Operation Iraqi Freedom' are a relevant example. Iraq deliberately used civilians to physically shield their operations.¹²⁵ Attacks against such installations remain lawful in principle; only the principle of proportionality may cause the attacker difficulties when trying to justify such an attack. It is, however,

debatable whether human shields that have been placed voluntarily may be taking direct part in hostilities during their employment as such.¹²⁶ Consequently, the shielded installation would remain a lawful target, without even having to consider aspects of proportionality.

3. One point remains unclear in respect of the prohibition of disproportionate attacks. It must be asked whether the deliberate taking of the risk by any civilian who stays in a military installation should influence the balance which must be struck between the intended military advantage and the collateral damage to be taken into account. What has been clarified is only the basic premise that collaboration in the military endeavours of the belligerent does not make the civilian a 'quasi-combatant', the civilian is therefore not a military objective himself.¹²⁷ Direct bombardment of civilian living quarters of arms production plant workers (such as occurred in World War II) can no longer be justified by the argument that these workers are military objectives by virtue of their essential contribution to warfare.¹²⁸ Whether collateral damage to civilians working in military objectives (and thus contributing to the military endeavour of its state) is of lesser weight in striking a balance with the military advantage than potential damage to 'innocent' civilians is a question not yet answered, but which needs careful study.¹²⁹ Although an affirmative answer might create serious ethical difficulties, reasons of military practicability (and of soldiers' common sense) might point in that direction.

7.05

An objective which is normally dedicated to civil purposes shall, in case of doubt, be assumed not to be used in a way which makes an effective contribution to military action (Article 52, para. 3, AP I), and shall therefore be treated as a civilian object.

1. The presumption laid down in Article 52, para. 3, AP I is complementary to the complex provision of Article 52, para. 2 (definition of 'military objectives'). The presumption expressly refers to objects which are normally dedicated to civilian purposes, 'such as a place of worship, a house or other dwelling or a school', but which may, if used to make an effective contribution to military action, become a military objective.¹³⁰ Only with respect to those objects which originally had a purely civil purpose can there be any serious doubt as to the military nature of the objective. Means of transport and of communication (which it was proposed, at the beginning of the Diplomatic Conference, should also (p. 188) be covered by the presumption) fall into a different category. They were excluded from the presumption because, if they are of military utility at all, there can be no doubt as to their 'contribution to military action'.¹³¹

2. Ultimately, when applying Article 52, para. 3, AP I, one should bear in mind that, according to the external circumstances and the information available to the attacker, before the presumption comes into play there must be a serious doubt as to whether the object in question contributes to military action. In most situations such doubt will not exist; in the combat zone, for example, there will normally be no question and the combatants will generally assume that an object constitutes a military objective the possession or destruction of which is essential for both sides. 'Combatants are not likely to entertain any doubt about the military use of buildings located in an area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground'.¹³² The decisive factor in that respect should be the perspective of the soldier acting on the ground, or of the military commander deciding on the attack: serious doubts must be obvious from his perspective before there is any reason to invoke the presumption contained in Article 52, para. 3. Several NATO states filed declarations confirming such an understanding when ratifying the Additional Protocols; the German declaration says that 'the decision taken by the person responsible has to be

judged on the basis of the information available to him at the relevant time, and not on the basis of hindsight'.¹³³

7.06

Attacks against military objectives shall be conducted with maximum precautions to protect the civilian population (Article 51, para. 1, AP I; Article 13 AP II). Attacks which may affect the civilian population shall be preceded by an effective warning, unless circumstances do not permit this (Article 26 HagueReg; Article 57, para. 2 lit. c, AP I). These rules shall also apply to attacks by missiles and remotely controlled weapons.

1. The corollary of the principle of distinction and the subsequent limitation of legally permissible military objectives is the fundamental maxim that the civilian population must be spared as far as possible.¹³⁴ As a customary rule this maxim has long been recognized;¹³⁵ indeed it is arguable that the principle of distinction and of non-combatant immunity today constitutes one of the few peremptory norms of humanitarian law, and accordingly also a part of '*jus cogens*'¹³⁶ which is applicable regardless of whether the (p. 189) conflict is international or internal in character.¹³⁷ In Article 51 AP I and Article 13 AP II the maxim is now reaffirmed and codified. The rule prohibits not only attacks against the general civilian population but also attacks likely to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects which are excessive in relation to the expected advantage. This formula covers all kinds of attacks which, under the perspective of military necessity, could cause unnecessary violence and which accordingly would unduly endanger the civilian population (measured according to the strict requirements of military necessity).¹³⁸ Thus there must be inherent in the principle of utmost protection of the civilian population a rule requiring that the military use of force be both necessary and appropriate, whenever damage to the civilian population is to be expected.¹³⁹ Collateral injury to the civilian population must be minimized by the operational arrangements under which the attacks are performed, either by an exact delimitation of the targets of the attack, by the use of precisely targetable weapons in the 'weapons mix' used for the attack, or by other precautionary measures in planning or implementing the military operations.¹⁴⁰ It will be difficult, however, to deduce from such general principles a specific rule that any particular type of weapons (in particular 'precision-guided munitions') must be used in a specific case; precision-guided munitions are still too expensive and too rare for even military super-powers to be required to use them in all cases where civilian losses might thereby be minimized.¹⁴¹ However, these states can in fact meet higher requirements concerning the precautionary measures than lower developed belligerents.¹⁴² The armed forces of belligerents therefore retain considerable discretion, which will be exercised primarily according to military considerations, in the framework of operational priorities, and not mainly according to humanitarian aspects.¹⁴³

2. The rule of utmost protection of the civilian population includes the requirement of a previous warning, if possible. This requirement was already recognized by customary law.¹⁴⁴ In so far as the planned attack is likely to cause serious losses to the civilian population, the competent authorities of the adversary shall be given an effective warning prior to the attack, allowing an opportunity to evacuate the civilian population, or at least to place the population in specifically protected locations. Article 26 of the Hague Regulations provided that the 'commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities'. Only in the case of an assault attack, namely an attack primarily based on the element of surprise, is such a warning logically excluded by considerations of military necessity.¹⁴⁵ Article 57, para. 2 lit. c, AP I, which addressed the question again, in essence goes no further than the traditional rule codified as early as 1907,¹⁴⁶ since it requires (p. 190) nothing more than an

effective advance warning—unless the specific circumstances of the planned operation do not permit such a warning, as especially before an assault.¹⁴⁷

3. The same principles apply to attacks by missiles and remotely controlled weapons. Accordingly, it is unlawful not only to use such weapons against the civilian population as such in order to terrorize it (as was done by the Iraqi ‘Scud’ attacks on Israel in the course of the Kuwait War 1991), but also to use these weapons indiscriminately against military pin-point targets in urban settlements or other concentrations of civilian population. Such supposedly ‘military’ use of remotely controlled weapons against military installations in urban areas makes little sense from a military perspective, since the low targeting capability of such weapons leads to minimal success in combating a specific military objective; the collateral damage from such attacks, on the other hand, is usually extremely high. Traditional remotely controlled weapons and missiles may thus be used only with extreme precaution, for example against concentrations of enemy forces in scarcely populated areas of deployment, or (if precisely targeted) against lines of communication in the enemy hinterland.

4. It is not only the attacker who is subject to specific obligations to minimize civilian casualties and collateral damage. The state responsible for a certain territory is also obliged to avoid collateral damage therein.¹⁴⁸ Article 58 AP I requires that parties to a conflict shall endeavour to remove the civilian population and civilian objects under their control away from the vicinity of military objectives (the traditional practice of evacuating the population of important cities),¹⁴⁹ and that the responsible state shall avoid locating military objectives within or near densely populated areas,¹⁵⁰ and obliges the belligerents to ‘take other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations’.¹⁵¹ The last covers preparations for civil defence, such as the provision of adequate shelters, the training and build-up of civil defence organizations, and the maintenance of adequate fire-fighting brigades.

7.07

Unmanned aerial vehicles (UAVs) may be used for target control and other purposes. They may be equipped with arms (unmanned combat aerial vehicles - UCAVs -). UAVs and UCAVs must be remotely controlled and piloted.

1. In 2009, the Program on Humanitarian Policy and Conflict Research at Harvard University published the non-binding ‘Manual on International Law Applicable to Air and Missile Warfare’ (*HPCR Manual*), in which it restated the existing rules governing airwarfare.¹⁵² According to rule 1 lit. dd HPCR Manual, an UAV is an ‘unmanned aircraft (p. 191) of any size which does not carry a weapon and which cannot control a weapon’. UAVs are used solely to gather intelligence and for purposes of surveillance and reconnaissance (ISR functions). Unmanned vehicles used for ISR functions do not raise questions with regard to *jus in bello* or *jus in bellum*, their deployment may only contravene over flight rights etc.¹⁵³

2. An UCAV, on the other hand, is ‘an unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target’ and is used to support ground troops and for ISR functions.¹⁵⁴ A missile is distinct to UCAVs, according to rule 1 lit. z HPCR Manual. It is a ‘self-propelled unmanned weapon—launched from aircraft, warships or land-based launchers—that are either guided or ballistic’. It itself is a weapon, while UCAVs only carry one and do not constitute a weapon themselves.¹⁵⁵ The most popular UCAV is the Predator drone, which can stay in the air up

to forty hours and can carry—apart from different possible kinds of missiles—surveillance technology.

3. Over the past decades, the employment of unmanned aerial vehicles (also called ‘drones’) has become more and more popular due to their strategic advantage, namely the non-exposure of the combatant to the other belligerent party. Starting in 2002, the first UCAV was used in the targeting of a high ranked Taliban by the CIA.¹⁵⁶ Since then, UAVs and UCAVs have mostly been used by the UK, USA, Israel, and NATO in Gaza, Pakistan, Somalia, Syria, and Yemen, either for purposes of surveillance and intelligence, for support of ground troops, but also for combat. Reportedly, some non-State actors possess UAVs and UCAVs as well.¹⁵⁷ UAVs and UCAVs are not specifically prohibited in international law; following the Lotus principles,¹⁵⁸ which allow States to do whatever is not prohibited by international law, they can hence be deployed lawfully, depending on the specific circumstances.

4. Both types of unmanned vehicles are either remote-controlled by pilots, which are often located in the sending state, or include an autonomous attack system, which is always considered by a weapons reviewer.¹⁵⁹ So far, all decisions of the deployment, including flight routes, choice of weapons, and choice of target, are made by human beings and not (p. 192) standardized and automated.¹⁶⁰ As long as these decisions are made by military personnel, the unmanned vehicle is a military aircraft.¹⁶¹

5. In general, their deployment is regulated by *ius ad bellum*, IHL, and human rights law.¹⁶² Any UCAV strike outside the context of an armed conflict is exclusively regulated by international human rights law.¹⁶³ The crucial question of whether a situation, in which UAVs and UCAVs are employed (e.g. in Yemen, Afghanistan, Pakistan, and Somalia), actually passes the threshold of an armed conflict, and whether it is a (global/ internationalized) non-international or an international armed conflict,¹⁶⁴ will be left aside, since these very controversial issues raise questions of *ius ad bellum*,¹⁶⁵ which are not the subject of this chapter or do not regard methods of warfare.

6. As stated by former Special Rapporteur Philip Alston in his report on extrajudicial, summary, or arbitrary executions in 2010, ‘a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles’.¹⁶⁶ Outside an armed conflict, the use of lethal force must comply with human rights obligations.¹⁶⁷ The fact that UAVs/UCAVs have no on-board pilot does not change the applicability of the principles of armed conflict to UAVs/UCAVs.¹⁶⁸ The deployment of unmanned vehicles in armed conflicts raises questions about its legality with regard to the principles of distinction and proportionality as well as the principle to take precautions and the principle to prevent superfluous injury or unnecessary suffering. The particularities of unmanned vehicles have to be considered while analysing their conduct and deployment.

7. First of all, before an initial deployment, new technology and new methods of warfare have to be reviewed in light of all international obligations regulating the conduct of hostilities according to Art. 36 AP I, meaning international humanitarian law but also international human rights law. All State parties to AP I are required to conduct such a review, but in practice only a few have publically confirmed to do so while others cite the sensitivity of the information for their silence on the topic.¹⁶⁹

(p. 193) **8.** The employment of UCAVs in general does not contravene the principle of distinction as codified in Art. 48 AP I. The lawfulness under IHL varies depending on the actual facts and the concrete deployment in the field.¹⁷⁰ All feasible precautions must be taken when determining the civilian status of a target. UCAVs can be equipped with precision guided munition, for instance. Precision munition allows for more precise attacks and thus even better adheres to the distinction between civilian and military objectives compared to other weapons.¹⁷¹ Still, mistakes may derive from unreliable intelligence, a

general challenge in warfare.¹⁷² On the other hand, UAVs facilitate long-term surveillance and produce more information about a target and its civilian or military status than traditional means of surveillance.

9. The US approach to target individuals on the basis of certain categories (so called 'signature strikes'), however, raises questions with regard to the principle of distinction.¹⁷³ For instance, attacks based on the category 'military-age male' are unlawful and contravene the concept of direct participation in hostilities, since status-based attacks are only permissible in non-international armed conflict against members of an organized armed group.¹⁷⁴ According to the ICRC, such an abstract affiliation is prone to error, since direct participation requires actual and continuous participation.¹⁷⁵ Furthermore, the mere 'consorting with known militants', e.g. sympathizing or collaborating, does not amount to a direct participation in hostilities either, and is therefore not an adequate criterion when determining a lawful target.¹⁷⁶ On the other hand, the signature 'transporting weapons' is lawful under IHL, since the attack would offer a military advantage and thus qualifies as a military objective, as long as the attacker differentiates between the transport of weapons and the mere fact that the object is armed.¹⁷⁷ The disputed practice of targeted killings also regards the question whether it is used in an armed conflict. Once this is established, such a killing is only lawful under IHL when targeting soldiers, members of an armed group, or civilians directly participating in hostilities.

10. A lawful deployment of UCAVs has to be proportionate. The intended purpose as well as the circumstances of the deployment and the effects of the attack have to be considered when analysing the lawfulness of an attack of a specific military target.¹⁷⁸ With regard to UCAVs carrying precision guided munition, depending on the State and its weapons arsenal, there comes greater responsibility to take precautions, which can result in an obligation to use the most precise weapon available from the arsenal.¹⁷⁹

(p. 194) **11.** The principle of precaution requires the attacking state to take all feasible¹⁸⁰ steps to ensure to minimize the risk of civilian casualties, to cancel an operation when disproportionate consequences are expected or intelligence reveals that the targeted object is not military, and to warn possibly affected civilians, if this does not contravene the purpose of the attack.¹⁸¹ This may lead to the conclusion that in cases of availability of UAVs/UCAVs in a certain region and by a specific party to a conflict, they might be the only legal choice of weapon.¹⁸²

12. A legal reviewer has to evaluate whether the equipment and the intended method of deployment meet the criteria of Art. 57 AP I or, if the attacking party has not joined AP I, criteria set forth in customary law, as codified partly in Art. 57 AP I, in Art. 27 of the 1907 Hague Regulations and as stated in rules 15 to 21 of the ICRC Customary Law Study.¹⁸³ Since Art. 57 para. 2 lit. a AP I addresses 'those who plan and decide upon an attack', problems derive regarding autonomous weapons systems.¹⁸⁴ Nobody decides or plans a specific attack using automated systems, in case the decision is left to an algorithm. The application of the principle of precaution may be guaranteed by so-called persons 'in the loop' who overview the attack and are fed with information on the targeted area and object and in the consequence can abort an automated attack, even if there is an interruption of communication with the automated UCAV.¹⁸⁵ However, even without a person 'in the loop', other human decisions that are taken in advance, depending on the algorithms, sophistication, and reliability,¹⁸⁶ may result in a positive legal evaluation. In light of questions of accountability, human responsibility while using weapons systems must be retained.¹⁸⁷

13. The deployment of unmanned vehicles in non-international armed conflicts, according to common Art. 3 of the Geneva Conventions and AP II, has been adapted over the past decades to the rules governing international armed conflicts.¹⁸⁸ In this context, the role of human rights and their extraterritorial application, such as of the right to life (p. 195) and of the prohibition of arbitrary killings, arguably play a role as well.¹⁸⁹ Although members of organized armed groups in a non-international armed conflict are not referred to as combatants,¹⁹⁰ their involvement with unmanned vehicles may amount to a direct participation in hostilities.¹⁹¹ It is questionable, however, whether the pilot of an unmanned vehicle, that may be situated far away from the actual combat action (or even in a third state¹⁹²), is a lawful object under IHL, in particular if he is not a member of the regular armed forces, but an intelligence official or contractor.¹⁹³ Common Art. 3 of the Geneva Conventions restricts the scope of application of IHL in a non-international armed conflict to the territory of a contracting party where the conflict takes place. AP II even states more precisely that only to the territory under the control of an involved organized armed group IHL applies. However, the ICTY in Tadić stated that the provisions at least partly apply to the entire territory.¹⁹⁴ In the case of the control of unmanned vehicles from a pilot situated in the territory of a contracting party, but not in the ‘vicinity of actual hostilities’, it appears reasonable to broaden the geographical frame. This geographical setting of UCAV pilots being situated outside the war theatre and sometimes in a third country has raised questions with regard to the third state and its obligation to ensure that international law is complied with in the UCAV operation.¹⁹⁵

7.08

In the aerial war zone enemy military aircraft may be attacked without warning in order to make them crash or land. Downed aircraft shall become spoils of war. The members of the crew and the passengers—save unlawful combatants and mercenaries—shall become prisoners of war (Article 36, para. 1, HRAW 1923; Article 4 A, paras 2 and 4 GC III).

1. In aerial warfare the military aircraft of all parties to a conflict are entitled to take part in hostilities and to attack military objectives. At the same time, military aircraft constitute a lawful military objective, against which violence may be used.¹⁹⁶ The attack against such objects is permitted at any time and requires no specific safeguards.¹⁹⁷ Even if there are persons on board such aircraft who are civilians according to the general rules, this does not prevent these aircraft from qualifying as military objectives, since those passengers voluntarily run the risk of being shot down.

(p. 196) **2.** The attacking enemy has the choice of shooting down the aircraft or of forcing it to land. Any planes shot down or forced to land are legitimate booty of war pursuant to established practice, and may be used by the adversary for its own military purposes.¹⁹⁸ Crew members and passengers become prisoners of war, because they are deemed to be combatants due to integration in the military structure of the enemy.¹⁹⁹ Captivity begins, however, only when those persons are taken into custody by state organs of the adversary. Accordingly, those who have parachuted or made an emergency landing do not acquire prisoner of war status immediately upon leaving their aircraft; for as long as they remain uncaptured, they are still regular combatants and must conform to the general rules governing troops who have advanced behind the enemy’s lines (such as patrols or commandos).²⁰⁰ They must therefore wear uniform and carry their weapons openly.

7.09

Other enemy public aircraft shall not be attacked without warning. They may, however, by force of arms, be intercepted and compelled to land (Article 34 HRAW 1923; Rule 136 (a) HPCR Manual). Such aircraft may be attacked if they:

- **escort enemy military aircraft;**
- **fly through an aerial zone interdicted by the adversary; or**
- **take part in hostilities.**

Other public aircraft, i.e. planes and helicopters which are used by state organs but which are not designed for military purposes and do not take part in the hostilities, are not a legitimate military objective.²⁰¹ The neutralization of such aircraft will not normally be militarily necessary, because they make no contribution to the military activities of the adversary. On the contrary, they should usually be considered as civilian objects. Therefore, like aircraft that enter foreign territory without authorization in peacetime, they may be forced to land, but they may not be shot down without previous warning.²⁰² The only exception applies if such aircraft escort enemy military aircraft, enter into an interdiction zone, or participate directly in hostilities. In those cases aircraft become military objectives.²⁰³ Even a non-military aircraft, by its integration in the operative framework of the enemy's warfare, then renders itself liable to attack, like in the case of UCAVs operated by civilian intelligence services.

7.10

Should a belligerent party establish an 'exclusion zone' in international airspace, the same rules of international humanitarian law will apply inside and outside the 'exclusion zone' (Rule 107 HPCR Manual). Even where a 'no-fly zone' is established in belligerent airspace to warn aircraft entering that zone without special admission (Rule 108 HPCR Manual), the principles of target discrimination still apply.

1. Exclusion zones and no-fly zones belong to the concept of war zones.²⁰⁴ An exclusion zone, according to rule 107 HPCR Manual, is defined as a 'three dimensional space beyond the territorial sovereignty of any State in which a Belligerent Party claims to be (p. 197) relieved from certain provisions of the law of international armed conflict, or where that Belligerent Party purports to be entitled to restrict the freedom of aviation (or navigation) of other States'.²⁰⁵ On the other hand, the Belligerent Party restricts or prohibits in a no-fly zone its aviation in its own or in enemy national territory, it cannot be established in international airspace.²⁰⁶ In consequence, in a no-fly zone only aircrafts of the enforcement air-forces are permitted.²⁰⁷ The general legality of no-fly zones has not been disputed, while the lawfulness of exclusion zones has been questioned. Most war zones established during the past decades have been in contradiction to international humanitarian law, because they resulted in unrestricted warfare.²⁰⁸ However recently, they have been recognized as a legal method of warfare as long as certain parameters are met. According to rule 107 HPCR Manual, obligations under IHL apply to exclusion zones and no-fly zones, in particular concerning neutrality and targeting.²⁰⁹ Thus, civilian aircraft may not be attacked and the principle of distinction and the rules to take all feasible precautions have to be applied. The mere presence in such a zone does not amount to the assumption that the entering aircraft is a lawful target. Zones established in the 'vicinity of hostilities' may prevent collateral damages to civilian aviation by prohibiting to enter the area or setting up special restrictions. The establishment of these zones has to be published in all available channels, in particular via diplomatic ones.²¹⁰ In case an aircraft enters an established zone, the

Belligerent Party shall warn the aircraft. If the aircraft however continues its course, it may be a lawful target when military necessity demands so.²¹¹

2. No-fly zones were established after the 1991 Gulf War to protect the Kurdish population, although their legal foundation in SC Resolution 688 (1991)²¹² is questionable, in 1992 in the Bosnia conflict²¹³ by SC Resolution 816 (1993)²¹⁴ and in 2011 in Libya,²¹⁵ the most robust no-fly zone was established by SC Resolution 1973 (2011).²¹⁶

7.11

It is prohibited to order that there shall be no survivors. It is also prohibited to threaten an adversary with such an order or to conduct military operations on that basis (Article 40 AP I; Article 23, lit. d, HagueReg).

1. There is an ancient customary principle prohibiting orders 'to give no quarter' to captured enemies.²¹⁷ This well established rule has now been reaffirmed by Article 40 AP I; it constitutes in essence a logical expression of the principle that the legal use of military violence is strictly limited to what is required by military necessity; clearly there is no necessity to kill persons *hors de combat*. Only for so long as the enemy combatant participates in hostilities is he to be considered as a legitimate military objective.²¹⁸ As (p. 198) soon as he lays down his arms or drops out of combat because of wounds, to kill him becomes a useless act from the perspective of strict military necessity,²¹⁹ since it contributes nothing to the military objectives of the belligerents (see also Article 41 AP I). The mere intimidation of the adversary with no other purpose, however, is not permitted under international law.

2. The principle codified in Article 40 AP I has been seriously violated even in our century, particularly in the practice of World War II (Hitler's order to kill all Soviet commissars, liquidation of so-called 'irregulars', martial law executions of 'saboteurs' and parachute commandos),²²⁰ but also in numerous civil wars since 1945, when the minimum standard of common Article 3 would have prohibited such an action. The Diplomatic Conference therefore thought it necessary explicitly to codify such a maxim in AP I (Article 40) as well as in AP II (Article 4, para. 1, last sentence), although there is a considerable overlap with the fundamental rules of Articles 41 and 51, para. 4, AP I, for combatants *hors de combat* do not constitute lawful military objectives. Even without the specific provision of Article 40 AP I attacks on those *hors de combat* would thus have been regarded as unlawful indiscriminate attacks.²²¹

II. Protection of Civilian Objects

7.12

It is prohibited to fire at or bombard—whether to terrorize them or for any other purpose—members of the civilian population, unless and for such time as they take a direct part in hostilities (Article 51, paras 2-3, AP I), and to make civilian objects the object of attack. Such attacks in reprisal are also prohibited (Articles 51, para. 6, 53 lit. c, 54, para. 4, 55, paras 2, and 56, para. 4, AP I).

1. The prohibition against attacks on civilian persons and on the civilian population as such (the principle of non-combatant immunity) is the logical consequence of the fundamental principle of limited warfare and of the rule ensuing from this basic foundation, namely the principle of distinction between military objectives and the civilian population.²²² Since only attacks on military objectives are admissible under the rule of military necessity, it is clear that neither the civilian population nor individual civilians can ever be permissible objects of attack. As a fundamental maxim of customary international law this rule has been

undisputed for decades;²²³ Article (p. 199) 51, para. 2, AP I is therefore a reaffirmation of established principles of customary law.²²⁴

2. The same is true of the prohibition against terror attacks stated in Article 51, para. 2, 2nd sentence AP I. An attack solely designed to spread terror among the civilian population constitutes a special case of unlawful attack on the civilian population. The bombardment of the civilian population or of civilian objects in such cases is deliberately intended to intimidate the adversary and the enemy civilian population.²²⁵ Although it constitutes a blatant violation of fundamental humanitarian law,²²⁶ which undoubtedly falls within the category of 'grave breaches' that should be sanctioned as war crimes, this particularly barbarian variant of 'total' warfare is unfortunately used regularly by military actors in practice. The 'Yugoslav', or rather Serbian army, for example, has repeatedly launched terror attacks on the civilian population and threatened attacks on purely civilian objects in the course of the wars in Croatia in 1991 and in Bosnia since 1992, in order to intimidate the 'secessionist' republics and to expel the indigenous population from the territories claimed as 'historically Serbian'.²²⁷ Soviet warfare in Afghanistan during the 1980s,²²⁸ the Iraqi attacks with 'Scud' missiles on Saudi and Israeli cities during the Kuwait War in 1991,²²⁹ and the terror attacks of the troops of the Assad regime in Syria²³⁰ also provide more recent examples of such blatantly illegal belligerent practices, to which the international community has not yet found an adequate mode of reaction.

3. The lack of any adequate response to such barbaric excesses is connected with a dilemma besetting the international community, which has found only a rather one-sided solution (in favour of direct humanitarian concerns) in the First Additional Protocol. For a long time it was disputed whether cases of blatant violation of the rules safeguarding the civilian population justify reprisals which injure the enemy's civilian population.²³¹ Additional Protocol I now unequivocally states that reprisals against the civilian population and against civilian objects are absolutely prohibited. The strictly reciprocal character inherent in traditional rules of humanitarian law has thus been superseded by an 'objective regime' which (p. 200) marginalizes the interests of individual member states in favour of 'community interests' of a purely humanitarian nature.²³² The fundamental provisions of Part IV of AP I cannot therefore be brushed aside under the system of the Protocol even for reprisal, i.e. by a reaction in deliberate disregard of international law to a prior violation of the law by another state.²³³ The prohibition of attacks on the civilian population and on purely civilian objects (Articles 51, para. 6, and 52, para. 1, AP I), on important cultural objects (Article 53 lit. c AP I), on objects indispensable to the survival of the civilian population (Article 54, para. 4, AP I), on works and installations containing dangerous forces (Article 56, para. 4, AP I), and on the natural environment (Article 55, para. 2, AP I) is now absolute and may not be waived even in reprisal, according to a whole series of provisions scattered throughout Chapters II and III of Part IV AP I. The peremptory character of these fundamental safeguards for the benefit of the civilian population is thus most clearly emphasized.

7.13

Defended localities or buildings may be fired at or bombarded in order to:

- **break down active resistance (conquering fire, bombardment);**
- **eliminate military objectives located therein (destructive fire, bombardment).**

In both cases, the fire or bombardment shall be locally limited to the actual resistance and the military objectives.

Unlike ‘undefended localities’, which the prohibition of attacks on the civilian population covers, ‘defended localities’ constitute legitimate military objectives.²³⁴ Whole cities or villages, however, do not become military objectives merely because some combatants resisting enemy forces remain there. Contemporary humanitarian law in that regard deviates from the approach traditional before World War II, which qualified defended (and in particular besieged) localities as legitimate military objectives *in toto*, thus permitting wholesale destruction of such settlements.²³⁵ Even against such localities, military force is permissible only if and in so far as the violence is justified by military necessity, in order to neutralize enemy resistance and to destroy specific military objects located in it. Only if bombardment of such a locality could achieve military purposes in a strict sense is the use of force justifiable under Article 52, para. 2, AP I. Accordingly, those sections of such a locality the bombardment of which does not offer a definite military advantage must be spared the bombardment—although it must be admitted that the defence of a locality will normally lead to practically all the important objects becoming military objectives.²³⁶

7.14

Effective advance warning shall be given of any bombardment, unless circumstances do not permit this (Article 57, para. 2 lit. c, AP I; Article 26 HagueReg).

1. Customary law already included an obligation, deduced from the principle of utmost minimization of collateral civilian casualties, that the opposing side should be given advance warning. The enemy authorities should be given the opportunity to evacuate the civilian population (or at least to lodge them in specifically protected localities, such as (p. 201) prepared shelters).²³⁷ Accordingly, Article 26 HagueReg required that the commander of an attacking force should inform the competent authorities of the target location of the fact that a bombardment is planned. Only in a case of assault, i.e. when the success of an attack depends on surprise, was such a warning deemed to be superfluous (or rather: militarily counter-productive), and therefore a warning of assault is logically excluded by considerations of military necessity.²³⁸

2. Article 57, para. 2 lit. c, AP I addressed again the question of warning. In essence the new provision in AP I does not go much beyond what was contained already in Article 26 Hague Regulations,²³⁹ since Article 57, para. 2 lit. c, does not require anything other than an effective advance warning in cases where the attack is likely to cause severe civilian casualties and collateral damage to civilian goods. The attacker may dispense with a warning if ‘circumstances do not permit’, namely when the specific circumstances of the planned operation do not make it possible to inform the defender because the purpose of the operation could not then be achieved (which in essence is no more than an abstract description of the ‘assault’ problem).²⁴⁰ The formulation of the exception in Article 57 AP I is even more vague than the old one contained in Article 26 HagueReg; but again the formula must be interpreted in the light of the overarching principle of military necessity. That means *in concreto* that the advance warning really must be excluded under a military perspective, because e.g. the element of surprise is crucial for the success of the whole operation. Two problems therefore become decisive, namely the repercussions of the warning on the chances of success of the operation on one hand, and the casualties which the attacking forces are likely to sustain if a warning is issued on the other hand.²⁴¹ A general preference for leaving the adversary in doubt about one’s operations is obviously not sufficient to fulfil the criteria of the ‘exception formula’; the relevant yardstick, however, must not be exaggerated, since it would undermine the plausibility of the system if too high

a level were imposed on the extent of casualties which attackers should risk in order to provide an opportunity for evacuation.

7.15

It is prohibited in any circumstances to fire at or bombard civilian and military objects without distinction (Article 51, paras 4-5, AP I).

1. Article 51, paras 4 and 5, AP I states the most important consequence of the principle of limited warfare. Essentially, the prohibition against indiscriminate attacks is no more than a logical conclusion from the principle of distinction.²⁴² The fundamental maxim of distinction and non-combatant immunity not only prohibits attacks on the civilian population but also requires that belligerents must always distinguish between military (p. 202) objectives on one hand and the civilian population and objects on the other.²⁴³ The prohibition of indiscriminate attacks laid down in Article 51, para. 4, AP I is thus a more or less self-evident inference from the fundamental rules of humanitarian law, if not from 'elementary considerations of humanity'. The ICRC and government delegates who were decisive in negotiating, and the Diplomatic Conference as a whole, accordingly considered it—in its abstract version—to be a fundamental rule of humanitarian law firmly established in custom.²⁴⁴

2. At the same time, however, the prohibition of indiscriminate attack as enshrined in Article 51 AP I, in its detailed version with many specific rules on combat, is also a development of convention law which far exceeds the customary core of traditional practice.²⁴⁵ For example, it is way beyond a mere logical deduction from military necessity to state that losses among the civilian population, even if resulting from an attack on a military objective and being necessary in a military perspective, may not always be legally permissible. Such a proposition cannot, in pure logic, be derived from the principle of military necessity. The restrictive approach which outlaws collateral damage even if 'militarily necessary' in the traditional sense, therefore needs a further value-judgement and a second fundamental principle, namely the essential principle of proportionality.²⁴⁶ Only if the concept of military necessity is combined with the principle of proportionality, can one come to the conclusion that collateral damage which is unavoidable in achieving certain military objectives may nevertheless be prohibited by law.²⁴⁷ The traditional approach, according to which all collateral damage that is unavoidable in attacking a certain military objective must be accepted, is no longer valid.²⁴⁸ Extreme cases demonstrate the point: the accidental presence of a civilian in a military objective does not render it immune under the rule of distinction; equally, an attack upon a military objective inside a city but which is in itself totally unimportant does not justify an attack on the city as a whole which causes enormous damage to the civilian population. The prohibition of excessive damage, inherent in the prohibition of indiscriminate attack, requires belligerents to relate the military advantage which is expected from an attack to the possible civilian losses.²⁴⁹ Only if the expected military advantage is of such tactical or strategic importance as to outweigh the collateral damage is the attack justifiable under Article 51 AP I. The criteria of such a balancing act necessarily remain indefinite, and inevitably leave considerable latitude in the assessment of probable consequences and the balancing of the various concerns.²⁵⁰ However, there is no alternative. The intellectual process of balancing the various elements is so complicated, needs to take into account such a huge amount of data and so many factors, that any attempt to design a formula which is both comprehensive and precise would be ridiculous. In short: common sense is irreplaceable.

(p. 203) 3. Though, in the context of modern warfare, if led by high-tech military forces, this balancing act takes a particular risk to blur decisively proportionality. The more professionalized and technologically advanced military forces become, the more military commanders will perceive the life of their soldiers as a precious asset that should be sacrificed only when it becomes unavoidable. They will consider it a decisive military

advantage if they can spare the life of their own soldiers, an advantage that justifies a certain amount of collateral damages.²⁵¹

7.16

Indiscriminate firing and bombardment means attacks:

- **which are not directed at a specific military objective (Article 51, para. 4 lit. a, AP I);**
- **which cannot be directed at a specific military objective (Article 51, para. 4 lit. b, AP I); or**
- **whose intended effects cannot be limited to the military objective (Article 51, para. 4 lit. c, AP I).**

1. Article 51, para. 4 lit. a–c, AP I undertakes to give concrete meaning to the notion of ‘indiscriminate attack’. Whether such a definition is helpful, and whether it does not risk confusing soldiers more than it enlightens them (which was the initial purpose of the provision) was a question hotly debated in the course of its drafting.²⁵² Ultimately the opinion prevailed that the laconic sentence ‘indiscriminate attacks are prohibited’ would be too imprecise and would fail to provide practical guidance to the field commanders and staff officers who have to plan and implement military operations.²⁵³ The ‘official’ explanation of the term ‘indiscriminate attack’ which, despite its use of a rather abstract formula, already goes into more detail than the earlier definitions, thus tries to elaborate the definitional approach. It carves out three different types of specific attacks which must be considered as violations of the rule of distinction.²⁵⁴

2. Article 51, para. 4 lit. a, API prohibits attacks which are not directed at a specific military objective; in essence a self-evident consequence of the rule of distinction. The attacker must be sure that the target against which the use of force is directed constitutes a military objective in accordance with humanitarian law, and he must restrict his action as far as possible to that specific objective alone, not objects and persons around it.²⁵⁵ This raises two particular concerns. The attacking force must—using all available (p. 204) means of intelligence—make sure of directing its operation against a genuine military objective, i.e. it must clarify whether the object or ground position against which firing or bombardment is directed actually constitutes a military objective the neutralization of which is essential.²⁵⁶ Blind fire into territory controlled by the adversary is clearly forbidden, which means that firing without reliable information about the objective, and therefore without a clear idea of the nature of the objective, is now strictly outlawed.²⁵⁷ Also forbidden is the practice of releasing bombs over enemy territory, particularly over settlements, after missing the original objective, which was common in World War II. Such an attack constitutes a paradigm case of indiscriminate warfare. Modern rules of engagement usually exclude this method of disposal of bomb loads; in ‘Operation Desert Storm’ the rules of engagement of the Allied forces expressly ordered air crews to bring home the entire bomb load when target identification had failed. In addition, the attacker must direct fire specifically at the identified military objectives. In combating a certain objective (or a compound of objectives) he may spread his fire power over a certain area, either as ‘harassing fire’ against the enemy’s lines and deployment areas,²⁵⁸ or as ‘interdiction fire’ against certain strategic points, bridgeheads, or ground positions the use of which is intended to be denied to the adversary.²⁵⁹ Even such kinds of ‘barrage fire’ covering a certain area, however, must fulfil the basic condition of being directed against a specific objective. Accordingly, in these cases the ground area serving as a target must be definable as a military objective in its entirety, i.e. the whole ground sector must in itself be militarily relevant. It is prohibited to combine clearly separate objectives in one single target area covered by an overall ‘area bombardment’, since such untargeted fire exposes

the civilian population and civilian goods in the intermediate zones to risk.²⁶⁰ The basic requirement of Article 51, para. 4 lit. a, AP I that the attack should be directed against a 'specific' military objective, draws a boundary which the belligerent may not overstep.²⁶¹ The same applies to the use of mines (see above Section 6.10). Although it is impossible to deduce a general prohibition on the laying of mines from Article 51, para. 4, AP I, even the ground sector blocked by mines must always constitute a military objective in itself. The neutralization (or closing) of the target area of a mine attack must be militarily necessary, and the surveillance and timely removal of the minefield must ensure that the civilian population will not be injured by the mining operation.²⁶²

3. Article 51, para. 4 lit. b, AP I prohibits attacks which cannot be directed against a specific military objective. This also concerns methods of warfare which are obviously prohibited by customary law as indiscriminate. The drafters of the provision had primarily (p. 205) in mind traditional remotely controlled weapons with extremely low target accuracy, such as long range missiles with only a rudimentary guidance system. In these cases the construction of the weapon itself (in combination with the specific operative modalities under which these weapons are used) leaves no doubt as to the nature of the attack. The mode of operation of such an attack usually makes it impossible to distinguish between military objectives and civilian objects.²⁶³ Thus, the attack is inherently unable to fulfil the requirements of distinction. The prime example of such an operation which *per definitionem* leads to an indiscriminate attack is the German use of V2 missiles against British cities in World War II.²⁶⁴ More recent practice also provides examples of such indiscriminate missile attacks, such as the Iraqi attacks with 'Scud' missiles on Israel in the Kuwait War of 1991.²⁶⁵ Aside from these self-evident cases it remains in dispute how far (beyond the core just described) the prohibition in Article 51, para. 4, lit. b really reaches. For example, there are many arguments in favour of including in the prohibition certain kinds of conventional bombing raids, at least those where the bombardment cannot in practice be limited to specific military objectives. Night attacks without adequate targeting equipment fall into this category, or bombing raids from extremely high altitudes where the target accuracy becomes unacceptably low.²⁶⁶ The prohibition seems, however, not to cover specific categories of weapons as such. Some states insisted on this during the drafting of the provision.²⁶⁷ Certain operational uses of dangerous weapons were thought to be outlawed under Article 51, para. 4 lit. b: operations where the distinction between military objectives and civilian objects is by definition impossible because the weapons cannot be directed specifically at individual military objectives. In principle, this sounds convincing. However, there remains an inherent tendency which extends the provision's application beyond a mere prohibition of certain operational designs; 'blind' weapons such as long-range missiles without adequate guidance systems, or traditional minefields laid without customary precautions (i.e. unrecorded, unmarked, and not designed to destroy themselves within a reasonable time) are difficult to imagine as compatible with Article 51, para. 4 lit. B.²⁶⁸ A most recent example is the dropping of barrel bombs in densely settled urban areas used by the Assad regime's Troops in Syria, found clearly indiscriminate by the Independent Commission of Inquiry on Syria.²⁶⁹

4. Article 51, para. 4, lit. c API outlaws attacks whose intended effects cannot be limited to the military objective, and is the most controversial part of the definition of indiscriminate attacks. Lit. c of Article 51, para. 4, reads as follows: 'Indiscriminate attacks are ... (c) those which employ a method or means of combat the effects of which cannot (p. 206) be limited as required by this Protocol.' This refers to a whole series of limitations on the use of force: the rules on the protection of the environment (Articles 35, para. 3, and 55, para. 1), the prohibition of attacks on works and installations containing dangerous forces (Article 56), and the principle of proportionality.²⁷⁰ Proportionality in particular has been a point of a fierce controversy. It was debated to what extent a prohibition of excessive damage really constitutes an established part of previously existing customary law, or to put it in another

way, to what extent Article 51, para. 4, lit. c, AP I refers to an established principle of proportionality.²⁷¹ The starting-point is the fact that the version of the rule which was finally adopted by the Diplomatic Conference deliberately included the problem of disproportionate attacks. The formulation of this, however, was rather cryptic, since it implicitly focused on methods of warfare which necessarily cause excessive losses to the civilian population.²⁷² Thus, the weapons primarily concerned are those whose effects are spread over a wide area, such as phosphorous incendiary bombs or other variants of incendiary weapons, or so-called 'cluster bombs'.²⁷³ If these undirected weapons are used in densely populated regions their effects will necessarily be disproportionate²⁷⁴ and accordingly they are prohibited under Article 51, para. 4 lit. C, AP I (see above Section 6.08). During the Operation Desert Storm, more than 61,000 cluster bombs were dropped by coalition forces on Iraq and Kuwait;²⁷⁵ the NATO forces, during the Kosovo Air Campaign, dropped an estimated 1,400 cluster bombs, each containing between 147 and 202 submunitions, on targets in Serbia and Kosovo.²⁷⁶ Recently, cluster bombs were being extensively used during the Israeli offensive in Lebanon in Summer 2006.²⁷⁷ Some authors argue that military planners are capable of directing cluster munitions at lawful military objectives; according to them, it rather depends on the specific employment of the weapon whether it entails indiscriminate attacks.²⁷⁸ In contrast, the ICRC calls upon the states to end the use of inaccurate and unreliable cluster munitions and to prohibit the targeting of cluster munitions against any military objective located in a populated area.²⁷⁹ This proposal is being supported by the 'Cluster Munition Coalition', a network founded in 2003 by civil society organizations; equally, a growing number of states pleads for the adoption of a binding instrument containing such a prohibition, which finally happened in 2008 with the Convention on Cluster Munitions.²⁸⁰ Although the international community has concluded special agreements on most of the armament items inherently covered by the provision (UN Weapons Convention of 1980) it remains (p. 207) to be resolved under a general perspective whether the particular convention rules which refer only to specific categories of weapons (excluding e.g. cluster bombs) are really exhaustive, or whether the general rule of Article 51, para. 4 lit. c, AP I should not be seen as providing an overriding legal framework which imposes a final limit. Most considerations speak in favour of such a proposition, so that weapons not regulated by the 1980 Convention (cluster bombs being the most obvious example) are subject to the more general principle codified in Article 51, para. 4 lit. c, AP I.²⁸¹

5. Particular problems arise from the definition of legally permissible uses of nuclear weapons (see Sections 6.33 to 6.37). If one assumes, as did the ICRC in its original draft, and which the nuclear powers later confirmed in their declarations, that the Additional Protocol did not intend to broach the question of legality of nuclear weapons, a further question arises immediately. Must Article 51, para. 4 lit. c, AP I be considered as an expression of established customary law, which continues to exist alongside the convention regulation in Additional Protocol I?²⁸² As long as Article 51, para. 4 lit. c, is seen to rely only on an established principle of proportionality, that question must be answered in the affirmative. Therefore, the use of weapons of mass destruction, which inevitably cause disproportionate collateral damage if used in densely populated areas, would in principle have to be considered as prohibited by public international law, independent of Article 51, para. 4 lit. c, AP I as a convention norm. At least first use of such nuclear munitions against urban settlements is accordingly already prohibited under customary principles. Only modern precision-guided nuclear warheads for combat against purely military objectives, and retaliatory use of nuclear weapons by way of reprisal, remain permissible, and not subject to the legal obstacles imposed by the customary standards here analysed.

7.17

Attacks and bombardments are also to be considered as indiscriminate if:

- a number of clearly separate and distinct military objectives located in a built-up area are attacked as if they were one single military objective (Article 51, para. 5 lit. a, AP I);**
- they are likely to cause loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated (Article 51, para. 5 lit. b, AP I);**
- they also cause excessive injury and damage to civilians or civilian objects located outside the actual target area and its immediate vicinity.**

1. The still abstract definition of what constitutes an 'indiscriminate attack' contained in Article 51, para. 4, AP I is supplemented in para. 5 of Article 51 by two examples of situations which had long been debated. Article 51, para. 5, now states expressly that they are covered by the prohibition of indiscriminate attack.²⁸³ The clarification concerns on one hand the practice of 'area bombardment' which had become common in World War II and which was claimed to be legal by the Allied Powers at the time.²⁸⁴ It is true that discussion has continued for decades as to whether area bombardments are (p. 208) not already outlawed under the customary prohibition of indiscriminate attacks,²⁸⁵ 'area bombardments' being defined as bombardments which combine a number of clearly separate and distinct military objectives located in a built-up area and treating them as one single military objective. State practice hitherto had not demonstrated its willingness to accept such a prohibition,²⁸⁶ although it is not difficult to argue that a prohibitory rule follows from the general prohibition of indiscriminate attacks. Thus, Article 51, para. 5 lit. a, AP I constitutes an important innovation, since it makes clear that such practices of area bombardment are generally inadmissible.²⁸⁷ Only where a genuine target area is attacked (i.e. a passage or ground sector the whole of which constitutes a military objective, or where several military objectives are so intermingled that they are practically inseparable and thus can only be attacked together) does bombardment of a wide area remain permissible.²⁸⁸

2. The second important point of debate clarified by Article 51, para. 5, AP I is the validity and scope of the principle of proportionality. Admittedly it had already been widely accepted before the adoption of AP I that attacks on military objectives are subject to elementary restrictions. If collateral damage is likely to affect the civilian population and civilian goods as a consequence of the attack, the anticipated damage must not be excessive in relation to the intended military advantage.²⁸⁹ Beyond that minimum requirement, Article 51, para. 5 lit. b, now ultimately settles that all damaging effects of military operations must be measured on the yardstick of proportionality.²⁹⁰ The collateral damage which inevitably occurs on the occasion of nearly every attack is justifiable only in so far as losses to the 'innocent' civilian population are commensurate with the military advantage which the operation sought to achieve.²⁹¹ As a general rule this sounds reasonable. However, the principle of proportionality creates serious difficulties in practice, since it (p. 209) necessarily remains loosely defined and is subject to subjective assessment and balancing. In the framework of the required evaluation, the actors enjoy a considerable margin of appreciation.²⁹² This is particularly true in view of the strongly prognostical character of any such assessment, which must always be an assessment of the future effects of the operation. Objective standards for the appraisal and balancing of expected collateral damage and intended military advantage are virtually non-existent. Proportionality requires that two very unlike values be weighed and balanced against each other, without any objective method to compare two such disparate categories.²⁹³ In the

final result, therefore, it is for the competent military commander and the staff planning the operation—who should know best the possible results and repercussions—to assess the consequences of the operation and to ensure its proportionality.²⁹⁴ Final responsibility is thus laid in the hands of the military, which can act only on the basis of the information available at the time of the decision. Germany, like most other NATO members ratifying AP I, therefore filed a declaration that ‘the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight’.²⁹⁵ In a second interpretative declaration Germany stated that by ‘definite military advantage’ in Article 51, para. 5 lit. b, AP I it understands ‘the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack’.²⁹⁶ This means that the point of reference of the required balancing is not the gain of territory or other advantage expected from the isolated action of a single unit, but the wider military campaign of which that action forms a part. Only in the framework of the more complex overall campaign plan of a belligerent can one assess the relative military value of the specific purpose of an individual attack.²⁹⁷ In essence this should be self-evident: actions of individual units are not ends in themselves in modern integrated warfare. To the contrary, they must be placed in their operational context.

3. A further problem makes the handling of the proportionality requirement of Article 51, para. 5 lit. b, AP I extremely difficult. In practice, the circumstances usually involve combatants and civilians, military objects or installations and civilian settlements; industrial plants, and infrastructure installations of dual use. Such a complicated mixture of categories, however, not only makes it difficult to meet the requirements of distinction, but also makes collateral damage inevitable, and often considerable. To prevent excessive losses and damage to the civilian population proves extremely difficult in such situations, (p. 210) unless the adversary takes it upon himself to ensure a certain minimum separation between military objectives and civilian population.²⁹⁸ For example, the NATO bombing of the Serbian state television in 1999 (which has been classified as a military objective by NATO) caused the death of up to seventeen civilians; these casualties were assessed by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia as not ‘clearly disproportionate’.²⁹⁹ A particularly difficult problem is caused for the attacker if the opposing side illegally uses the civilian population to shield military activities, whether by transferring parts of the civilian population deliberately to military installations, or by calculatedly establishing military objectives among the civilian population and civilian objects, a common example of which is sub-contracting in the armaments industry.³⁰⁰ Article 51, para. 8, API now expressly confirms that the violation of international legal obligations by the adversary does not exempt the attacker from his legal obligations with regard to the civilian population.³⁰¹ The problem is obviously not solved by that new provision—quite to the contrary. The attacker will face extreme difficulties of justification, without having the alternative of accepting a higher level of collateral damage, if he wants effectively to counter the moves of the other side.³⁰² Also, the role of civilians deliberately incorporated into the military organization of the belligerent, such as workers in arms factories or civilian drivers of munitions transports, has remained unclear in that regard.³⁰³ Does the loss of thousands of workers in an attack on a munitions factory have the same relative value, in terms of the proportionality of collateral damage, as the predictable deaths of women and children caused by an attack on a military command centre located in the midst of a densely populated civilian quarter? Does the rule of proportionality allow measures avoiding risks of casualties amongst one’s own soldiers to the detriment of the civilian population?³⁰⁴ Many would argue no, but it must be admitted that many questions are left open.³⁰⁵ The role of the commander responsible for the operation is not made easier by these uncertainties, although one should not exaggerate demands for exact detail in such a rule. What is required is no more than a sincere effort to cope with the problem of collateral damage, and a proper application of common sense. Humanitarian law in that regard is dependent on an inherent sense of humanity, whose

impulse is to avoid attacks causing catastrophic collateral damage when the objective is of only marginal importance; in other words, which shuns blatant disproportionality. Judging proportionality thus is, in essence, a decision that appeals to individual morality and relies on moral judgment of deciding commanders.³⁰⁶

(p. 211) 4. A major problem in determining excessive collateral damages is the prognostic character of two of the three analytical steps that must be undertaken in assessing the proportionality of military operations (and its incidental losses).³⁰⁷ Let us *first* look at the determination of the expected incidental losses to civilian lives and civilian goods. There are two factors creating quite some insecurity in that regard. The first is the dynamic character of the distinction between military objectives and civilian goods, making it impossible to decide at one point in time whether a certain installation is of a military character or falls under the protection of civilian persons and goods. The *second* factor creating epistemic uncertainty is the time lag between operation planning (and decision-making) and the effective execution of the operation. What may have been totally harmless at one point of time may become extremely problematic with the passing of time. One might think of the notorious 'Kunduz incident' involving the German district commander Col. Klein.³⁰⁸ At the beginning, there were two military fuel trucks hijacked by Taliban forces that had got stuck in a river ford. Attacking these two trucks in clinical isolation somewhere out in the empty countryside would have been a safe issue. But with time passing, the Taliban called the villagers from some hamlets nearby for help, first to move the trucks out of the ford, then to unload the fuel and fill canisters with it, with more and more civilians assembling. This changes the situation entirely. That is what makes the determination of the 'expected incidental loss' so tricky. The dynamic character of distinguishing military objectives from (protected) civilian goods finds its expression in Article 52 (2) AP I. The second sentence of this article provides that 'military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'. This constitutes a very dynamic definition. Nature and location of an object may still be relatively static elements. Purpose and use, however, are definitely not static in its meaning. These elements contain the inherent assumption of a fluid situation where an object which—at its origins—was purely civilian in its purpose and use, may under changed circumstances easily become a military objective. At the other side of the scale, there may arise indirect consequences (with civilian losses in its wake) as a result of long-term and complex chains of causality. These 'reverberating effects' in principle belong to the assessment of collateral damage, but only where that harm will arise as an expected consequence of the attack.³⁰⁹ In the following step, any attempt to delimit still-sustainable levels of incidental loss, while drawing boundary lines that demarcate where the extent and nature of collateral damages become too problematic, inevitably ends up in an act of balancing.³¹⁰ It is not the fault of the drafters of the Additional Protocol that the rules on collateral damage and proportionality are so vague and open, leaving room for subjective assessment.³¹¹ It is a (p. 212) result of the structure of the problem. The proportionality rule of Article 51 (5)(b) AP I does justice to the underlying ethical dilemma by requiring to relate the expected incidental loss to the 'concrete and direct military advantage anticipated'.³¹² Accordingly, the pair of concepts that must be related to and compared with each other consists on both sides of strongly prognostic character—'expected incidental loss' under the civilian population on the one side, 'anticipated military advantage' on the other side. The prognostic character of both essential elements of the analytical operation of balancing makes the proportionality test dependent on expectations and probabilities of future consequences of a planned action.³¹³

5. Prognoses are always prone to failure, open to errors. For that reason, a strong ‘error tolerance’ in assessing the anticipated military advantage and the expected incidental losses is built into the rule system. There have been discussions whether the (judicial) control of the proportionality test should follow a ‘subjective’ approach, based on a reconstruction of the specific decisional horizon of the actors involved, or whether one should add some elements of a more ‘objective’ control, looking into the question whether the actors taking the decision have achieved their decision in a diligent manner according to ‘objective’ standards, following all the rational precautions and analytical steps required from a ‘reasonable military commander’.³¹⁴ The preference for a ‘subjective’ approach protects the military commander and/or military planner entirely against accusations that he made an error leading to huge numbers of incidental losses of civilian lives and property which in hindsight might be deemed excessive. If the decision-maker started from a ‘subjective’ assessment assuming that incidental losses would be proportionate to the anticipated military advantage, there can be no claim of a ‘faulty’ assessment. The result may be unhappy, but the commander took a justifiable decision at the time of decision-making. The burden shifts a bit with the passage towards a more ‘objective’ control, where the obligation to invest enough efforts in a careful prognosis of the expected incidental losses and the anticipated military advantage tends to become a ‘due diligence’ obligation. Even a ‘due diligence’ standard, however, still contains a significant degree of ‘error-tolerance’, since the fact as such that too large incidental losses occurred in the result is irrelevant as long as the military decision-maker was diligent enough in preparing his decision. This seems to be a delicate point which is difficult to convey to the public-at-large in democratic states tending to assume a violation of the proportionality requirement as soon as incidental losses *ex post* seem unbearable in relation to the anticipated military advantage. The focus on the epistemic horizon of decision-making at the time of taking the decision is important, however, if efficient military action under conditions of limited knowledge and strong time pressure shall remain possible. It is often better that the commander takes a decision which might prove erroneous in hindsight than taking no decision at all, an alternative often seriously endangering his own troops. The question of ‘error tolerance’ is of utmost importance since prognostic estimations, such as the assessment of future consequences of certain actions, are open to a number of typical errors. (p. 213) The sources of these typical errors are relatively well-known from the research in the field of social psychology.³¹⁵ The capacity of humans to achieve a reliable (and un-biased) assessment of consequences and risks of a given behaviour are very limited. Professional training and the long-standing experience of commanding officers may moderate such shortages in weighing all the relevant factors—but the fundamental sources of error and deficient weighing of all the relevant factors remain, such as forms of cognitive bias, distortions in risk perception, decisional routines leading to the marginalization of important aspects in a concrete situation, and phenomena of cognitive dissonance.

6. The difficulties culminate in the final balancing that constitutes the essence of the proportionality test. Comparing and balancing rather different types of (expected) positive and negative consequences of a certain action raises systematic problems of a fundamental nature.³¹⁶ The significance of (estimated) consequences must be contextualized in different internal logics of different societal sub-systems and must be evaluated in the light of (different) value-systems. These different ‘valuations’ then must be related to each other. This is far from easy and leaves the decider with a strong feeling of unease. Training and experience might help to overcome that unease and might assist in developing a sufficiently differentiated moral judgment—and it is moral judgment that is finally brought to the stage in the proportionality test, thus the strong element of subjectivity that accompanies the decisive balancing.³¹⁷ There have been proposals to develop some kind of a decisional matrix, decisional schemes that give some (rough) indication how the balancing should look like—and it seems that different forms of such a matrix have been used in military practice.³¹⁸ One should remain sceptical towards these types of endeavours, however, since

they only create a semblance, if not to say illusion, of clarity in judgment. At the end, such endeavours hide the problems in the way of scaling—and in the attribution of real cases to the various boxes. In operative practice, the balancing is usually done in an intuitive way³¹⁹—a way forward that is not wrong, since current research of social psychologists demonstrates that a professional intuition trained for a long time and enriched with vast experience is astonishingly secure in taking adequate decisions.³²⁰ Admittedly, this makes the reliability of the balancing strongly dependent on the ethical sensibility of the deciding actors, couples the intricacies of balancing with the kind of professional ethics that actors develop over a long process of professional socialization.³²¹ But we have nothing else to rely on—and more clear-cut rules will not help against heinous actors, will not discipline brute military elites of armed forces in certain parts of the world, nor militias and armed groups raised ad hoc. By the way: the fact that even the actors in non-international armed conflict are required to balance the anticipated military advantage with the expected incidental losses assumes that the rule on the (p. 214) prohibition of excessive collateral damage applies also in situations of non-international armed conflict—an assumption largely shared in international legal doctrine.³²²

7. Comparable elementary considerations underlie the third sub-category, the case of excessive injury and damage to civilians or civilian objects located outside the actual target area and its immediate vicinity. The pre-existing customary prohibition of such attacks results from the rule of distinction and the prohibition of attacks which are not directed against a specific objective, or the effects of which cannot be directed against a military objective. The damaging effects must not only be specifically directed (or directable) against the military objective; the planning and implementation of the attack must also ensure that the effects of the force employed are restricted to the military objective and do not result in the civilian population living nearby being damaged more than the military objective which was targeted.³²³ At the same time proportionality must be observed, with the dictate that collateral damage may not exceed the direct military advantage achieved by the operation.

7.18

Before engaging an objective, every responsible military leader shall:

- **verify the military nature of the objective to be attacked (Article 57, para. 2 lit. a (i), AP I);**
- **choose means and methods minimizing incidental injury and damage to civilian life and objects (Article 57, para. 2 lit. a (ii), AP I);**
- **refrain from launching any attack which may be expected to cause incidental injury and damage to civilian life and objects which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2 lit. a (iii), AP I);**
- **give the civilian population advance warning of attacks which may affect it, unless circumstances do not permit this (Article 57, para. 2 lit. c, AP I);**
- **when a choice is possible between several military objectives of equal importance, engage that objective the attack on which is likely to cause the least incidental injury or damage (Article 57, para. 3, AP I).**

The obligation to take feasible precautions in attack applies equally to the operation of unmanned combat aerial vehicles - UCAVs - (Rule 39 *HPCR Manual*).

An attack shall be suspended if it becomes apparent that the objective is not military or is subject to special protection or that the attack may be expected to cause excessive incidental loss of civilian life (Article 57, para. 2 lit. b, AP I).

1. The rule repeats almost verbatim the content of Article 57 AP I. By that article the international community drew its conclusions from the above explained rules on methods of warfare as to the precautions required by the attacking party in order to avoid or minimize civilian loss and damage.³²⁴ The military authorities responsible for preparing and (p. 215) implementing an attack are required by Article 57 AP I to implement certain elementary safeguards and are subject to stringent standards in their attempts to protect the civilian population from collateral damage.³²⁵ Paragraph 1 of the provision begins by stating the general principle underlying the whole provision, namely that the attacker shall take 'constant care' to spare the civilian population and civilian objects in the conduct of military operations, or—as formulated in the 1967 ICRC Memorandum—to reduce the damage inflicted upon non-combatants to a minimum.³²⁶ This rule may be deduced from the general principle of military necessity provided by customary law.³²⁷ With regard to non-international armed conflicts the same result is achieved by the humanitarian minimum standard laid down in common Article 3 of the Geneva Conventions, but in particular by customary law standards.³²⁸

2. Although the general rule requiring precautions is undisputed, one essential problem remains, namely as to which individuals are addressed by Article 57. The obligations should be understood to address primarily commanders and staff officers who are directly responsible for specific operations, and only to a lesser degree the individual soldiers participating directly in the attack.³²⁹ Due to the lack of sufficient information, even non-commissioned officers and unit commanders up to the level of company commanders will not normally have the overview of the military situation which is required for an adequate evaluation of the legality of operations under Articles 48-57 AP I, in particular for the assessment of proportionality. Without an adequate idea of the operational framework and of the nature and importance of the target, however, the safeguard measures provided for in Article 57 AP I cannot be implemented satisfactorily. Junior officers and soldiers in the field will thus have to rely on the assessment given by their superiors,³³⁰ with the exception of obvious war crimes such as deliberate indiscriminate attacks. Only in so far as these officers and soldiers independently plan and carry out operations will comparable precautions be required of them. Some states have expressly recorded their understanding as to this point by filing corresponding declarations or reservations. Switzerland for example declared on the occasion of ratification: 'The provisions of Article 57, para. 2, are binding only on battalion or group commanders and higher echelons. The determining factor shall be the information available to such commanders at the time of reaching a decision.'³³¹

(p. 216) 3. The point of reference of this declaration is the introductory formula of Article 57, para. 2 lit. a, AP I, which reads: 'Those who plan or decide upon an attack ...' Such a restrictive clause is necessary since the specific precautions required by lit. a apply mainly to the planning staff and commanders who decide upon an attack. These persons bearing responsibility for operational decisions are required by point (i) of lit. a to 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of para. 2 of Article 52, and that it is not prohibited by the provisions of this Protocol to attack them'. This is clearly intended primarily to impose a duty of verification, a duty to collect

sufficient information to clarify the nature of the objective.³³² The command authorities responsible for planning and deciding upon an attack must employ all means of reconnaissance and intelligence available to them unless and until there is sufficient certainty of the military nature of the objective of an attack.³³³ What is required is a subjective certainty: the standard of Article 57 in that regard is relative, for there is no absolute obligation to employ all means until the ultimate attack.³³⁴ As soon as there are no longer any serious doubts concerning the military character of the objective (and the other requirements of lawfulness, such as proportionality have been observed), the duty of Article 57 lit. a (i) is satisfied.³³⁵ Where doubt remains, however, the situation is more problematic. For a military actor lacking elaborate means of gathering the necessary intelligence (a case not far from reality in most Third World conflicts), there is a simple alternative: refraining from attack or attacking without sufficient certainty as to the military character of the objective. Under Article 57 AP I (and the corresponding customary rule in non-international conflicts) only the first option is legal; the second risks violating the principle of distinction. Although most military actors in internal conflict tend to an attack on the basis of mere suspicion in such cases,³³⁶ they should be aware that this may constitute a war crime (or a crime against humanity), to which lack of information is no defence.

4. Sub-para. a (ii) calls upon commanders and planning staff officers to ‘take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’.³³⁷ The required measures relate in particular to the problems of so-called ‘targeting’ and to the choice of weapons and ammunition used in the attack.³³⁸ How to select and locate the objective, and the linked question of selecting the weapons best suited for the attack, is probably the essential question in the practical implementation of (p. 217) the principles of distinction and proportionality.³³⁹ Only if the target becomes, as far as possible, precisely demarcated and if, in selecting the means of attack and establishing the mission parameters, it is ensured that the effects of the use of force are as far as possible limited to the military objective, can the ‘rule of proportionality’ be realized in military practice.³⁴⁰ Yet the logistics of such mission parameters are so complex and depend on so many factors that it is impossible to express the consequences of distinction and proportionality in a precise formula. The flexibility of the clauses contained in AP I reflect the recognition by the international community that it is not possible to regulate all the infinite variables affecting military operations in a stringent provision. The location and physical character of the objective, the configuration of the surrounding terrain, the presence of civilians in the vicinity of the objective and the adjacency of military and civilian objects, the degree to which the target is defended and the resulting risks for the attacker’s personnel and equipment, the quality of the weaponry used by attacker and defender (in particular the relative accuracy of artillery, bombs, and missiles), the standards of technical training of combatants and their physical and psychological condition, meteorological conditions—all these may be factors decisive to the final result.³⁴¹ The list could easily be extended. Also the ‘rules of engagement’ governing the operating forces might play a key role in conforming with Article 57, para. 2 lit. a (ii); to give one example, the principle included in the rules of engagement of the US Air Force in Vietnam and in the Kuwait War of 1991, according to which bomber aircraft must return home with the entire bomb load unless they are one hundred per cent certain of their target,³⁴² may have decisive importance in minimizing unnecessary collateral damage in aerial operations. In general, the weapon with most accurate delivery parameters should be employed to attack a military objective with civilian objects in its vicinity.³⁴³ In some cases there may also be a requirement to use infantry operations in circumstances where firepower (air support or artillery) would traditionally have been employed. However, it is not to be expected that one could ever structure the whole question in a short and precise formula; the individual responsibility of the competent commander will therefore be sanctioned only in extreme cases, such as deliberate attacks on obviously civilian objects, because the above-mentioned

uncertainties must be taken into account when assessing *ex post facto* the legality of an operation. What is required is a decision taken in good faith according to the standard of a 'reasonable military commander', and nothing more.³⁴⁴ However, some general safeguards will also apply in nearly every case at the level of high command. (p. 218) In order to avoid precipitate decisions being made without sufficient information, it is advisable to follow the example of the US forces established since 'Operation Desert Storm' (Kuwait/Iraq 1991), which provided for the control of targeting decisions and operations plans by legal advisers to the armed forces who were specially trained for that task.³⁴⁵ Admittedly such an additional precaution is not required by Article 57, para. 2 lit. a (ii), but the mechanism is effective in assisting the competent commander in the exercise of his responsibilities, as long as the legal advice is properly taken into account.

5. Article 57, para. 2 lit. a (iii) also reiterates the rule of proportionality. Command authorities and planning staff must ensure that operations remain within the bounds of proportionality, i.e. that they do not cause collateral damage which is excessive in relation to the expected military advantage.³⁴⁶ Excessive attacks may result in criminal responsibility for the competent commander and staff officers responsible for their operation, since indiscriminate attacks in violation of the requirement of proportionality constitute 'grave breaches' as provided by Article 85, para. 3 lit. b, AP I, which must be sanctioned as war crimes by the criminal justice system.³⁴⁷ Some military authors, particularly in the United States, have argued that an offence based on the principle of proportionality is too vague and uncertain to form the basis of a prosecution according to the rule of law.³⁴⁸ It must be admitted that there is a debatable point here; war crime definitions in general, however, may not be equated with ordinary provisions in internal criminal codes, since war crimes are always dependent on imprecise rules of public international law, the violation of which is defined as a crime under international law. Since blatant violations of the principle of proportionality are traditionally considered to be unlawful indiscriminate attacks resulting in international responsibility, the objection is ultimately not convincing.

6. Article 57, para. 2 lit. c, also repeats the requirement of an effective advance warning prior to attacks which may cause damage to the civilian population, a rule which in principle was already binding on belligerents by virtue of Article 26 HagueReg (for details, see Section 7.14).

7. Article 57, para. 3, AP I stresses the self-evident consequence of the principle of proportionality and the corresponding general principle of optimal minimization of collateral civilian damage:³⁴⁹ the need to choose, when several military objectives would provide equal military advantage, the objective 'the attack on which is likely to cause the least danger to civilian lives and objects'.³⁵⁰ An example often cited is the option to (p. 219) attack, instead of a railway station inside a city, an equally important railway junction or line at a strategically important point outside a densely populated area, on the basis that the destruction of such a crucial point causes as much disruption to the enemy lines of communication as the destruction of an urban station.³⁵¹

8. The duties of military leaders to take precautions in favour of the civilian population relates not only to the planning and preparation prior to an attack, but also to its implementation.³⁵² The officers responsible for carrying out each operation must minimize collateral damage to the civilian population even during the course of combat operations (Article 57, para. 2 lit. b, AP I). They must call off the attack immediately if it becomes clear that the attacked objective does not have the supposed military character, but constitutes a purely civilian object.³⁵³ They must halt fire if it becomes apparent that the incidental danger to the civilian population is more serious than had been expected.³⁵⁴ The commanders responsible for the attack must also call off the attack if the military advantage which can still be obtained from the operation becomes too small in relation to the probable collateral damage to the civilian population.³⁵⁵ Military leaders therefore must

ensure for the entire course of the operation that the attack remains inside the limits drawn by the rules of humanitarian law.³⁵⁶ All this relates primarily to military leaders, as was made clear by the wording of the preceding phrases. Whether a corresponding duty also affects the lower levels of hierarchy actually engaged in combat remains in doubt, however.³⁵⁷ On one hand, if there is a duty on ordinary soldiers to halt fire or break off an attack in the case of flagrant indiscriminate attack, this can relate only to the decisive phase of immediate combat.³⁵⁸ Yet ordinary soldiers and junior officers have no authority to resist their superiors' orders and to break off an operation; they would risk sanction under domestic martial law if in following their personal judgment they refused to obey orders. Accordingly, the obligation in Article 57, para. 2 lit. b, AP I for ordinary cases cannot extend below the level of commanders with authority to stop or modify an operation.³⁵⁹ Only in extraordinary cases does there exist a counter-balance: an order to commit a war crime (which in this respect means the order to attack an obviously purely civilian object or to attack despite blatantly excessive collateral damage) must not be obeyed; just to the contrary, in such cases a superior order is no defence to a combatant in criminal proceedings, who bears individual criminal responsibility.³⁶⁰

9. All this hinges upon the flow of recurrent information on the changing operational circumstances on the ground. Only with the flow of (relatively reliable) information from the ground to the planners and commanders are these possible to adapt their operational (p. 220) plans and—as a result—abstain from an operation that might threaten to cause excessive collateral damage under the circumstances prevailing. Art. 57 (2) (b) AP I puts that in the formula that an attack shall be cancelled or suspended if it becomes apparent 'that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. Note the prominence of the words 'may be expected' and 'anticipated'. The prognostic problem does not end with finalizing the operational planning. It goes on and on, and requires planners and commanders to monitor the situation—which they will do for operational purposes anyway—and to correct evidently wrong prognostic elements in the planning and adapt the operational details accordingly.³⁶¹ In the situation where the plans are executed one is much nearer to the time horizon where the effects realize in practice, thus giving better ground for estimating the real effects.³⁶² At the same time, planners and commanders are acting under significant time pressure in these situations—time pressure which gives them less leeway to proceed and weigh the incoming information diligently in order to decide whether an attack shall be cancelled or suspended. There is a conflict of goals—efficiency vs. diligence in mitigating the effects. One cannot square the circle and resolve the dilemma simply in one direction. All comes down again to the question of what degree of diligence can we expect from a 'reasonable military commander'.

10. In particular with regard to unmanned combat aerial vehicles (see Section 7.07), the obligation to take all feasible precautions has to be applied to their deployment. To minimize the risks for civilians, human decision making is essential. Evaluating the situation based on the provided intelligence, the equipment, and the intended method of deployment is only possible by a human being so far.

7.19

The attack or bombardment of non-defended localities is prohibited (Article 59, para. 1, AP I; Article 25 HagueReg).

Traditional customary law recognized a distinction between defended localities, which by the fact of being defended become military objectives in their entirety,³⁶³ and non-defended localities which may not be made the object of attack.³⁶⁴ The Hague Peace Conferences had already codified this customary rule in Article 25 of the Hague Regulations.³⁶⁵ By declaring a city or village a non-defended locality, and thus ceding it to the adversary without

resistance, the belligerent can exclude certain settlements from combat activity, in the interest of the civilian population, and to preserve important buildings or works of art; the adverse effects of warfare may be thus limited to the proper area of combat.³⁶⁶ Non-defended localities *qua definitionem* cannot be military objectives, for the adversary has deliberately excluded them from (p. 221) his military activities, so that the intended military advantage could be achieved by mere occupation without combat activity, whereas a bombardment would be evidently unnecessary. Article 59, para. 1, AP I restates this rule explicitly, although it follows logically from the general principles of distinction and necessity.³⁶⁷ The same rules must apply also to non-international armed conflicts, since the fundamental principle of distinction between fighting troops and military objectives on one hand and the civilian population on the other is valid also for internal conflicts. The civilian population must be spared as far as possible even in domestic conflicts (Article 13, para. 2, AP II), which leads to the conclusion that even for internal conflicts a prohibition against attacks on non-defended localities applies.³⁶⁸

7.20

A locality shall be considered non-defended if it has been so declared by its competent authorities, is open for occupation, and fulfils the following conditions:

- **all combatants, mobile weapons, and mobile military equipment must have been evacuated;**
- **no hostile use will be made of fixed military installations and establishments;**
- **no acts of hostility shall be committed by the authorities or the population; and**
- **no activities in support of military operations will be undertaken (Article 59, para. 2, AP I).**

1. The protection afforded by Article 59, para. 1, API applies only if certain conditions are fulfilled.³⁶⁹ In general: the locality must be totally excluded from the military activities of the belligerent hitherto exercising control, i.e. it must play no role in its operations; the locality must be open for occupation by the opposing side, and this fact must be declared to the adversary.

2. The declaration by the power responsible for the locality is intended to remove uncertainties, and binds the adversary to protect the 'open city' by formally announcing abandonment without resistance. The protection of Article 59, para. 1, AP I then enters into force—unlike the provisions for demilitarized zones in Article 60 AP I—*ipso jure*, as soon as the preconditions of Article 59 are fulfilled. The declaration must define and describe the exact limits of the undefended locality.³⁷⁰ The adverse party must acknowledge receipt of the declaration, and must protest immediately if it considers that the conditions laid down in Article 59, para. 2, are not fulfilled.³⁷¹ Otherwise it is bound by the protective provisions of Article 59 AP I. The non-defended locality must subsequently be marked by special signs, in order to enable the fighting troops of both sides to respect the protection of the locality at all times.³⁷²

3. For the purposes of Article 59 AP I a non-defended locality must be situated in the immediate zone of combat or in its vicinity. The locality must be open to immediate entry by the adversary armed forces, and open to occupation without a fight, following (p. 222) its evacuation.³⁷³ A city or town behind enemy lines, or even far in its hinterland, may not be a lawful target of military attack if there are no combatants or other military objectives in it; such a town, however, is not a 'non-defended locality', because the armed forces of the

adverse party are prevented from entering it by the troops in between, at the line of combat.³⁷⁴

4. In order to enjoy the protection of Article 59 AP I, the town or city must be free from all military activities. All combatants, mobile weapons, and mobile military equipment must be evacuated from the locality (Article 59, para. 2 lit. a, AP I). No hostile use may be made of fixed military installations and establishments (although it is not necessary that they be made unfit for use or destroyed). Neither the authorities nor the population of the town or city shall participate in acts of hostility, nor may the town or specific installations or establishments in it be in any way involved in the military activities of any party to the conflict, whether by production of armaments or by provision of transport or telecommunications services with a military purpose.³⁷⁵

7.21

A locality shall not on suspicion be deemed defended unless the behaviour of the adversary substantiates such a supposition.

If by formal declaration a town or city has become an undefended locality, and if the adverse party has not transmitted a counter-declaration in accordance with Article 59, para. 4, sentence 2, AP I, the advancing belligerent is bound by the declaration.³⁷⁶ Even in other cases the attacker must, according to Article 57, para. 2 lit. a (i), AP I (see Section 7.18), make sure that the town or city to be attacked constitutes a military objective. If there is no indication that combatants, military installations, or other military objectives are present in the town which serve to assist the combat activities of the adverse party, then such a town or city is by definition not a legitimate military objective, and thus may not be made an object of attack.

7.22

It is prohibited to extend military operations to demilitarized zones. The prerequisites for establishing such a zone are the same as those applying to non-defended localities (Articles 59, para. 2, and 60, para. 3, AP I). Demilitarized zones are created by agreement between the parties to the conflict either in peacetime or in the course of conflict. It is prohibited for any party to the conflict to attack or occupy such zones (Article 60, para. 1, AP I).

1. Unlike non-defended localities, the specific protection for demilitarized zones does not apply *ipso jure*, even when the conditions in Article 60, para. 3, AP I are fulfilled.³⁷⁷ A separate agreement between the parties to the conflict is required which establishes the specific modalities of demilitarization. The agreement may be concluded in peacetime, and may facilitate both disarmament and confidence building;³⁷⁸ it can also be concluded *ad hoc* after the outbreak of a conflict in order to preserve certain areas from the effects (p. 223) of combat.³⁷⁹ The requirement of an express agreement is sensible in this respect, since demilitarization of larger areas needs a whole series of complex and detailed provisions which cannot be deduced *in abstracto* from the general rules of humanitarian law.³⁸⁰ Both the specific limits of the zone and the mechanisms of verification require a detailed legal framework, and these are only two examples of the many questions which require legal clarification in such cases. Also, the question of any militarily relevant activities which may exceptionally be allowed should be regulated before it becomes a point of dispute.

2. The preconditions for establishing a demilitarized zone are nearly the same as those required for declaring a non-defended locality, i.e. the area must be entirely free from all military activities, and in principle also from all activities assisting the efforts of warfare.³⁸¹ Demilitarized zones, however, need not necessarily be situated in the combat zone. Even areas behind the enemy lines may be brought under the protection of Article 60 in anticipation. By agreement, the zone becomes legally closed to military activities of both sides. No party to the conflict shall attack a demilitarized zone, or occupy it, or use it for military purposes in any other way.³⁸²

7.23

If a party to the conflict breaches these provisions, the non-defended localities, open towns or cities, or demilitarized zones will lose their special protection. The general provisions for the protection of the civilian population and civilian objects shall, however, continue to apply (Articles 59, para. 7, and 60, para. 7, AP I).

In paragraph 7 of both Article 59 and Article 60 Additional Protocol I contains one of the few express convention provisions concerning the consequences of violation of the treaty. If any party violates Article 59 or 60 or an agreement concluded on the basis of these provisions, the non-defended locality or demilitarized zone automatically loses the protection accorded to it under these provisions.³⁸³ This results from the basic logic behind these institutions, because by extending military operations to the respective localities or areas, the conditions required for protection are removed. The adverse party may then lawfully use force against the newly created military objective. As a matter of good policy, however, it should warn the party violating the demilitarization provisions that such practice endangers the protected status of the town or zone, to provide an opportunity to redress the grievance and to give the population time for precautions.³⁸⁴ In the case of an attack, the attacker must still limit combat operations to the adverse armed forces and other military objectives. The civilian population continues to enjoy the protection afforded by the general principles of distinction and proportionality, with all the specific rules resulting from that body of law.³⁸⁵

7.24

It is further prohibited to attack:

- **safety zones and neutralized zones, i.e. zones designed to give shelter to wounded and sick soldiers and to civilians who take no part in hostilities (Article 23 GC I; Articles 14, 15 GC IV);**
(p. 224) — **medical and religious personnel (Articles 12, 15 AP I);**
- **hospital ships (Article 22 GC II);**
- **hospitals and associated personnel (Article 19 GC I; Articles 18, 20 GC IV);**
- **objects indispensable to the survival of the civilian population (e.g. production of foodstuffs, clothing, drinking water installations) with intent to deprive the civilian population of their supply (Article 54, para. 2 AP I; Article 14 AP II); any deviations from this prohibition shall be permissible only on friendly territory if required by cogent military necessity (Article 54, paras 3 and 5, AP I; Article 14 AP II);**
- **coastal lifeboats and associated fixed coastal installations (Article 27 GC II);**

- **cultural objects (Article 53 AP I);**
- **aircraft protected by international law:**
 - + **employed for the purpose of exchanging prisoners;**
 - + **on the assurance of safe-conduct;**
 - + **medical aircraft (Articles 36, para. 1, and 37, para. 1, GC I; Article 39 GC II; Articles 24–31 AP I; Article 17 AP II); and**
 - + **civilian aircraft.**

1. The system of the Geneva Conventions and Additional Protocols, supplemented by customary law, recognizes a whole series of specifically protected objects, against which the use of any form of force is prohibited. Such objects shall not be made the object of attack, and conversely they may not be used by belligerents for hostile purposes in the framework of military operations.

2. Comparable to demilitarized zones are the safety zones and neutralized zones provided for in Article 23 Geneva Convention I and in Articles 14 and 15 GC IV (see also Sections 8.12–8.13 and 12.24–12.27). Specified localities may be declared safety zones to provide safe shelters for the wounded and sick, as well as for children, mothers, and the aged.³⁸⁶ These zones shall serve only as lodging for protected persons (including the personnel taking care of them and the local population); they shall not contain any military objects and must be situated in areas which in all probability are not relevant for the conduct of hostilities. The agreement on a neutralized zone around the Anglican Cathedral in Port Stanley on the Falkland Islands, concluded between the Argentine and British authorities on 13 June 1982, is an example of such an arrangement in contemporary practice.³⁸⁷

3. Under the system of the First, Second, and Fourth Geneva Conventions and the Additional Protocols absolute protection is accorded to medical and religious personnel, to hospital ships, and to hospitals and personnel associated with them. The comprehensive standard of protection created by Articles 19 and 24 of the First Geneva Convention in regard to military hospitals, military medical personnel, and chaplains attached to the armed forces (and also that of Articles 18 and 20 GC IV in regard to civilian hospitals and their personnel) was extended by Articles 12 and 15 AP I to civilian medical and religious personnel (see Sections 12.10–12.19, 15.18–15.26). Even in non-international armed conflicts, Articles 9 and 11 AP II provide analogous protection for medical and religious personnel, as well as for medical units and their means of transport.³⁸⁸ Hospital (p. 225) ships (as a special case) already enjoyed a certain protection from the Hague Convention on Hospital Ships of 21 December 1904.³⁸⁹ Articles 22–35 Geneva Convention II consolidated the protected status of hospital ships (as to which, see Sections 17.54–17.64).³⁹⁰ In the course of the new codification in Article 27 GC II a specific regime of protection was accorded also to coastal lifeboats and associated fixed coastal installations (see Section 17.54).

4. A new creation, in contrast, is the special category of protected objects, now codified in Article 54 AP I and Article 14 AP II, namely ‘objects indispensable for the survival of the civilian population’.³⁹¹ In traditional customary law such a category was not recognized, even if the principle of proportionality had always set bounds on attacks on such objects, whose damage or destruction logically leads to particularly grave suffering for the civilian population.³⁹² As an expression of the general prohibition against the starvation of civilians as a method of warfare, laid down in Article 54, para. 1, AP I, para. 2 of Article 54 now prohibits any form of violence against ‘objects indispensable for the survival of the civilian population’.³⁹³ The most common examples of such protected objects are specifically listed as objects ‘such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works’. These examples

clarify the core of the protection, but the list is not exhaustive. It is beyond doubt that the objects primarily protected under the provision are the food and water supply of the civilian population, being the basic means of subsistence;³⁹⁴ this does not mean, however, that objects not directly linked to food and water supply are necessarily excluded from the category of 'objects indispensable for the survival of the civilian population'. It depends on the particular situation, and under certain circumstances (e.g. in climatically rough mountainous regions) other goods, such as the supply of clothing or the basic shelter of the civilian population, will undoubtedly be protected under Article 54, para. 2, AP I.³⁹⁵ It is prohibited 'to attack, destroy, remove, or render useless' such objects. 'Rendering useless' may include acts such as deliberate pollution, by chemical or other agents, of water reservoirs or the contamination of crops by defoliants.³⁹⁶ The destruction, removal, or rendering useless of foodstuffs, water, or other 'indispensable' objects is only prohibited, however, in so far as it is committed deliberately for the purpose of depriving the civilian population of such objects 'because of their sustenance value'. By contrast, it is legitimate to damage the protected objects and installations by military operations if the impairment is only an incidental effect of the attack.³⁹⁷ An irrigation channel, for example, shall not be destroyed deliberately in order to interrupt agricultural (p. 226) production; the same is true for the destruction of crops or gardens because of their importance to the sustenance of the civilian population. Nevertheless, the destruction of an irrigation channel may be permissible if the channel is used as a defensive position by the military forces in occupation and a field of crops may be burnt down in order to clear the field for artillery.³⁹⁸ Installations for electric power supply have proved particularly problematic. To the extent that the power supply serves military purposes, in maintaining military installations, it undoubtedly constitutes a military objective. At the same time, however, electric power supply installations will often constitute an 'object indispensable for the survival of the civilian population'. The elimination of the power supply network will also cause considerable disruption to other elements of the civilian infrastructure, for example the drinking water supply system (as happened e.g. in the course of 'Operation Desert Storm' in 1991 in Iraq).³⁹⁹ Especially in arid regions, the breakdown of such vital sustenance systems may, albeit indirectly, expose the civilian population to the very risk that Article 54 AP I was intended to prevent.

5. The protection of 'objects indispensable for the survival of the civilian population' is—as stated above—part of a far-reaching new approach underlying the provisions of Articles 54 AP I and 14 AP II. Article 54, para. 1, AP I contains a new general prohibition against the starvation of civilians as a method of warfare.⁴⁰⁰ This rule completely outlaws traditional warfare methods, such as sieges of defended towns, or 'scorched earth' strategies.⁴⁰¹ Even in the course of the war crime trials after World War II, the deliberate devastation of occupied territories during operations of retreat, as well as the starvation of populations in besieged enemy towns, were still considered permissible.⁴⁰² In the wake of the reorientation effected by the general rules of Articles 54, para. 1, AP I and Article 14 AP II, however, such practices must be reassessed.⁴⁰³ The Fourth Geneva Convention already provided, in Article 17, for evacuation of certain groups of persons from besieged territories, and in Article 23 it called for the admission of humanitarian assistance deliveries into besieged localities for the assistance of specific groups of the population.⁴⁰⁴ The general prohibition of starvation of the civilian population now implies that deliveries of foodstuffs, medicines, drinking water, and other goods indispensable for the survival of the civilian population must not be hindered by the adverse party, provided that they are delivered solely to the civilian population of the town under siege, and not to the military (p. 227) persons defending the town.⁴⁰⁵ Article 70 AP I now expressly requires the admission of humanitarian relief operations for the civilian population,⁴⁰⁶ which completely outlaws

siege strategies such as those still being used by the Serbian troops in Bosnia or the Assad regime in Syria.

6. As a specific exception to Article 54, para. 2, AP I, para. 5 of Article 54 AP I provides that derogations from the prohibition of attacks on 'objects indispensable for the survival of the civilian population' may be made, 'in recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion', where 'required by imperative military necessity'; such derogations are allowed, however, only within territory under a party's own control.⁴⁰⁷ The defender fulfilling this precondition may impede the advance of the enemy by deliberately devastating the areas from which he is retreating. In view of the fundamental interest of any defender in minimizing his own damage it was considered that in these exceptional circumstances the defender should be permitted to employ 'scorched earth' strategies.

7. Particular protection is granted to cultural objects. The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, and the supplementary provisions of Articles 53 AP I and Article 16 AP II, have developed an elaborate protective regime for historical monuments, works of art, and places of worship 'which constitute the cultural or spiritual heritage of peoples'. These specific safeguards are dealt with below; see Chapter 16.

8. Aircraft are covered by specific regulation of mostly customary character. Civilian aircraft may not be attacked in peacetime and may not be shot down. For ordinary public international law this follows already from the fundamental rule of prohibition of the use of force and from the general rules of air law, codified in the Chicago Convention on International Civil Aviation (Article 3 bis); in an armed conflict such a prohibition can be inferred from the principle of distinction, since a civilian aircraft rarely constitutes a military objective in the sense of Article 52, para. 2, AP I.⁴⁰⁸ In this respect problems arise mainly in respect of the practical implementation of the rule of distinction, for in situations of limited armed conflict the air space is normally used at the same time for both hostile military operations and civil aviation. The accidental downing of the Iranian civil aircraft (Airbus A300) over the Persian Gulf by the US Navy warship 'USS Vincennes' on 3 July 1988 was a telling example of the dangers inherent in such situations of confusion.⁴⁰⁹ In addition to these general rules, particular protection is granted by customary law to: military aircraft employed for the purpose of exchanging prisoners; aircraft, whether civilian or military, which have been assured safe conduct,⁴¹⁰ and (p. 228) medical aircraft, the status of which has recently been exhaustively regulated by Articles 24–31 AP I (see Sections 12.20–3).

III. Protection of Works and Installations Containing Dangerous Forces

7.25

Works and installations containing dangerous forces, namely dams, dykes, and nuclear electricity generating stations (Article 56, para. 1, AP I) shall not be made the object of attack, even where these objects are military objectives, if such attack could cause the release of dangerous forces and consequent severe damage to the civilian population (Article 56, para. 1, AP I).

1. Article 56 AP I (and the analogous Article 15 AP II concerning non-international armed conflicts) introduced a new category hitherto totally unknown, namely 'works and installations containing dangerous forces'.⁴¹¹ According to the official definition of Article 56 this category comprises three types of installation: dams, dykes, and nuclear power plants.⁴¹² All three types of installation are potentially extremely dangerous, since in the

event of their destruction uncontrollable forces are released that may cause immense damage to the civilian population.⁴¹³ The regulation of their status in warfare by a separate provision is undoubtedly justified by virtue of these risks. Although a considerable degree of caution was required under traditional customary law (because there was always a risk of excessive collateral damage in case of attacks on such objects),⁴¹⁴ there was no absolute prohibition of attack upon them in humanitarian law prior to the adoption of the Additional Protocols. In belligerent practice attacks had always occurred on such objects,⁴¹⁵ even if only under extreme precautions in recent times.⁴¹⁶

2. The new rule of Article 56 AP I must be understood in an overall perspective as an essential part of the general attempt to restrict the extent of permissible collateral damage. The evaluation of what constitutes admissible collateral damage has undergone a great change since World War II, a fact demonstrated with utmost clarity by US practice in the course of the last decades. An attack on a specifically dangerous installation in the sense of Article 56 AP I would only be allowed—even without the special rule of Article 56—under exceptional circumstances, given the strict precaution currently required to minimize loss of civilian lives and damage to civilian objects. The collateral damage likely to be caused by such an attack is so high that the deliberate acceptance of such a risk would in any event qualify as a blatant violation of the prohibition against indiscriminate attack. Thus, even the undeniably novel rule of Article 56 is arguably only an illustration of the standard of protection which is already provided for by customary law.⁴¹⁷

(p. 229) 3. Installations like dams and nuclear power plants, although in principle civilian objects, will often constitute military objectives, and accordingly would be admissible objects of attack under normal circumstances.⁴¹⁸ The regulation of AP I, like that of AP II, has adopted a different yardstick, however, by providing a special degree of protection for these installations, in order to protect the civilian population against the catastrophic effects of damaging or destroying such objects.⁴¹⁹ Attacks are prohibited even if the installation obviously constitutes a military objective ‘if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population’.⁴²⁰ The same considerations led to an expansion (by Article 56, para. 1, second sentence) of the protection of ‘other military objectives located at or in the vicinity of these works or installations’, since comparably severe effects are likely to be caused by an attack on such objectives as from a direct attack on the dams, dykes, or nuclear plants.⁴²¹ Hydroelectric facilities at the foot of dams, for example, fall into that category, since such electricity generating plants usually constitute a military objective, the destruction of which would necessarily risk the damage or destruction of the dam itself.⁴²²

4. Underlying the prohibition of Article 56 AP I is a sort of ‘worst case’ analysis, an assessment which deems the serious risk of releasing dangerous forces to constitute an unacceptably high risk of collateral damage. In view of the risk potential inherent in the respective installations, that assessment is doubtlessly correct. It is nearly inconceivable that massive risks for the civilian population could ever be outweighed by military considerations so as to justify an attack on such installations used for purely civilian purposes. The attack is accordingly strictly prohibited and cannot be justified by any claim of military necessity, notwithstanding the exception of para. 2 of Article 56.

7.26

This protection shall cease if these plants are used in regular, significant, and direct support of military operations and such attack is the only feasible way to terminate such use. (Article 56, paras 2 lit. a-b, AP I). This

shall also apply to other military objectives located at or in the vicinity of these plants or installations (Article 56, para. 2 lit. c, AP I).

1. The mere fact that an installation which is protected under Article 56 AP I constitutes, according to general criteria, a 'military objective' does not justify an attack on such an object. There exist, however, certain situations in which such an installation abandons its original purposes in favour of military concerns, when its use exceeds its common contribution to military activities ('for other than its normal function') in order directly to support military operations.⁴²³ This must be a form of use alien to its normal function, which does not result from its ordinary use, but which is given to it *ad hoc* in the framework of military activities. Dykes, for example, are often integrated in defence positions as a part of the system of fortifications. Roads on the top of a dam offer a strategic advantage for military transport, either for the movement of armed forces or logistical support for the combat troops. In such cases of immediate use for 'regular, significant and direct (p. 230) support of military operations' even dangerous installations in the sense of Article 56 may be attacked and destroyed, 'if such attack is the only feasible way to terminate such support'.⁴²⁴ There must, however, be no other objective which is not protected under Article 56 but the destruction of which would achieve an equal military advantage to that gained by destroying the installation. For example, if a strategically important transport route includes a dyke and also another weak point, the destruction of which would prevent the use of the whole route for military transport, the other target must be chosen in preference to the dyke.

2. Article 56, para. 2, AP I differentiates between dams and dykes (lit. a), in the case of which acts of regular, significant, and direct support of military operations distinct from their normal function may lead to exclusion of the protection afforded by Article 56, para. 1, and nuclear power plants (lit. b), in the case of which a different problem arises.⁴²⁵ Nuclear electricity generating stations often constitute the central source of energy for modern electricity supply networks, and thus constitute—in contrast to dams and dykes—in their normal function a military objective of the first order.⁴²⁶ Their contribution to military operations—i.e. the delivery of electric energy in 'regular, significant, and direct support of military operations'—can sometimes only be neutralized by destroying the power plant. In order to justify the extremely high risks of collateral damage resulting from such an attack, however, it is essential that the attack is absolutely necessary, which means that there must not exist any other 'feasible way' to terminate the support flowing from the nuclear plant. Accordingly, the exception of Article 56, para. 2 lit. b requires that there must be no other way of neutralizing the power supply, for example by destroying the essential installations of the distribution network (transformer stations, or main circuit lines).⁴²⁷

3. Other military objectives located at or in the vicinity of these 'dangerous installations' (such as strategically important bridges or works of the defence industry) may also be destroyed only for compelling reasons of military necessity, and only if the objectives are used for 'regular, significant, and direct support of military operations', and then only if their contribution to military operations cannot be neutralized in another way.⁴²⁸ After all, even for the cases excluded under Article 56 para. 2 from the specific protection of Article 56, para. 1, the rule still applies that, notwithstanding the special protection of Article 56, the civilian population always enjoys the protection afforded by the general principles of distinction and proportionality.⁴²⁹ Even in cases of exclusion from specific protection, due to direct contribution to warfare, all feasible precautions must be taken to prevent the release of dangerous forces (Article 56, para. 3, AP I).

7.27

Regular, significant, and direct support of military operations (Article 56, paras 2 lit. a-c, AP I) includes, for instance, the manufacture of weapons, ammunition, and (p. 231) defence material. The mere possibility of use by armed forces is not subject to these provisions.

The definition of what constitutes 'regular, significant, and direct support of military operations' is extremely difficult. Problems of delimitation exist in particular concerning lit. b and c of Article 56, para. 2 AP I. In the case of direct military appropriation of dams and dykes the identification of such support does not constitute a real problem. This is less clear-cut, however, as regards the directness of contributions from nuclear power plants and industrial works at or near installations containing dangerous forces.⁴³⁰ A power generating station which supplies electrical energy mainly for military installations undoubtedly delivers a direct contribution to warfare. As for a nuclear power plant delivering energy mainly for industrial works of the defence industry, the point is already debatable.⁴³¹ What directly supports warfare in such a case is the industry supplied with power, not the power station in itself. However, even such a primarily defence industry-related function should probably be regarded as a 'regular, significant, and direct contribution'. Only in cases where defence industry and genuinely civilian industry are intimately compounded will one have to conclude that immediacy is interrupted, even if the 'civilian' industrial installations produce goods with both civilian and military uses (so-called 'dual-use items').⁴³² Clearly excluded from the category of 'regular, significant, and direct support' is the case of normal power stations feeding electric energy into the normal electricity power grid, despite the fact that military installations may also be supplied by the same grid.

7.28

The decision to launch an attack shall be taken on the basis of all information available at the time of action. The parties to a conflict shall be bound by the principle of proportionality to refrain from launching an attack if the risk of releasing dangerous forces is such that it is excessive to any military advantage.

Article 56 AP I contains in paragraphs 1 and 2 a whole series of vague notions evidently needing some clarification. They preserve a considerable degree of discretion for the military actors who are bound to apply the provision, but they also place on the military command authorities an enormous responsibility to assess the factual situation and apply the ill-defined notions of Article 56. In particular, the prognostical requirements of the provision are extremely difficult to fulfil. Whether an attack on a protected installation will release dangerous forces, and thus risk severe damage to the civilian population; and whether the planned attack is the only feasible means of ending the military use; these are complex factual questions which require considerable technical expertise for their evaluation. However, all military actions involve an extremely high degree of factual uncertainty, which necessarily means that the decision of the responsible commander can only be judged on the basis of the information available to him at the time of the decision, and not on the basis of hindsight.

7.29

Military objectives shall not be located in the vicinity of works and installations containing dangerous forces unless they are necessary for the defence of those works (Article 56, para. 5, AP I).

In para. 5 of Article 56 AP I the Diplomatic Conference has included a concrete expression of the principle of 'passive precautions' as it applies to 'dangerous installations'. Military objects and other installations which qualify as military objectives (such as armaments and munitions factories) should be geographically clearly separate from (p. 232) installations containing dangerous forces, such as dams, dykes, and nuclear power stations; the state responsible for them should locate all potential military objectives at a considerable distance from such protected installations, in order to minimize the risks of attack on its 'dangerous installations'.⁴³³ Only military installations erected for the sole purpose of defending the protected installations from attack are excluded from this rule. Since a military or police guard—even if of limited size—is always necessary to protect such installations against terrorists and saboteurs (at least in the case of nuclear power stations), one must accept as normal a certain minimum degree of military defence located at the installation itself. The character of the installation is not changed by such smallscale defence arrangements, and in particular such military defence does not render it an admissible target according to Article 56, para. 2, as long as the military guard and their facilities (such as guarded enclosures, anti-aircraft guns, etc.) serve the sole purpose of defending the installation against sabotage.⁴³⁴

7.30

The parties to the conflict shall remain obliged to take all precautions to protect dangerous works from the effects of attack (e.g. by shutting down nuclear electricity generating stations).

Besides the specific rule of Article 56, para. 5 AP I, there apply also the general rules of Article 58 AP I on 'passive precautions' concerning the protection of dams, dykes, and nuclear power stations. According to Article 58 lit. c AP I the parties to the conflict shall take the 'necessary precautions to protect the civilian population, individual civilians, and civilian objects under their control against the dangers resulting from military operations'. In the case of 'dangerous installations' this could mean also that the party on whose territory, for example, an endangered dam lies, must drain the lake in order to minimize the risk of collateral damage if the combat zone approaches the dam; a similar requirement is applicable to nuclear power stations, where the party responsible for the plant might even be obliged to switch off the reactor if imminent danger of combat in the vicinity of the nuclear installation arises.⁴³⁵

7.31

Works and installations containing dangerous forces may be marked with a special protective sign consisting of three bright orange circles on a horizontal axis (Article 56, para. 7, AP I).

The First Additional Protocol introduced in Article 56, para. 7. lit. a, a protective sign (analogous to the system of the Hague Convention for the Protection of Cultural Property), to be attached to protected objects. The lack of a protective sign, however, does not mean that the parties are exempted from the protective provisions of Article 56; to the contrary, the obligations resulting from Article 56 bind the parties irrespective of marking of the installations in accordance with Article 56, para. 7.⁴³⁶

IV. Aerial Blockade

7.32

An aerial blockade is a means to prevent aircraft and unmanned aerial vehicles from entering or leaving a certain airspace of the adversary. The blockade must be declared and notified to all states. It must be enforced impartially. In order to be binding, it must be effective.

(p. 233) **1.** Aerial blockade is a method of warfare rooted in customary law. There is no codification of the rules governing aerial blockade in treaty law. Only the (informal) document of the 'HPCR Manual on International Law Applicable to Air and Missile Warfare', produced under the auspices of the Program on Humanitarian Policy and Conflict research at Harvard University, has tried to lay down the basic rules governing aerial blockade. These rules largely mirror the traditional laws of naval blockade that have evolved over centuries. With the advent of aviation, belligerents started to use the mechanisms of blockade also in air warfare, thus trying to prevent entry or exit by aircraft to or from specified airfields or coastal areas belonging to (or being under control of) the adversary.⁴³⁷

2. Rule 147 of the HPCR Manual provides: 'An aerial blockade is a belligerent operation to prevent aircraft (including UAVs and UCAVs) from entering or exiting specific airfields or coastal areas' under the control of the adversary. The means of enforcement are irrelevant, which means that (aerial) blockades can be enforced not only by military aircraft, but also by missiles and warships.⁴³⁸ An aerial blockade is limited to the airspace controlled by the adversary; it must not bar access to the airspace of neutral powers.⁴³⁹

3. The primary purpose of establishing an aerial blockade 'is to deny the enemy the use of neutral aircraft to transport personnel and goods to or from the blockaded area'.⁴⁴⁰ Such an aerial blockade must be enforced against all aircraft, even when they are not actually transporting anything. A blockade, whether aerial or naval, is the only method of warfare entitling a belligerent to lawfully interfere with enemy exports on board neutral civilian aircraft. Without a blockade, goods on board neutral aircraft may be captured as prize only when they constitute contraband.⁴⁴¹

4. As a method of warfare, aerial blockade is exclusively applicable in international armed conflicts. This does not exclude that in non-international armed conflicts the central government imposes restrictions on entry into and exit from areas formally subject to the territorial sovereignty of the state.⁴⁴²

5. As rule 148 HPCR Manual sets out, an aerial blockade must be formally declared and must be notified to all states, in particular also the neutral states. The declaration (and notification) must delimit the territorial area in which the blockade applies. The declaration must specify the commencement, duration, location, and extent of the aerial blockade.⁴⁴³ In case of a strategic blockade, it must be notified to the enemy government; in case of a local aerial blockade, the notification may be addressed to the authorities of the blockaded area.⁴⁴⁴ In addition, any cessation, temporary lifting, re-establishment, extension, or alteration of the blockade must be declared and notified to all states.

6. Like a naval blockade, an aerial blockade must be effective, i.e. any enemy aircraft or neutral aircraft must be effectively prevented from entering or leaving the closed part of (p. 234) the airspace.⁴⁴⁵ It is not necessary that the military aircraft of the blockading power are in the air on a permanent basis. The area may be monitored by electronic means of surveillance, and the force maintaining the blockade may be deployed at a distance determined by military requirements.⁴⁴⁶ For such a blockade to be maintained and enforced by military aircraft, the condition of effectiveness requires a sufficient degree of air superiority.⁴⁴⁷ Effectiveness in essence requires 'that civilian aircraft believed on reasonable grounds to be breaching, or attempting to breach, an aerial blockade, be forced to land, inspected, captured or diverted'.⁴⁴⁸ When there is reasonable ground to believe that a neutral civilian aircraft is attempting to cross a blockade line or carrying contraband, it may be intercepted, diverted from its course, or ordered to land for inspection. Refusal to

comply with such orders would turn the neutral civilian aircraft into a military objective, and it may be shot down accordingly.⁴⁴⁹

7.33

The party declaring the blockade must consider its consequences. The suffering of the civilian population must not be excessive to the concrete and direct military advantage anticipated. Starvation of the civilian population as a method of warfare is prohibited. The right to receive humanitarian assistance must be respected (see below, Chapter 11).

1. Any kind of blockade constitutes an extreme form of economic warfare, trying to stop most of the external trading and traffic of the adversary.⁴⁵⁰ Blockades accordingly have an in-built temptation to strangle the economy of the adversary, cutting off the supplies of the economy (and of the civilian population). In that sense, blockades are comparable with traditional patterns of siege in land warfare.⁴⁵¹ After the move of prohibiting traditional forms of siege warfare in Article 54, para. 2 AP I. in order to bring an end to using starvation of the civilian population as a method of warfare (see above section 7.24), aerial blockades must also find its limits when comparable consequences are to be expected.⁴⁵² The access of the civilian population to objects indispensable for their survival must in principle be safeguarded.

2. Rule 157 HPCR Manual accordingly provides that the establishment or maintenance of an aerial blockade is prohibited in a number of cases, in particular where 'its sole or primary purpose is to starve the civilian population or to deny that population other objects essential for its survival'.⁴⁵³ The suffering of the civilian population, which is inevitable in any case of blockade, shall never be 'excessive in relation to the concrete and direct military advantage anticipated from the aerial blockade'.⁴⁵⁴

3. If the civilian population of the blockaded area 'is inadequately provided with food or other objects essential for its survival, the Blockading Party must provide for free (p. 235) passage of such foodstuffs or other essential supplies, for example by establishing a humanitarian air corridor'.⁴⁵⁵ Such a humanitarian air corridor may be subject to a number of conditions. The Blockading Party retains the right to prescribe certain technical arrangements, including inspection, as conditions for free passage. The distribution of the supplies delivered through the humanitarian air corridor 'may be made subject to the condition that it will be carried out under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality'.⁴⁵⁶ Such arrangements may also apply to the passage of medical supplies for the civilian population, which the Blockading Party must also allow in principle.⁴⁵⁷

7.34

The principles and rules of naval blockades apply mutatis mutandis to aerial blockades (see below, Sections 17.51-17.53; see Rules 147-59 HPCR Manual).

The historical model underlying the rules of aerial blockade is the traditional regime of naval blockade. Rules of naval blockade have developed over a number of centuries and look back on a long series of precedents in state practice.⁴⁵⁸ In comparison, aerial blockade is a relatively new phenomenon. The rules of aerial blockade largely follow the traditional model of naval blockade—sometimes both forms of blockade are even dealt with in the same turn.⁴⁵⁹ Accordingly it seems logical to apply—mutatis mutandis—the rules of naval blockade if there does not exist any established practice in the realm of aerial blockade.

V. Cyber Operations in Armed Conflict

7.35

Cyber operations amounting to ‘attack’ must comply with the principles and rules of international humanitarian law (see above, Section 6.30).

1. Cyber operations are a quite recent phenomenon in military life. Only with the evolution of the internet, the information revolution and the resulting digitization of more and more aspects of social and economic life it became interesting for the military to be active in cyberspace.⁴⁶⁰ With growing connectivity, the cyberspace has become an urgent issue of security. Cyber operations open up a broad range of options to intrude the information systems of adversaries, to collect information, to spy out confidential and secret data, to manipulate public opinion and to compromise the integrity of essential information systems (and of connected parts of critical infrastructure).⁴⁶¹ Not every hostile cyber operation, even if operated by military personnel, comes into the realm of international (p. 236) humanitarian law.⁴⁶² Most of these operations remain in the remits of espionage, sabotage, propaganda, and political manipulation and belong more to the empire of intelligence than to the world of military operations in a narrow sense.

2. In the context of cyber operations, the principles and rules of international humanitarian law come into play only if the threshold of the law of armed conflict has been surpassed, i.e. if we can qualify the hostile operations as happening in a context of ‘armed conflict’.⁴⁶³ The existence of an ‘armed conflict’ can result from two different situations. On the one hand, the hostile cyber operations in question may happen in a context where a traditional armed conflict with conventional military operations is ongoing, and the cyber operations serve as an additional tool of damaging the military operations and resources of the enemy.⁴⁶⁴ With other words, the cyber operations in this case serve as an additional arena of hostile activities in an ongoing conflict. On the other hand, a hostile cyber operation can in itself be of such gravity, may have such a significant and lasting damaging effect that it may be qualified as an ‘attack’ that constitutes the beginning of an armed conflict, since the other side will answer either with conventional military means or with cyber operations of a similar gravity.⁴⁶⁵ An ‘armed conflict’ requires systematic hostilities, i.e. an exchange of armed force of a certain extent, duration, and intensity.⁴⁶⁶ ‘Armed’ force does not necessarily require the use of weaponry by military personnel, but presupposes some kind of destructive effect resembling the traditional military use of kinetic weapons.⁴⁶⁷

3. As a result, the notion of ‘attack’ plays a central role in determining the applicability of the principles and rules of international humanitarian law.⁴⁶⁸ There is a clear parallel to the requirement of an ‘attack’ that may be directed only against a military objective, leading to the application of the rules and principles governing the conduct of hostilities (see above Section 7.01). The crucial rule 92 of the Tallinn Manual 2.0 defines a ‘cyber attack’ as ‘a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects’.⁴⁶⁹ Based on the definition of ‘attack’ in Article 49, para. 1 AP I—‘attacks means acts of violence against the adversary, whether in offence or defence’—the requirement of the use of violence against a target distinguishes cyber attacks from other hostile cyber operations. ‘Acts of violence’ should not be (mis)understood as being limited to activities that release kinetic force. It (p. 237) is the effects that are caused by the operation, not its nature that determines the quality as ‘attack’.⁴⁷⁰ Cyber operations that do not do more than compromising the integrity of information systems thus cannot constitute an attack in themselves; an operation against data upon which the functionality of physical objects or infrastructures relies can, however,

constitute an attack if death to persons or physical damage to objects is caused by the operation.⁴⁷¹

4. A hostile cyber operation reaching the threshold of ‘attack’ results in the application of the principles and rules on the conduct of hostilities, primarily the principle of distinction.⁴⁷² The principle of distinction is one of the two cardinal principles of the law of armed conflict recognized by the ICJ as being of fundamental importance, as expressed in the *Nuclear Weapons Advisory Opinion*.⁴⁷³ As a result, such computer network attacks should at all times distinguish between the civilian population and combatants and between civilian objects and military objective and accordingly shall be directed only against military objectives.⁴⁷⁴ The civilian population as such, as well as individual civilians, shall not be the object of cyber attacks.⁴⁷⁵ The same is true for cyber attacks intended to damage or destroy purely civilian object, with the notion ‘object’ referring to tangible items that can be physically destroyed (not data).⁴⁷⁶ Likewise prohibited are cyber attacks the primary purpose of which is to spread terror among the civilian population.⁴⁷⁷

5. These prohibitions are of special importance in the case of computer network attacks against critical infrastructures on which large parts of modern life in technologically developed societies depends.⁴⁷⁸ A cyber operation causing some turmoil or a brief shutdown of such infrastructures might still remain in the ambit of nuisance, molesting people in their daily lives, but not creating serious damage. One can easily imagine scenarios where the cyber operation-induced shutdown of such infrastructures endangers civilian lives and leads to significant damage with civilian objects. Let us think of a hostile cyber operation that seizes an urban traffic control system in a metropolitan area, causing (by manipulation of its working procedures) a series of accidents and finally a breakdown of traffic. The damage in lives and civilian assets would be considerable, the military advantage in such an operation is barely discernible, except spreading terror under the civilian population (which is not a legitimate objective under the rules of IHL). Things are not always as easy as in this example. Some of the most important critical infrastructures serve a dual purpose, being in use for both civilian and military purposes.⁴⁷⁹ This might often (p. 238) be the case with the electricity grid, but also with the transport infrastructure (in particular the rail network) as well as with the cyber infrastructure.⁴⁸⁰ Such dual-use objects and infrastructures constitute a military objective, and may accordingly be attacked, if the destruction offers a definite military advantage.⁴⁸¹ This will be the case if the (partial or total) shutdown of a critical infrastructure such as the electricity, railway, or telecommunications network enables the attacker to halt the operations of the adversary, thus allowing it to gain a decisive advantage in his own operations.⁴⁸² The shutdown of these infrastructures, however, will rarely offer a ‘definite military advantage’ in itself, if the shutdown does not serve an exterior military purpose in the context of conventional military operations.

6. Any attack on a military objective, in particular in case of attacks against dual-use objects, must be measured against the standards of proportionality, at least as far as Article 51 (5) (b) AP I requires—an attack is prohibited ‘that 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’.⁴⁸³ This clause is—if closely analysed—quite constraining for cyber attacks.⁴⁸⁴ As already mentioned above, the ‘concrete and direct military advantage’ will rarely result from the damage (or temporal incapacitation) of a critical infrastructure itself; the required ‘direct and concrete’ advantage usually will be linked to an overall operation, where the shutdown of an infrastructure deprives the adversary of its control over the situation and hampers the development of its operations, thus allowing the attacking side a tactical opportunity to conduct his own operations.⁴⁸⁵ Self-standing cyber operations, however, will lack these linkages, which makes establishing a ‘direct and concrete military advantage’ very difficult. This might be crucial as far as the balancing provided for by the rule is

concerned—the military advantage must be of a nature that it is not completely outweighed by the collateral damage arising from the cyber attack (and attacks on a critical infrastructure might easily give rise to significant collateral damage with civilians and civilian objects).⁴⁸⁶

7. Particular problems arise with certain objects specially protected from attack. This concerns, on the one hand, installations containing dangerous forces that are explicitly put under a high degree of protection in Articles 56 AP I, 15 AP II. The attack on such installations is (at least in principle) absolutely prohibited.⁴⁸⁷ As tempting as it might be for a belligerent party, the destruction by a cyber attack on a dam, with a subsequent flooding of the downward settlements, power generating system installed in the dam, is thus clearly illicit. This is probably also true for the taking of control, and then manipulation, of the control system of the hydro electric power plant installed in the dam, with the purpose of opening the gates and flooding downward territory. Even more this rule prohibits cyber attacks on nuclear power plants with the intention to derail the control (p. 239) system and bring the reactor to explosion. Comparable problems are raised with the prohibition of attacks destroying, removing, or rendering useless objects indispensable to the survival of the civilian population, at least if undertaken with the specific purpose of denying the civilian population their sustenance value.⁴⁸⁸

8. Bearing in mind the high degree of risk of incidental losses of civilian lives and damage to civilian objects going along with cyber attacks on critical objects and infrastructures, the precautions in attack provided for in Article 57 AP I are of utmost relevance. Constant care shall be taken during hostilities involving cyber operations to spare the civilian population, individual civilians, and civilian objects.⁴⁸⁹ This encompasses due diligence in the verification of targets, the choice of means and methods of cyber attack, the avoidance of excessive collateral damage, and the choice of targets (if several targets are at choice).⁴⁹⁰ These precautions require special expertise, since the direct and indirect effects of cyber attacks, in particular on infrastructures, are difficult to determine in advance. A cyber attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or the attack may be expected to cause, directly or indirectly, incidental 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.⁴⁹¹

7.36

Cyber operations from or against neutral territory are prohibited.

1. In all situations where hostile cyber operations happen in a context which may be qualified as armed conflict, the rules of neutrality come into play.⁴⁹² The basic rule inherited from traditional laws of neutrality provides that neutral territory should not be involved in the conduct of hostilities.⁴⁹³ This basic principle has several ramifications in detail. The first is the protection of neutral cyber infrastructure, but also of objects and installations situated on neutral territory, against attack from any of the belligerents (including cyber attacks).⁴⁹⁴ Neutral territory is in essence exempt from the conduct of hostilities, and accordingly objects and infrastructures on neutral territory may not be attacked and damaged.⁴⁹⁵ More difficult to sustain is the rule that a belligerent shall not misuse belligerent infrastructures for attacks on their adversary.⁴⁹⁶ Given the complex nature of the internet, this is not easy to guarantee, since in normal use, the operator of a cyber attack will not know exactly through which nodes his data packages will be transported. Due to the interconnectivity of networks and the use of packet switching as a method of data transmission in the ordinary 'modus operandi' of the internet, data and malware are highly likely to transit through cyber infrastructure located in neutral territory before reaching their destination.⁴⁹⁷ The resulting question is whether a belligerent is under an obligation to abstain from such routing, and whether the neutral states are under an obligation not to allow it. Both obligations would be illusory, at least if understood in a

rigid sense. (p. 240) Data are divided by the communications protocol into packets that are then sent independently from each other, taking different paths depending on availability and traffic volume.⁴⁹⁸ Neither the transited states nor the senders can influence the route that the packets take.⁴⁹⁹ This makes it more than difficult for the transited neutral state to detect the routing, since the data transiting his cyber infrastructure would probably look completely innocuous.⁵⁰⁰ Systematically controlling this traffic would require an extremely high degree of surveillance of data traffic—but neutral states have only an obligation to use the means at their disposal to prevent violations of their neutrality.⁵⁰¹ Intent and purpose of the operations thus become at the end the decisive factors—transmission of data packages through neutral infrastructure may still be acceptable, but hijacking a server in neutral territory in order to lead the planned cyber attack against the adversary from such a server will be prohibited.⁵⁰²

2. At the same time, the neutral state is under an obligation not to use this infrastructure for hostile acts against any of the belligerents. Even more, the neutral state may not knowingly allow the exercise of belligerent rights from cyber infrastructure located in its territory or under its exclusive control.⁵⁰³ If the neutral state fails to terminate such hostile use of its infrastructure, ‘the aggrieved party to the conflict may take such steps, including by cyber operations, as are necessary to counter that conduct.’⁵⁰⁴ In a way, neutral infrastructure then becomes legitimate battlespace for hostile cyber operations and may be attacked by the belligerent harmed by hostile use of the neutral infrastructure.

VI. Ruses of War and the Prohibition Against Perfidy

7.37

Ruses of war and the employment of measures necessary for obtaining information about the adverse party and the country are permissible (Article 37, para. 2, AP I; Article 24 HagueReg) (e.g. the use of enemy signals, passwords, signs, decoys, etc.; to be distinguished from espionage, see Sections 5.22-5.25).

Deceiving the enemy about the military situation, in particular about the strength of one’s own forces, their location, and one’s own intentions and plans, has belonged to the common arsenal of warfare since time immemorial.⁵⁰⁵ Since warfare has always been at least as much a psychological attempt to bring one’s influence to bear on the adversary as it has necessarily comprised the use of physical violence against the enemy, deception is often better suited to achieve results than the blatant use of violence.⁵⁰⁶ Camouflaging one’s own defence positions and using them for ambushes, setting up surprise attacks from such camouflaged positions, simulating operations of retreat, as well as simulating operations of attack, using dummy weapons, transmitting misleading messages, *inter (p. 241) alia* by using the adversary’s radio wavelengths, passwords, and codes, infiltrating the enemy’s command chain in order to channel wrong orders, moving land-marks and route markers, giving members of one military unit the signs of other units to persuade the enemy that one’s force is larger than it really is—all these are established elements of traditional tactics.⁵⁰⁷ Modern cyber warfare adds a plethora of new examples, because it opens up a broad range of data manipulations and spreading deceptive information.⁵⁰⁸ The laws of war have never prohibited such measures of deception, or ‘ruses of war’.⁵⁰⁹ Article 24 of the Hague Regulations states only the simple rule: ‘Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are permissible.’⁵¹⁰ Article 37, para. 2, AP I has added nothing new to this old rule, and is worded in terms reminiscent of Article 24 HagueReg: ‘Ruses of war are not prohibited. Such ruses are acts intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to

protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations, and misinformation.'

7.38

Perfidy is prohibited. The term 'perfidy' refers to acts misleading the adverse party into the belief that there is a situation affording protection under international law (e.g. humanitarian agreement to suspend combat with the intention of attacking by surprise the adversary relying on the agreement, Article 37 AP I).

1. The real problem underlying Article 37 AP I—already apparent from the wording of Article 37, para. 2, AP I—is the threshold between a lawful ruse of war and an unlawful act of perfidy. What primarily distinguishes perfidy from ordinary ruses of war is, according to the definitional approach of Article 37 AP I, the exploitation of deliberately induced trust on the part of the adversary in order to injure, kill, or capture him. There must be a deliberate attempt to instil confidence with an 'intent to betray'.⁵¹¹ As it is expressed in Article 37, para. 1: 'Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.'⁵¹² Deception is not limited here to questions of general military interest, such as the disposition of forces, or potential strategic planning, but concerns the existence of a right to protection provided by international law.⁵¹³ Moral and legal duty requires the combatant in such situations to protect the adversary and the (p. 242) innocent civilian. Elementary rules of international law, the observance of which should be a matter of honour (and a product of a genuine sense of justice) are grossly abused by perfidy.⁵¹⁴ Accordingly, the old notion of breach of honour is still present in the notion of perfidy: the (dishonourable) violation of the rules of 'chivalry', which in medieval customs constituted the core of perfidy.⁵¹⁵
2. Article 37, para. 1, AP I illustrates the abstract definition of perfidy by examples—which, however, are not meant to be exhaustive, since the Diplomatic Conference in its drafting of Article 37 limited itself to uncomplicated examples, avoiding debatable situations.⁵¹⁶ Prohibited as perfidy is *inter alia* (a) the abuse of a flag of truce by feigning an intent to negotiate or surrender, (b) the feigning of incapacity to fight due to wounds or sickness, (c) the feigning of civilian, non-combatant status, and (d) 'the feigning of protected status by the use of signs, emblems, or uniforms of the United Nations or of neutral or other States not Parties to the conflict'.⁵¹⁷ Of most importance in that respect is example (c), because the feigning of civilian, non-combatant status in order to attack the enemy by surprise constitutes the classic case of 'treacherous killing of an enemy combatant' which was already prohibited by Article 23 lit. b HagueReg; it is the obvious case of disgraceful behaviour which can (and should) be sanctioned under criminal law as a killing not justified by the laws of war, making it a common crime of murder.⁵¹⁸ Obscuring the distinction between combatants and civilians is extremely prejudicial to the chances of serious implementation of the rules of humanitarian law; any tendency to blur the distinction must be sanctioned heavily by the international community; otherwise the whole system based on the concept of distinction will break down.⁵¹⁹ Article 37, para. 1 lit. c, AP I, has a parallel provision in Article 44, para. 3, AP I, which signals (although only indirectly) attacks in violation of the conditions set out in Article 44, para. 3, AP I as being perfidious. A problematic question has been how to distinguish permitted cases of operating in civilian clothes (guerilla fighters in occupied territories and in wars of national liberation) from cases of legally forbidden perfidy,⁵²⁰ such as in the case of command units operating and

attacking in civilian clothes, as was e.g. the concept of the former Soviet Spetsnaz troops (see Section 5.21).

3. The phrase: 'perfidy is prohibited' does not reproduce the entire current rule of international law. According to Article 37 AP I, perfidy is prohibited only in so far as it intentionally wounds, kills or captures the enemy.⁵²¹ Perfidy as such, beyond this restrictive definition based on hostile intent, is not banned under international law; if it is used solely for combat against military objects, for example, without affecting any enemy (p. 243) combatant, it is permissible.⁵²² 'Perfidious' acts are also allowed in order to evade capture or to escape from a prisoner of war camp, as long as no attack is committed under cover of the disguise;⁵²³ the same is true for all *attempts* to commit acts covered by Article 37, para. 1.⁵²⁴ To reiterate: only the commission of a treacherous attack on enemy personnel which wounds, kills, or captures them is prohibited. That limitation of the prohibition on hostile attacks under cover of disguise has been criticized,⁵²⁵ but it corresponds to the general attitude of most states which were involved in drafting the provision. Accordingly, it was impossible to avoid such a limitation to the prohibition of perfidy, and one must accept that most acts committed under camouflage and feigning still constitute legitimate ruses of war, and not perfidy.

7.39

It is prohibited to make improper use of flags of truce, enemy, or neutral national flags, military insignia, and uniforms, and internationally acknowledged protective emblems, e.g. the red cross or the red crescent (Article 39 AP I; Article 23, para. 1 lit. f, HagueReg; Article 17, para. 2, CultPropConv), distress codes, signals, or frequencies (Rule 115 HPCR Manual). For specific rules of naval warfare see below Chapter 17.

Apart from the basic rule of Article 37, para. 1, AP I, the system of the Additional Protocols, Hague Regulations, and customary law contains a whole series of other prohibitions of various kinds of deception, i.e. prohibitions on specific ruses or stratagems.⁵²⁶ The prohibition of abuse of flags of truce (now expressly defined as perfidy by Article 37, para. 1 lit. a, AP I) was mentioned above; in Article 38 AP I it is further enlarged to an all-embracing prohibition against any abuse of such signs.⁵²⁷ In a parallel provision Article 38 AP I prohibits the abuse of 'recognized emblems' such as the emblems of the red cross, of civil defence, the protective emblem of cultural property, or of 'other internationally recognized protective emblems, signs, or signals'.⁵²⁸ Article 39 AP I prohibits also the improper use of false flags, military insignia, emblems, or uniforms. Whereas according to Article 39, para. 1, the use of the flags, military emblems, insignia, or uniforms of 'neutral or other States not Parties to the conflict' is generally prohibited,⁵²⁹ paragraph 2 of the same Article imposes a different rule on the use of the flags, military emblems, insignia, or uniforms of adverse parties to the conflict. The use of such symbols of the opposing belligerent is prohibited only during attacks or if it serves 'to shield, favour, protect, or impede military operations'.⁵³⁰ Although the use of enemy flags, insignia, or uniforms does not constitute perfidy in the strict sense, since those items do not create a specific confidence, i.e. the confidence of protection demanded by the moral code of chivalry, state practice has nonetheless for centuries considered such deception to be dishonourable, and accordingly not permissible.⁵³¹ (p. 244) Article 23 lit. f HagueReg puts the abuse of national flags, military emblems, insignia, and uniforms of the enemy on the same footing as abuses of flags of truce or the red cross emblem, and expressly prohibits such abuses as means of warfare;⁵³² military operations using false insignia or uniforms are not lawful under international law and may be prosecuted under criminal law as illegitimate acts of violence.⁵³³ Apart from that, the mere fact of operating behind enemy lines in civilian clothes or false uniforms may be considered to be espionage and may be punished as such

(see Sections 322–325) although such acts (if not accompanied by the use of force against the adversary) are not prohibited per se by Article 39, para. 2, AP I.⁵³⁴

VII. Psychological Warfare

7.40

It is permissible to engage in political and military propaganda by spreading false information to undermine the adversary's will to resist and to influence the military discipline of the adversary (e.g. instigation to defect).

Propaganda with intent to influence the adversary's civilian population and to work on the members of the opposing armed forces has been an important means of warfare throughout the twentieth century.⁵³⁵ During World War I the issue arose for the first time and had led to a fierce debate on the legality of psychological warfare.⁵³⁶ By the 1920s however, the use of propaganda was generally considered to be legally permissible (see Article 21 HRAW 1923). In the course of World War II all sides made active use of the new weapon, as have the parties of all wars since 1945.⁵³⁷ Classic forms of propaganda, often listed under the heading of (permissible) ruses of war, are the spreading of false rumours; the erosion of adverse armed forces' fighting morale by the dissemination of misleading information; the incitement of enemy combatants to rebel, mutiny, or desert; and the incitement of the entire enemy population to revolt against its government.⁵³⁸ Classical modes of psychological warfare today overlap very much with 'psychological operations', a part of information operations that has gained additional significance in the ambit of cyber operations.⁵³⁹

7.41

Incitement to commit crimes and breaches of international law is prohibited.

The expression of the rule in this Section is not totally correct, since it gives the impression that incitement to commit any crime is illegal. In fact, not all acts classified (p. 245) by the adversary as crimes are taboo for the power engaging in psychological warfare. Many generally accepted forms of hostile propaganda are in essence incitement to commit crimes, e.g. to desert to the enemy, which is a crime sanctioned with severe penalties according to all legal systems, as are all acts of mutiny and treason. Also, the common incitement to overthrow a 'war-mongering' regime clearly constitutes (from the perspective of the affected nation) incitement to commit high treason.⁵⁴⁰ However, all these subversive activities may undoubtedly be lawfully encouraged (and assisted) by the opposing belligerent. What is generally recognized to be prohibited as disgraceful is incitement to commit common crimes such as murder, robbery, or rape, and particularly incitement to commit war crimes, crimes against humanity, or acts of genocide, which would evidently constitute an illegal act leading to state responsibility.⁵⁴¹ The same would apply to elementary violations of rules of international law, which is mainly of relevance in the attempts to ban propaganda for war.⁵⁴²

VIII. Reprisals

7.42

Reprisals are coercive measures which would normally be contrary to international law but which are taken in retaliation by one party to a conflict in order to stop the adversary from violating international law.

1. The law of reprisals is one of the classic instruments to implement the rules of public international law (see also Section 21.08). It must be seen as closely connected with the principle of reciprocity, since it allows one state illegally injured by another to react to the violation of the law by an action which itself would normally breach international legal obligations.⁵⁴³ The underlying purpose of the law of reprisals is to induce a law-breaking state to abide by the law in future, and to respect the demands of law in its further conduct.⁵⁴⁴

2. The instrument of reprisal, however, involves serious difficulties. On one hand experience shows that reprisals are not necessarily effective in forcing the adverse party to respect the law, since reprisals often produce the contrary effect, tending to prompt a harsher reaction to every new reprisal of the adverse side, thus setting up a process of escalation.⁵⁴⁵ Also, on the other hand, the institution is prone to all kinds of abuse, because it offers an excuse serving merely to palliate breaches of law which would have been committed in any event—and this, in cases of reprisals concerning humanitarian law, to (p. 246) the detriment of innocent civilians or prisoners.⁵⁴⁶ Accordingly, there has long existed a tendency which sought to bind the use of reprisals in a compelling legal framework, in order to make the use of reprisals dependent on strict observance of certain formalities.⁵⁴⁷ At last, humanitarian law since the Geneva Conventions of 1949 has progressively developed a system with protective rules for specific groups of persons or objects who become immune from reprisals, in order to prevent any erosion of humanitarian rights under the guise of reprisal.⁵⁴⁸

7.43

Because of their political and military significance, reprisals shall be authorized by the highest political level. No individual soldier is authorized to order reprisals on his own accord.

Because of the extremely complex legal and political assessment which must precede any reprisal, it is necessary that the political leadership of a belligerent state decide on any possible use of reprisals.⁵⁴⁹ The exact legal nature of the adverse belligerent's actions may be extremely difficult to determine; even more importantly, a decision to use reprisals requires a genuine assessment of the political risks as well as the immediate dangers connected with use of a reprisal. It is not only uncertain whether the enemy will be forced to abide by the law, but under certain circumstances reprisals may even—particularly if at or near the limits of proportionality—set in motion an uncontrollable process of escalation which could expose one's own civilian population to considerable danger. Accordingly, it is not appropriate for individual military commanders to undertake reprisals on their own accord; this is the sole responsibility of the highest political authority, in the case of Germany: the Federal Government.

7.44

Reprisals shall not be excessive in relation to the offence committed by the adversary and shall be preceded by a warning. They must be the last resort, when all other means to stop the illegal behaviour have failed and the warning has not been heeded.

There are two basic preconditions of customary law for legal reprisals: the requirement of proportionality concerning the original breach of law and the reaction, and the duty to warn in advance that such a reaction is imminent.⁵⁵⁰ These two limitations on the use of reprisals

have proven to be the most efficient safeguards in preventing fundamental abuses of reprisals, or at least to reveal improper reliance on the law of reprisals.

7.45

It is expressly prohibited by international agreement to take reprisals against:

- **the wounded, sick, and shipwrecked; medical and religious personnel; medical facilities and supplies (Article 46 GC I; Article 47 GC II; Article 33, para. 2 lit. b, GC III; Article 20 AP I);**
- **prisoners of war (Article 13, para. 3, GC III);**
- **the civilian population or civilians (Article 33, para. 3, GC IV; Article 51, para. 6, AP I);**
- **civilian objects (Article 52, para. 1, AP I:**
(p. 247) — **private property of civilians on occupied territory or of enemy foreigners on friendly territory (Article 33, para. 3, GC IV);**
- **objects indispensable to the survival of the civilian population (Article 55, para. 2, AP I);**
- **the natural environment (Article 55, para. 2, AP I);**
- **works and installations containing dangerous forces (Article 56, para. 4, AP I); or**
- **cultural objects and places of worship (Article 53, lit. c, AP I; Article 4, para. 4, CultPropConv).**

1. In the course of the last decades humanitarian law was developed by a process which gradually excluded more and more groups of persons and protected objects from the scope of reprisals. The process was begun, after the Geneva Convention on Prisoners of War of 1929 which included a prohibition of reprisals,⁵⁵¹ by the provisions of Articles 46 GC I, 47 GC II, 13, para. 3 GC III, and 33 GC IV, in which all reprisals were prohibited that prejudice the protection of the specific groups covered by the four Conventions (wounded, sick, and shipwrecked; medical and religious personnel; prisoners of war; civilians in occupied territories) and to the protection of certain objects (medical facilities and supplies, private property of civilians in occupied territories).⁵⁵² The Hague Convention on the Protection of Cultural Property of 1954 contains an analogous prohibition of reprisals in favour of objects protected under that Convention.⁵⁵³

2. The First Additional Protocol now enlarges the traditional prohibitions of reprisals considerably.⁵⁵⁴ True, the comprehensively formulated proposal which sought to exclude all groups of persons and objects protected under the Convention from reprisals was rejected.⁵⁵⁵ The final text of the Protocol, however, represented agreement on a whole catalogue of additional and specific prohibitions of reprisals. Reprisals in disregard of the protection of the natural environment (provided for in Article 55) as well as reprisals to the detriment of objects indispensable for the survival of the civilian population (Article 54, para. 4, AP I) and to the detriment of works and installations containing dangerous forces are now absolutely prohibited.

3. The most important of these safeguards, however, is the prohibition in the Additional Protocol, Article 51, para. 6, namely the prohibition against attacks on a civilian population based on a justification of reprisal. Such reprisals had been permitted under traditional customary law,⁵⁵⁶ and they constituted the bulk of all measures declared to be reprisals. The prohibition set out in Article 51, para. 6 AP I has been fiercely criticized in legal literature as well as in practice, since it almost completely prevents the taking of reprisals

as a response to breaches of humanitarian law by the adverse side.⁵⁵⁷ It also creates (p. 248) considerable difficulties in the legal justification of the dominant doctrines of nuclear deterrence, since even the planned inclusion of large-scale use of strategic nuclear weapons as a military option might be justified only in the framework of belligerent reprisals;⁵⁵⁸ from this follows the immense importance of the nuclear declarations and of the resulting exclusion of the nuclear question from the applicability of all the new rules in AP I (and implicitly from the prohibition against reprisals contained in Article 51, para. 6, AP I). Only by recourse to reprisal can current nuclear strategies be legitimated under international law. For a long time, the predominantly adopted position accepted reprisals against civilians as permissible under customary law; though, the assertion of the ICTY in two decisions that customary law contains an absolute ban on such reprisals evoked a lively discussion of this question.⁵⁵⁹ Apart from that, one must consider the prohibitions of reprisals included in Additional Protocol I to be one of the great achievements brought about by the development of humanitarian law, although it makes the entire system more dependent on an international system of implementation if decentralized reaction to breaches of law is to be excluded.

Footnotes:

¹ Concerning Japanese and Islamic traditions see S. Adachi, 'La conception asiatique', in UNESCO/Institut Henri Dunant (eds), *Les dimensions internationales du droit humanitaire* (Pedone, 1986), 31–6; H. Sultan, 'La conception islamique', in UNESCO and Institut Henri Dunant (eds), *Les dimensions internationales du droit humanitaire* (Pedone, 1986), 47–60.

² See above, Chapter 2. See also M.E. O'Connell, 'Peace and War', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012), 274–6.

³ See J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. IX-A: *The Laws of War* (Sijthoff, 1978), 131–5.

⁴ See M. Vale, 'Chivalry and the Conduct of Warfare – Illusion and Reality', in B. Koch (ed.), *Chivalrous Combatants? The Meaning of Military Virtue Past and Present* (Nomos/Aschendorff, 2019), 29–43; see also S. C. Neff, *War and the Law of Nations: A General History* (CUP, 2005), 68–75.

⁵ See R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (OUP, 1999), 78–108.

⁶ See W. G. Grewe, *Epochen der Völkerrechtsgeschichte* (Nomos, 1988), 247–54, 428–9, and G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Methuen, 1983), 53–9.

⁷ See Neff, above (n. 4), 95–130.

⁸ On the Lieber Code see in detail R. S. Harrigan, *Lieber's Code and the Law of War* (Precedent, 1983), and S. Vöneky, 'Der Lieber's Code und die wurzeln des modernen Kriegsvölkerrechts' (2002) 62 *ZaöRV* 423–60.

⁹ See Y. Sandoz, *Des armes interdites en droit de la guerre* (Gronauer, 1973), 16–22, and in particular detail F. Kalshoven, 'Arms, Armaments and International Law' (1985 II) 191 *RdC* 183–341 [205–13].

¹⁰ See in particular Best, above (n. 6), 128–215.

¹¹ See W.H. Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1–225, at 8–20, esp. 19; M. Sassòli, *Bedeutung einer Kodifikation für allgemeine Völkerrecht mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* (Helbing & Lichtenhahn, 1990), 247–50; D.D. Caron,

'War and International Adjudication : Reflections on the 1899 Peace Conference' (2000) 94 *AJIL* 4-30.

¹² See Kalshoven, above (n. 9), 292-3.

¹³ See above, Section 2.31. See also F. Münch, 'Die Martens'sche Klausel und die Grundlagen des Völkerrechts' (1976) 36 *ZaöRV* 347-73; T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 78-89.

¹⁴ Concerning the HAWR 1923, see Verzijl, above (n. 3), 328-31; Parks, above (n. 11), 25-36; Sassòli, above (n. 11), 252-4; H.M. Hanke, 'The 1923 Hague Rules of Air Warfare—A contribution to the development of international law protecting civilians from air attack' (1993) 75 (292) *IRRC* 12-44.

¹⁵ Concerning this problem see in detail Parks, above (n. 11), 50-4.

¹⁶ See esp. Sassòli, above (n. 11), 257-66; C.S. Maier, 'Targeting the City: Debates and Silences About the Aerial Bombing of World War II' (2005) 87 (859) *IRRC* 429-44.

¹⁷ See D. Schindler, 'L'évolution du droit de la guerre des Conventions de la Haye aux Protocoles Additionnels aux Conventions de Genève' (1982) XXI *RDMilG* 23-33 [28].

¹⁸ Best, above (n. 6), 262-85.

¹⁹ See esp. H. Meyrowitz, 'Le bombardement stratégique d'après le Protocole Additionnel I aux Conventions de Genève de 1949' (1981) 41 *ZaöRV* 1-68 [12-18].

²⁰ See L. Doswald-Beck, 'The Value of the Geneva Protocols for the Protection of Civilians', in M. A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (British Institute of International and Comparative Law, 1989), 137-72, at 145-6.

²¹ For the reasons underlying that approach see J.L. Kunz, 'The Chaotic Status of the Laws of War and the urgent Necessity for their Revision' (1951) 45 *AJIL* 37-61 [58-61]; G. Schwarzenberger, 'The Law of Armed Conflict: A Civilized Interlude' (1974) 28 *Yearbook of World Affairs* 293-309 [302]; Parks, above (n. 11), 55-9.

²² See F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn (ICRC, 2001), 92.

²³ See the report of the special rapporteur appointed by the UN Human Rights Commission in order to investigate human rights violations in Afghanistan, Felix Ermacora, UN Doc. E/CN.4/1985/21 of 19 February 1985, 33 (paras 122-3).

²⁴ Concerning the use of environmental damage as a means of war in the Kuwait War 1991, see D. Momtaz, 'Les règles relatives à la protection de l'environnement au cours des conflits armés à l'épreuve du conflit entre l'Iraq et Kuwait' (1991) 37 *Annuaire Francais de Droit International* 203-19; A. Roberts, 'La destruction de l'environnement pendant la guerre du Golfe de 1991' (1990) 72 *RIC* 559-77; L. Lijnzaad and G.J. Tanja, 'Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War' (1993) 40 *Netherlands International Law Review* 169-99 [169-71].

²⁵ For the course of the Conference, cf. M. Bothe, K. Ipsen, and K.J. Partsch, 'Die Konferenz über humanitäres Völkerrecht – Verlauf und Ergebnisse' (1978) 38 *ZaöRV* 1-85; Parks, above (n. 11), 76-94; Sassòli, above (n. 11), 289-93.

²⁶ As to the basic set of rules see above Chapter 4. See also the comments of W. Solf on Article 48 AP I, in M. Bothe, K.J. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts* (Nijhoff, 1982), 282-6; see also N. Melzer, 'The Principle of Distinction Between Civilians and Combatants', in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP, 2014), 296-331 [296-307]; N. Hayashi, 'Basic Principles', in R. Liivoja and T. McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016), 89-105, at 90-3; N. Tsagourias and A. Morrison, *International*

Humanitarian Law (CUP, 2018), 40–8; E. Crawford and A. Pert, *International Humanitarian Law*, 2nd edn (CUP, 2020), 185–8; N. Hayashi, *Military Necessity* (CUP, 2020), 267–301.

²⁷ See D. Turns, ‘Military Objective’, in R. Liivoja and T. McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016), 139–56, at 147; see also Kalshoven, above (n. 9), 296; J. Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP, 2004), 176–80; Melzer, above (n. 26), 306–23; Y. Dinstein, *Non-international Armed Conflicts in International Law* (CUP, 2014), 147–9; Rules 1, 7 *CIHL*.

²⁸ See also Solf, in Bothe/Partsch/Solf, above (n. 26), 289, and Kalshoven/Zegveld, above (n. 22), 97.

²⁹ Parks, above (n. 11), 114 and 115.

³⁰ See esp. Parks, above (n. 11), 113–16; see also C. Pilloud and J. Pictet, ‘Article 49’, in Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocol of 1 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), 603 (para. 1879).

³¹ See Pilloud/Pictet, above (n. 30).

³² Solf, in Bothe/Partsch/Solf, above (n. 26), 288.

³³ Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 603 (para. 1880; see also A. Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* (Routledge, 2015), 10.

³⁴ Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 603 (para. 1881); see also E. Rauch, ‘The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines’ (1981) 24 *GYIL* 270–8; Kalshoven/Zegveld, above (n. 22), 160.

³⁵ Sassòli, above (n. 11), 337–41, proves that such an understanding corresponds to the basic approach of the relevant rules of customary law.

³⁶ Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 604–5 (paras 1883–91); Solf, in Bothe/Partsch/Solf, above (n. 26), 289–90; Kalshoven/Zegveld, 98.

³⁷ Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 604–5 (paras 1888, 1890).

³⁸ See Sassòli, above (n. 11), 334–7.

³⁹ See the observations on Article 49 in the Memorandum of the German Government annexed to the statute transforming the Additional Protocols, BR-Drs. 64/90 of 2 February 1990, 111.

⁴⁰ See Turns, above (n. 27), 140–4, and Jachec-Neale, above (n. 33), 23–32.

⁴¹ See the Preamble to the St Petersburg Declaration of 1868 which is worded: ‘Considering ... that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ...’; see also Turns, above (n. 27), 139–56; I. Henderson, *The Contemporary Law of Targeting* (Nijhoff, 2009), 45–51.

⁴² As to the concept of lawful combatants, see E. Crawford, ‘Combatants’, in R. Liivoja and T. McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016), 123–38; Henderson, above (n. 41), 80–9; Crawford/Pert, above (n. 26), 98–105.

⁴³ See J. de Preux, ‘Article 42’, in *ICRC Commentary*, above (n. 30), 501 (para. 1652); cf. also the *US Naval Manual* (1997), para. 11.6.

⁴⁴ See de Preux, in *ICRC Commentary*, above (n. 30), 501 (para. 1652).

⁴⁵ See *Ibid.*, 494–501 (paras 1634–51); L.R. Penna, ‘Customary International Law and Protocol I: An Analysis of Some Provisions’, in C. Swinarski (ed.), *Studies and Essays on*

- International Humanitarian Law and Red Cross Principles. Essays in Honour of Jean Pictet* (Nijhoff, 1984), 212–14; Henderson, above (n. 41), 89–91.
- ⁴⁶ See in detail de Preux, in *ICRC Commentary*, above (n. 30), 496–7 (paras 1639–43); L.C. Green, *Contemporary Law of Armed Conflict*, 2nd edn (Manchester Univ. Press, 2000) 151–2; cf. also Rule 48 *CIHL*.
- ⁴⁷ See in detail de Preux, in *ICRC Commentary*, above (n. 30), 497–501 (paras 1644–51); see also the *US Naval Manual* (1997), para. 11.6.
- ⁴⁸ As to the drafting history of Article 52, para. 2, AP I see Sassòli, above (n. 11), 370–2; see also Rule 8 *CIHL*.
- ⁴⁹ For the massive criticism from the US military see e.g. Parks, above (n. 11), 137–44; see also Jachec-Neale, above (n. 33), 36–42, and W.H. Boothby, *The Law of Targeting* (OUP, 2012), 489–511.
- ⁵⁰ Parks, above (n. 11), 138–41; see also Henderson, above (n. 41), 47–9, and Jachec-Neale, above (n. 33), 84–91.
- ⁵¹ As to the systematic structure of Article 52, para. 2 AP I see Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 635 (para. 2018); Meyrowitz, above (n. 19), 35; Jachec-Neale above (n. 33), 36–7.
- ⁵² As attempts to define more neatly these elements, see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (CUP, 2016), 110–15; Turns, above (n. 27), 149–51; Henderson, above (n. 41), 54–61.
- ⁵³ See Jachec-Neale, above (n. 33), 46–9, and Dinstein, above (n. 52), 110.
- ⁵⁴ See Jachec-Neale, above (n. 33), 47–8.
- ⁵⁵ *Ibid.*, 51–7; see, however, also Dinstein, above (n. 52), 115–16.
- ⁵⁶ See Dinstein, above (n. 52), 119–20, and Jachec-Neale, above (n. 33), 58–61.
- ⁵⁷ See Jachec-Neale, above (n. 33), 61–5, and Dinstein, above (n. 52), 115.
- ⁵⁸ See Dinstein, above (n. 52), 111–13, Henderson, above (n. 41), 58–9; Jachec-Neale, above (n. 33), 65–74.
- ⁵⁹ Dinstein, above (n. 52), 112.
- ⁶⁰ See Jachec-Neale, above (n. 33), 66–71.
- ⁶¹ Dinstein, above (n. 52), 112.
- ⁶² See Henderson, above (n. 41), 59–61; Jachec-Neale, above (n. 33), 75–81; Dinstein, above (n. 52), 113–14.
- ⁶³ As to the problems of establishing the enemy's intentions, see Jachec-Neale, above (n. 33), 77–9.
- ⁶⁴ See Parks, above (n. 11), 138–41.
- ⁶⁵ See Parks, above (n. 11), 139 n. 412.
- ⁶⁶ Concerning this problem see Parks, above (n. 11), 139–44.
- ⁶⁷ *Ibid.*, 141.
- ⁶⁸ *US Naval Manual* (1997), para. 8.1.1.; C.J. Dunlap, 'The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era' (2000) 9 *Strategic Review* 9, at 17; see also in detail as a critical assessment of such position J. Holland, 'Military Objective and Collateral Damage: Their Relationship and Dynamics' (2004) 7 *YIHL* 35–78, at 57–64; Dinstein, above

(n. 52), 109; K. Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules* (2005) 8 *YIHL* 3–53, at 16–17; Jachec-Neale, above (n. 33), 95–109.

⁶⁹ A.P.V. Rogers, *Law on the Battlefield*, 2nd edn (Manchester Univ. Press, 2004), 70–1, and Jachec-Neale, above (n. 33), 105–9 as well as Boothby, above (n. 49), 106.

⁷⁰ On the background and problematic of the formula see Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 635 (para. 2019) and 637 (para. 2027); Parks, above (n. 11), 141–4; Solf, in Bothe/Partsch/Solf, above (n. 26), 324–6; Gardam, above (n. 27), 100–2.

⁷¹ See Meyrowitz, above (n. 19), 43; Solf, in Bothe/Partsch/Solf, above (n. 26), 324.

⁷² See Meyrowitz, above (n. 19), 39–43.

⁷³ *Ibid.*, 40–1.

⁷⁴ *Ibid.*, 35–6; Dinstein, above (n. 52), 103–4.

⁷⁵ See Meyrowitz, above (n. 19), 36, but also Parks, above (n. 11), 141 n. 416.

⁷⁶ Parks, above (n. 11), 140–1.

⁷⁷ As an example, the experience of the Allied armies (in particular the US armed forces) in the course of ‘Operation Desert Storm’; see T.P. Keenan, ‘Die Operation “Wüstensturm” aus der Sicht des aktiven Rechtsberaters’ (4/1991) *HuV-I* 36.

⁷⁸ Regarding the different requirements dependent on the technological state of the belligerent, see S. Oeter, ‘Comment: Is the Principle of Distinction Outdated?’, in W. Heintschel v. Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007), 59.

⁷⁹ See e.g. E. Rosenblad, *International Humanitarian Law of Armed Conflict. Some aspects of the Principle of Distinction and Related Aspects*, (Henri Dunant Institute, 1979), 71; Dinstein, above (n. 52), 103–4.

⁸⁰ See Meyrowitz, above (n. 19), 32; Kalshoven/Zegveld, above (n. 22), 101.

⁸¹ Reprinted in Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 632 n. 3 and Parks, above (n. 11) 138–9; see also M. Sassòli, ‘Military Objectives’, *MPEPIL*, para. 3; D. Fleck, ‘Strategic Bombing and the Definition of Military Objectives’ (1997) 27 *IsrYHR* 41–64, at 45 n 15.

⁸² See Dinstein, above (n. 52), 105; Henderson, above (n. 41), 80–7.

⁸³ See Oeter, above (n. 78), 59; M.N. Schmitt, ‘Asymmetrical Warfare and International Humanitarian Law’, in W. Heintschel v. Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007), 11–48, at 27–28; Dinstein, above (n. 52), 105.

⁸⁴ See J. de Preux, in *ICRC Commentary*, above (n. 30), 517–18 (paras 1682–3); Solf, in Bothe/Partsch/Solf, above (n. 26), 240; Dinstein, above (n. 52), 118–19.

⁸⁵ See Solf, *ibid.*, 240; the question whether Yugoslavian police forces were legitimate targets during the Kosovo conflict is dealt with by P. Rowe, ‘Kosovo 1999: The air campaign: Have the provisions of Additional Protocol I withstood the test?’ (2000) 82 (837) *IRRC* 147–64, at 151–2.

⁸⁶ See Dinstein, above (n. 27), 58–62 and Henderson, above (n. 41), 91–106; see also N.I. Diab, ‘Targeting Members of Non-State Armed Groups in NIACs’, in E. Heffes, M.D. Kotlik, and M.J. Ventura (eds), *International Humanitarian Law and Non-State Actors* (Asser Press/Springer, 2019), 321–49; G. Gaggioli, ‘Targeting Individuals Belonging to an Armed Group’ (2018) 51 *Vanderbilt J. of Transnational L.* 901–17.

- ⁸⁷ See R.P. Huston, 'A Practical Perspective on Attacking Armed Groups' (2018) 51 *Vanderbilt J. of Transnational L.* 919–30; C. Finkelstein, 'The Equality of Combatants in Asymmetric War', in J.D. Ohlin, L. May, and C. Finkelstein (eds), *Weighing Lives in War* (OUP, 2017), 241–58; E.T. Jensen, 'Targeting of Persons and Property', in G.S. Corn (ed.), *The War on Terror and the Laws of War* (OUP, 2015), 71–99; M. Hlavkova, 'Reconstructing the Civilian/Combatant Divide: A Fresh Look at Targeting in Non-international Armed Conflict' (2014) 19 *JCSL* 251–78; D. Turns, 'Targets', in N.D. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar, 2013), 342–74, at 357–62; S. Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP, 2012), 363–72; K. Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance' (2010) 42 *N.Y.U. J. of Int'l. L. & Policy* 641–96; W.H. Boothby, 'Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance' (2010) 1 *J. of Int'l. Humanitarian Legal Studies* 143–64; M.N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Security J.* 5–44; W.J. Fenrick, 'ICRC Guidance on Direct Participation in Hostilities' (2010) 12 *YIHL* 287–300; A.P.V. Rogers, 'Direct Participation in Hostilities' (2009) 48 *Revue de droit militaire et de droit de la guerre* 143–63.
- ⁸⁸ See N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009).
- ⁸⁹ See no. 3 of the Red Cross list annexed to the New Delhi 'Draft Rules' of 1956: 'installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (...) and other organs for the direction and administration of military operations'; see also nos 4 and 5 of the list, see also Dinstein, above (n. 52), 119–20, Jachec-Neale, above (n. 33), 147–53, and Henderson, above (n. 41) 110–16,
- ⁹⁰ See no. 2 of the Red Cross list.
- ⁹¹ See also Dinstein, above (n. 52), 112.
- ⁹² See BR-Drs. 64/90 of 2 February 1990, 132; see also the explanations given to Article 52 in the Memorandum of the German Government submitted with the draft of a statute transforming the Additional Protocols, BR-Drs. 64/90 of 2 February 1990, 112.
- ⁹³ See Dinstein, above (n. 52), 120–3; Jachec-Neale, above (n. 33), 92–5; Henderson, above (n. 41), 142–4.
- ⁹⁴ See nos 6, 7, and 8 of the Red Cross list—cf. ICRC *Commentary*, above (n. 30), 632 n. 3.
- ⁹⁵ As to television and radio stations see Dinstein, above (n. 52), 123–4; Jachec-Neale, above (n. 33), 155–62; Henderson, above (n. 41), 129–39.
- ⁹⁶ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 *ILM* 1278 paras 75–6; see Rogers, above (n. 69), 82–3; M. Lippmann, 'Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1–67, at 50–3; G.D. Solis, *The Law of Armed Conflict* (CUP 2010) 535–6; for a critical review of the Report see M. Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY' (2001) 12 *EJIL* 531–5; in contrast, C.J. Dunlap 'Targeting Hearts and Minds: National Will and Other Legitimate Military Objectives of Modern War', in: W. Heintschel von Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007), 117–25, at 123–4; C. Byron,

'International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage' (2010) 13 *YIHL* 175-211, at 184-6.

⁹⁷ Rogers, above (n. 69), 83.

⁹⁸ See Dinstein, above (n. 52), 115-16, 123.

⁹⁹ As to that problem see Parks, above (n. 11), 139-40 n. 413.

¹⁰⁰ In the affirmative: Dinstein, above (n. 52), 115-16; more depreciative Rowe, above (n. 85), 151-2.

¹⁰¹ Bothe, above (n. 96), 534; J.A. Burger, 'International humanitarian law and the Kosovo crisis: Lessons learned or to be learned' (2000) 82 (837) *IRRC* 129-45, at 131-2; Dinstein, above (n. 52), 115-16; Rogers, above (n. 69), 116; K. Obdradovic, 'International humanitarian law and the Kosovo crisis' (2000) 82 (839) *IRRC* 699-731, at 720-1.

¹⁰² See Dinstein, above (n. 52), 120-3, and Jachec-Neale, above (n. 33), 92-5.

¹⁰³ See nos 8 (a), (b), (c), and (d) of the ICRC list of 1956.

¹⁰⁴ See Parks, above (n. 11), 141 n. 415; Daniel T. Kuehl, 'Airpower vs. Electricity: Electric Power as a Target for Strategic Air Operations' (1995) 18(1) *Journal of Strategic Studies* 237-66, gives an overview of the targeting of enemy electric power systems in the twentieth century, including US-Operation 'Desert Storm' in Iraq; as to the impact of these attacks on the water supply, 254-6; see also C. Greenwood, *Essays on War in International Law* (Cameron May, 2006). 570.

¹⁰⁵ See Oeter, above (n. 78), 58, and E. Shamir-Borer, 'Fight, Forge, and Fund: Three Select Issues on Targeting of Persons' (2018) 51 *Vanderbilt J. of Transnational L.* 959-78, at 967-71.

¹⁰⁶ See in detail D. Stephens and A. Lewis, 'The Targeting of Civilian Contractors in Armed Conflict' (2006) 9 *YIHL* 25-64.

¹⁰⁷ See Dinstein, above (n. 52), 122.

¹⁰⁸ Schmitt, above (n. 83), 11-48.

¹⁰⁹ Burger, above (n. 101), 132; Dunlap, above (n. 96), 123-5; see also Jachec-Neale, above (n. 33), 96-105.

¹¹⁰ See in detail, Oeter, above (n. 78), 56-7; Dinstein, above (n. 52), 109; K. Watkin, 'Assessing Proportionality: Moral Complexity and Legal Rules' (2005) 8 *YIHL* 3-53, at 16-17.

¹¹¹ See H. Münkler, 'Asymmetrie und Kriegsvölkerrecht. Die Lehren des Sommerkrieges 2006' (2006) 81 *Friedens-Warte* 65.

¹¹² M. Beck, 'Zur Kritik am Sommerkrieg 2006 im Nahen Osten' (2006) 81 *Friedens-Warte* 91-5, at 92; C. Tomuschat, 'Der Sommerkrieg des Jahres 2006: Eine Skizze' (2006) 81 *Friedens-Warte* 179-90, at 187-8; see also UN Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, 23 November 2006, A/HRC//3/2., para. 144.

¹¹³ See Henderson, above (n. 41), 62.

¹¹⁴ Ibid., 62-5; Jachec-Neale, above (n. 33), 116-19.

¹¹⁵ See Jachec-Neale, above (n. 33), 120-2.

¹¹⁶ See also Henderson, above (n. 41), 68-71, and Jachec-Neale, above (n. 33), 122-4.

- 117** My formulation in the last version of this *Handbook* was too broad and sweeping in that regard—see Jachec-Neale, above (n. 33), 123.
- 118** See particularly Solf, in Bothe/Partsch/Solf, above (n. 26), 325, who uses the example of preparations of the invasion in Normandy in 1944.
- 119** For instance Belgium, Declaration of 20 May 1986; Italy, Declaration of 27 February 1986; and Spain, Declaration of 21 April 1986; see also Henderson, above (n. 41), 68–9.
- 120** See BR-Drs. 64/90 of 2 February 1990, 132; Gardam, above (n. 27), 102; Dinstein, above (n. 52), 108.
- 121** See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 618–19 (paras 1942–5); Solf, in Bothe/Partsch/Solf, above (n. 26), 301–4; and Kalshoven/Zegveld, above (n. 22), 101.
- 122** See Henderson, above (n. 41), 106–9.
- 123** See Kalshoven/Zegveld, above (n. 22), 101, and Sassòli, above (n. 11), 393–4; see also, as an extremely critical voice towards AP I in that regard, Parks, above (n. 11), 134–5.
- 124** For examples of the practice to use ‘human shields’, see H.W. Parks, ‘The Protection of Civilians from Air Warfare’ (1997) 27 *IsrYHR* 65–113, at 98–104; see also Henderson, above (n. 41), 211–18; Dinstein, above (n. 52), 181–6; C.J. Dunlap, ‘Targeting of Persons: The Contemporary Challenges’ (2018) 51 *Vanderbilt J. of Transnational L.* 887–900, at 889–92; Turns, above (n. 87), 362–4.
- 125** Schmitt, above (n. 83), 26–7; concerning the practice to use ‘human shields’ especially in asymmetrical warfare see also Oeter, above (n. 78), 57–8.
- 126** In favour M.N. Schmitt, ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’ (1998–99) 47 *Columbia J. of Transnational L.* 336, and Henderson, above (n. 41), at 216–18; dismissive J.-F. Quéguiner, ‘Precautions under the Law Governing the Conduct of Hostilities’ (2006) 88 (864) *IRRC* 793–822, at 815–17.
- 127** Doswald-Beck, above (n. 20), 154; Henderson, above (n. 41), 106–7; Dinstein, above (n. 52), 150–1; see, however, Stephens and Lewis, above (n. 106), at 47–57.
- 128** Doswald-Beck, above (n. 20), 154
- 129** Parks, above (n. 124), 109–10; Stephens and Lewis, above (n. 106), 48–9; Dinstein, above (n. 52), 159–60.
- 130** Critical towards this regulation is Parks, above (n. 11), 136–7.
- 131** Solf, in Bothe/Partsch/Solf, above (n. 26), 326.
- 132** *Ibid.*, 327.
- 133** See BR-Drs. 64/90 of 2 February 1990, 132 (Germany), 125 (Belgium), 127 (Italy), 129 (Netherlands), 130 (Spain); see also D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts*, 4th edn (Sijthoff 2004), 707, 712, 714, and 717.
- 134** As to the codification of that maxim in Article 51 AP I see Solf, in Bothe/Partsch/Solf, above (n. 26), 299; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 615–17 (paras 1923–33, 1935); Gardam, above (n. 27), 114–18; concerning the growing risk of collateral damages arising from modern warfare, see Oeter, above (n. 78), 58; M.N. Schmitt, ‘Future War and the Principle of Discrimination’ (1998) 28 *IsrYHR* 51–90 [70–71].
- 135** See C. Greenwood, ‘Customary Law Status of the 1977 Geneva Protocols’, in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of F. Kalshoven* (Nijhoff, 1991), 93–114 [108–11]; G. Venturini, *Necessità e proporzionalità nell’uso della forza militare in diritto internazionale* (Giuffrè 1988), 127–50;

Sassòli, above (n. 11), 344–50; Gardam, above (n. 27), 132–62; D. Fleck, ‘Strategic Bombing and the Definition of Military Objectives’ (1997) 27 *IsrYHR* 52.

136 In that sense argue e.g. S Miyazaki, *The Martens Clause and International Humanitarian Law*, in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles. Essays in Honour of Jean Pictet* (Nijhoff, 1984), 436–9 and D. Fleck, ‘The Protocols Additional to the Geneva Conventions and Customary International Law’ (1990) XXIX *RDMilG* 495–517, at 501.

137 See e.g. Gardam, above (n. 27), 176–9.

138 As to the practical difficulties of implementing the general rule see Parks, above (n. 11), 152–63.

139 In this sense see para. 3 of *US Army Manual FM 27-10*: ‘The law of war ... requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes’; US Army Civilian Casualties Mitigation of July 2012, ATTP 3-37.31, http://www.lawfareblog.com/wp-content/uploads/2012/07/attp3_37x31.pdf-approved.pdf; see also Sassòli, above (n. 11), 346.

140 On the relevant experiences of the Kuwait War see Keenan, above (n. 77), 34–7 [36]; concerning a critical assessment of the Afghanistan Air Campaign in 2001–2002, see Lippmann, above (n. 96), 56–64.

141 M. Bothe, ‘Moderner Luftkrieg und Schutz der Zivilbevölkerung’ (2002) 15 *HuV-I* 31, 33.

142 Bothe, above (n. 141), 33; Oeter, above (n. 78), 59.

143 See Dinstein, above (n. 52), 165.

144 Rule 20 *CIHL*.

145 Concerning Article 26 HagueReg see Parks, above (n. 11), 157.

146 Of a different opinion is Parks, above (n. 11), 158; to the point, however, Solf, in Bothe/Partsche/Solf, above (n. 26), 368, and Dinstein, above (n. 52), 172.

147 See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 686–7 (paras 2223–5); Solf, in Bothe/Partsche/Solf, above (n. 26), 367–8; Dinstein, above (n. 52), 172; Henderson above (n. 41), 185–9.

148 See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 692 (paras 2239–44); Solf, in Bothe/Partsche/Solf, above (n. 26), 371–3; Sassòli, above (n. 11), 490–3; Fleck, above (n. 135), 52.

149 Details can be found in the studies of Sassòli, above (n. 11), 493–5, and in the comments by Pilloud/Pictet, above (n. 30), 693–4 (paras 2247–50); see also Dinstein, above (n. 52), 173–4, and Quéguiner, above (n. 126), at 817–20.

150 Concerning details see Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 694 (paras 2251–6); Sassòli, above (n. 11), 496–8.

151 See Sassòli, above (n. 11), 498–9 and Pilloud/Pictet, above (n. 30) 694–5 (paras 2257–8).

152 See M.N. Schmitt (ed.), *HPCR Manual on International Law Applicable to Air and Missile Warfare, Published with a Commentary*, International Humanitarian Law Research Initiative (CUP, 2013); additionally, in 2012, the International Human Rights Clinic together with Human Rights Watch published ‘Losing Humanity: The Case Against Killer Robots’, a legal evaluation on drones, calling for an international treaty, <https://www.hrw.org/sites/default/files/reports/Losing%20Humanity%20Executive%20Summary.pdf>; furthermore, the International Human Rights and Conflict Resolution Clinic (Stanford Law School) and the

Global Justice Clinic (NYU School of Law) published another legal analysis in September 2012 'Living under Drones', <https://www.globalresearch.ca/living-under-drones/5306110>.

153 See M. Schmitt, 'Drone Attacks Under the *Jus ad Bellum* and the *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 *YIHL* 311-26, at 313-14.

154 HPCR Manual, rule 1 lit. e.

155 See Schmitt, above (n. 152), rule 1, lit. x, no. 1; R. Frau, 'Unbemannte Luftfahrzeuge im international bewaffneten Konflikt' (2011) 24 *HuV-I* 63.

156 Cf. J. Miller and E. Schmitt, 'Ugly Duckling Turns Out to be Formidable in the Air', *New York Times* of 23 November 2011, <http://www.nytimes.com/2001/11/23/international/23PRED.html?pagewanted=print>.

157 See C. Heyns *et al.*, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 *ICLQ* 793.

158 See A. v Bogdandy and M. Rau, 'The Lotus', *MPEPIL*, para. 15

159 See W.H. Boothby, *Weapons and the Law of Armed Conflict*, 2nd edn (OUP, 2016), 252-3; regarding autonomous weapons systems, see e.g. DoD Directive on Autonomy in Weapon Systems of 21 November 2012, No. 3000.09.

160 For automated UCAVs, see the former special rapporteur C. Heyns, Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions on the protection of the right to life during law enforcement—the need for domestic law reform; remotely piloted aircraft or armed drones and emerging autonomous weapons systems, UN Doc. A/HRC/26/36 from 1 April 2014.

161 See Schmitt, above (n. 152), rule 1 lit. x, no. 15.

162 See for each field specifically Heyns *et al.*, above (n. 157), 791.

163 Heyns *et al.*, above (n. 157) 805, and G. Gaggioli, 'Remoteness and Human Rights Law', in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 133-85.

164 See e.g. K. Mačák, *Internationalized Armed Conflicts in International Law* (CUP, 2018).

165 For further information, see C. Jenks, 'Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict' (2009) 85 *North Dakota Law Review* 649, 656-60; regarding the situation in Pakistan see A.C. Orr, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law' (2011) 44 *Cornell International Law Journal* 729 ff.; Heyns *et al.*, above (n. 157) 805-8.

166 Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Philip Alston, from 28 May 2010, UN Doc. A/HRC/14/24/Add.6, para. 79.

167 *Ibid.*, para. 85.

168 See W. Boothby, 'The Law Relating to Unmanned Aerial Vehicles, Unmanned Combat Air Vehicles and Intelligence Gathering from the Air' (2011/12) 24 *HuV-I* 81, 82, and A. Cullen, 'The Characterization of Remote Warfare under International Humanitarian Law', in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 110-32.

169 See A. Dienelt, 'The Shadowy Existence of the Weapons Review and Its Impact on Disarmament' (2018) *S+F Sicherheit und Frieden/Security and Peace* 128.

170 See M.N. Schmitt, 'Drone Attacks under the *Jus Ad Bellum* And *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 *YIHL* 321, and E. Crawford, 'The Principle of Distinction and Remote Warfare', in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 50-78,

- 171** See P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century* (Penguin, 2009), 33.
- 172** See Dinstein, above (n. 52), 140.
- 173** See K.J. Heller, ‘“One Hell of a Killing Machine”: Signature Strikes and International Law’ (2013) *Journal of International Criminal Justice* 89–120, at 93.
- 174** Ibid., at 97.
- 175** See ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (2008) 90 (872) *IRRC* 991, 1007.
- 176** See Heller, above (n. 173), 97.
- 177** Ibid., 99. Rejecting the lawfulness of this signature Heyns et al., above (n. 157), 813
- 178** See Boothby, above (n. 159), 231, and T.D. Gill, J. van Haaster, and M. Roorda, ‘Some Legal and Operational Considerations Regarding Remote Warfare: Drones and Cyber Warfare Revisited’, in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 298–333.
- 179** See Special Rapporteur Heyns, above (n. 160), para. 71
- 180** See M.N. Schmitt, ‘Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the oft Benighted Debate’ (2012) 30 *Boston University International Law Journal* 595, 614–15.
- 181** Boothby, above (n. 168), 84, as well as I. Henderson, P. Keane, and J. Liddy, ‘Remote and Autonomous Warfare Systems: Precautions in Attack and Individual Accountability’, in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 335–70.
- 182** Boothby, *ibid.*, at 84.
- 183** See Boothby, above (n. 159), 232.
- 184** See R. Geiß and H. Lahmann, ‘Autonomous Weapons Systems: A Paradigm Shift for the Law of Armed Conflict?’, in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 371–404
- 185** Cf. Frau, above (n. 155) 60, 65; S. Wuschka, ‘The Use of Combat Drones in Current Conflicts—A Legal Issue or a Political Problem?’ (2011) 3 *Goettingen Journal of International Law* 891, 896.
- 186** See Boothby, above (n. 159), 233, and P. Margulies, ‘Making Autonomous Weapons Accountable: Command Responsibility for Computer-Guided Lethal Force in Armed Conflicts’, in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 405–42.
- 187** See the endorsement by the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) at the Meeting in November 2019, Final Report, Annex III ‘Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Areas of Lethal Autonomous Weapons’, UN Doc. CCW/MSP/2019/9, 13 December 2019, para. 31.
- 188** See A. Zimmermann, ‘Die Wirksamkeit rechtlicher Hegung militärischer Gewalt’, in: S. Hobe et al (ed.), *Moderne Konfliktformen—Humanitäres Völkerrecht und privatrechtliche Folgen*. Berichte der Deutschen Gesellschaft für Völkerrecht Vol. 44 (C F Müller, 2010), 9–33, and R. Heinsch, ‘Modern Drone Warfare and the Geographical Scope of Application of

IHL: Pushing the Limits of Territorial Boundaries?', in J.D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Edward Elgar, 2017), 79–109.

189 See e.g. Special Rapporteur Heyns, above (n. 160), paras 12 ff.; see also R. Frau, 'Unmanned Military Systems and Extraterritorial Application of Human Rights Law' (2013) 1 *Groningen Journal of International Law* 1; S. Casey-Maslen, 'Unmanned Weapons Systems and the Right to Life', in: S. Casey-Maslen *et al.*, *Drones and Other Unmanned Weapons Systems under International Law* (Brill Nijhoff, 2018), 158; Heyns *et al.*, above (n. 157), 818 ff

190 Rule 3 *CIHL*.

191 See Frau, above (n. 155), 60, 67–8.

192 For an evaluation, see J. Kleffner, in T.D. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP, 2010), para. 4.01, no. 29.

193 See I. Henderson, 'Civilian Intelligence Agencies and the Use of Armed Drones' (2010) 13 *YIHL* 133–73.

194 See ICTY, *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT 94-1-AR72, Appeals Chamber (2.10.1995), paras 68–9.

195 E.g. Germany was held responsible for ensuring the lawfulness of US operations from German territory, see an unofficial translation of the wording of the oral pronouncement of the judgment of the North Rhine-Westphalia Higher Administrative Court, judgment from 19/3/2019, docket number 4 A 1361/15, https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf.

196 See Dinstein, above (n. 52), 133.

197 See W.H. Boothby and W. Heintschel von Heinegg, *The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual* (CUP, 2018), 363–6.

198 See C. Bruderlein (ed.), *HPCR Manual on International Law Applicable to Air and Missile Warfare, produced by the Program on Humanitarian Policy and Conflict Research at Harvard University* (CUP, 2013), Commentary to the HPCR Manual, 342–3.

199 See Boothby/Heintschel von Heinegg, above (n. 197), 359–61.

200 See Dinstein, above (n. 52), 194.

201 *Ibid.*, 134.

202 See Boothby/Heintschel von Heinegg, above (n. 197), 361–3.

203 See Dinstein, above (n. 52), 134.

204 See Heintschel von Heinegg, 'War Zones', in *MPEPIL*, para. 1, as well as Boothby/Heintschel von Heinegg, above (n. 197), 363.

205 Commentary to the HPCR Manual, above (n. 198), 289.

206 *Ibid.*, 290.

207 See M.N. Schmitt, 'Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement' (1998) 20 *Loyola of Los Angeles International and Comparative Law Review* 727, 729–30.

208 Commentary to the HPCR Manual, above (n. 198), 290, 292.

209 *Ibid.*, 295–8.

- 210** Ibid., 99.
- 211** Ibid., 299.
- 212** UN Doc. S/RES/0688 (1991) of 5 April 1991.
- 213** See T.P. McIlmail, 'No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq' (1994) 17 *Loyola of Los Angeles International and Comparative Law Review* 35.
- 214** UN Doc. S/RES/816 (1993) of 31 March 1999.
- 215** See M.N. Schmitt, 'Wings over Libya: The No-Fly Zone in Legal Perspective' (2011) 36 *The Yale Journal of International Law Online* 45.
- 216** UN Doc. S/RES/1973 (2011) of 17 March 2011.
- 217** Rule 46 *CIHL*; concerning the historic background of this customary rule see de Preux, in *ICRC Commentary*, above (n. 30), 474 (paras 1589–90), and B. Demeyere and T. Ruys, 'Means and Methods of Warfare', in J. Wouters, P. De Man, and N. Verlinden (eds), *Armed Conflicts and the Law* (Intersentia, 2016), 305–42, at 336–8.
- 218** See Solf, in Bothe/Partsch/Solf, above (n. 26), 219–23.
- 219** Ibid., 217.
- 220** See de Preux, in *ICRC Commentary*, above (n. 30), 476 (para. 1595); Solf, in Bothe/Partsch/Solf, above (n. 26), 217; Demeyere/Ruys, above (n. 217), 336.
- 221** See de Preux, in *ICRC Commentary*, above (n. 30), 476–7 (para. 1598).
- 222** See S.R. Johansen, *The Military Commander's Necessity* (CUP, 2019), 131–3; Tsagourias/Morrison, above (n. 26), 111–12; Crawford and Pert, above (n. 26), 45; Dinstein, above (n. 52), 144–5; S. Verhoeven, 'The Protection of Civilians and Civilian Objects against Hostilities', in J. Wouters, P. De Man, and N. Verlinden (eds), *Armed Conflicts and the Law* (Intersentia, 2016), 259–303, at 278–9; Melzer, above (n. 26), 298–300; W.H. Boothby, *The Law of Targeting* (OUP, 2012), 89–93; Henderson above (n. 41), 116–23; Fleck, above (n. 135), 43.
- 223** See Sassòli, above (n. 11), 378–87, with further references; see also Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II, 7th edn (David McKay, 1952), 524–30; E. Castrén, *The Present Law of War and Neutrality* (Suomalaisen Kirjallisuuden Seuran Kirjapainon Oy, 1954), 174–5; F. Kalshoven, *The Law of Warfare* (Sijthoff, 1973), 59–70; L.C. Green, *Essays on the Modern Law of War*, 2nd edn (Transnational Publ., 1999), 586.
- 224** That was the position argued by the ICRC and the negotiating delegations when drafting the Additional Protocols, as well as the position of subsequent state practice—cf. Sassòli, above (n. 11), 388–9.
- 225** See in particular Sassòli, above (n. 11), 396–402; Solf, in Bothe/Partsch/Solf, above (n. 26), 300–1; E.-C. Gillard, 'Protection of Civilians in the Conduct of Hostilities', in R. Liivoja and T. McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016), 157–80, at 161–2.
- 226** Already concerning the traditional customary law, to the same conclusion come M. Greenspan, *The Modern Law of Land Warfare* (Univ. of California Press, 1959), 337; Castrén, above (n. 223), 200–1; Sassòli, above (n. 11), 398–9.
- 227** As to Bosnia see the detailed materials on the practices of so-called 'ethnic cleansing' contained in the reports of the Special Rapporteur on Bosnia of the UN Commission of Human Rights, Mazowiecki, esp. UN Doc.A/47/418 of 3 September 1992, 4–9, and UN

Doc.A/47/666 of 17 November 1992, 6-12; *see also* the appeal to the parties of the conflict by the ICRC on 13 August 1992, 74 *IRRC* (1992), 511-12.

228 *See* F Ermacora, 'Der Afghanistankonflikt im Lichte des humanitären Völkerrechts', in W. Haller et al. (eds), *Im Dienst an der Gemeinschaft. Festschrift für Dietrich Schindler* (Helbing & Lichtenhahn, 1989), 201-14, at 206.

229 *See* N.D. White and H. McCoubrey, 'International Law and the Use of Force in the Gulf' (1991) 10 *International Relations* 347-73, at 366.

230 *See e.g.* Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN-Doc. A/HRC/40/70 of 31 January 2019, paras 23-49 (comparable findings can be found in the previous reports of the Commission of Enquiry); *see also* J. Lhotsky, 'The International Criminal Court and Syria: the Absence of Jurisdiction and the Pressing Need for International Criminal Justice', in P. Sturma (ed.), *The Rome Statute of the ICC at its Twentieth Anniversary* (Brill Nijhoff, 2019), 148-62.

231 As to that debate *see* F. Kalshoven, *Belligerent Reprisals*, 2nd edn (Nijhoff, 2005), 353-61.

232 As to the problems of that approach *see* F. Kalshoven, 'Belligerent Reprisals Revisited' (1990) 21 *NYIL* 54-67.

233 As to 'reprisal' *see* Dinstein, above (n. 52), 292-6; Sassòli, above (n. 11), 428-32, and esp. Kalshoven, above (n. 231), 11-33.

234 *See* Sassòli, above (n. 11), 355-8; Doswald-Beck, above (n. 20), 58; Dinstein, above (n. 52), 125-6.

235 *See* Lauterpacht, above (n. 223), 421; Castrén, above (n. 223), 201; Meyrowitz, above (n. 19), 28; Sassòli, above (n. 11), 356-7.

236 In that regard *see* Sassòli, above (n. 11), 357-8.

237 *See* Dinstein, above (n. 52), 172.

238 As to Article 26 Hague Regulations *see* Parks, above (n. 11), 157, and Sassòli, above (n. 11), 478-81.

239 Of a different opinion seems to be Parks, above (n. 11), 158; to the point Solf, in Bothe/Partsch/Solf, 368 and Sassbli, above (n. 11), 481-4 as well as Quéguiner, above (n. 126), 806-9.

240 *See* Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 686-7 (paras 2223-5); Solf, in Bothe/Partsch/Solf, above (n. 26), 367-8; Dinstein, above (n. 52), 172.

241 *See* B. Carnahan, '“Linebacker II” and Protocol I: The Convergence of Law and Professionalism' (1982) 31 *American University Law Review* 861-70, at 866, with an illustration of the practical problems in the case of the US bombardment of Northern Vietnam in December 1972; as to the NATO Kosovo Air Campaign, *see* P. Rowe, above (n. 85), 154.

242 *See* Dinstein, above (n. 52), 146; Verhoeven, above (n. 222), 279-80; Tsagourias and Morrison, above (n. 26), 112-14.

243 *See* Kalshoven, above (n. 223), 64; H. Blix, 'Area Bombardment: Rules and Reasons' (1978) 49 *BYIL* 47; Sassòli, above (n. 11), 403.

244 *See* Sassòli, above (n. 11), 405-8.

245 Sassòli, above (n. 11), 407.

- 246** On the rule of proportionality in the context of humanitarian law *see* Parks, above (n. 11), 168–85; Venturini, above (n. 135), 127–50; R. Geiß and M. Siegrist, ‘Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?’ (2011) 93 (881) *IRRC* 29–34; Dinstein, above (n. 52), 149–55.
- 247** Solf, in Bothe/Partsch/Solf, above (n. 26), 304–5.
- 248** *See* W.A. Solf, ‘Protection of Civilians Against the Effects of Hostilities under Customary International Law and under Protocol I’ (1986) 1 *The American University Journal of International Law and Policy* 107–35, at 119; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 619 (para. 1946).
- 249** *See* Sassòli, above (n. 11), 404.
- 250** *See* Bothe, above (n. 96), 535.
- 251** *See* A. Kasher, ‘Combatants’ Life and Human Dignity’ (2014) 44 *IsrYHR* 219–46; M.N. Schmitt, ‘The Impact of High and Low-Tech Warfare on the Principle of Distinction’, in R. Arnold and P.-A. Hildbrand (eds), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* (Editions interuniversitaires Suisse, 2005), 169–89; R. Katzir, ‘Four Comments on the Application of Proportionality under the Law of Armed Conflict’ (2018) 51 *Vanderbilt J. of Transnational L.* 857–66, at 854–5; *see also* Oeter, above (n. 78), 58.
- 252** Sassòli, above (n. 11), 405.
- 253** Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 620, para. 1950; as to current understandings of the term ‘indiscriminate attack’ *see* Dinstein, above (n. 52), 146–9; Gillard, above (n. 225), 162–5; Verhoeven, above (n. 222), 279–80; C. Bell and J. Pfeiffer, ‘Indiscriminate Attack’, in F. Lachenmann and R. Wolfrum (eds), *The Law of Armed Conflict and the Use of Force* (OUP, 2017), 497–501.
- 254** That it is not a mere list of examples but a genuine definition ‘by law’, is demonstrated convincingly by H. Fischer, *Der Einsatz von Nuklearwaffen nach Art. 51 des 1, Zusatzprotokolls zu den Genfer Konventionen von 1949* (Duncker & Humblot, 1985), 1831–90; *see also* Rule 12 *CIHL*.
- 255** As a general explanation of Article 51, para. 4 lit. a, AP I *see* Sassòli, above (n. 11), 420–2; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 620–1 (paras 1951–5) and in much detail Fischer, above (n. 254), 185–90; *see also* Dinstein above (n. 52), 147, and F. Moneta, ‘Direct Attacks on Civilians and Indiscriminate Attack as War Crimes’, in F. Pocar, M. Pdrizzi, and M. Frulki (eds), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Edward Elgar, 2013), 59–77, at 66–7.
- 256** Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 620–1 (para. 1952); Fischer, above (n. 254), 189–90.
- 257** Sassòli, above (n. 11), 421.
- 258** Cf. Solf, in Bothe/Partsch/Solf, above (n. 26), 307 and O. Kimminich, *Schutz der Menschen in bewaffneten Konflikten* (Kaiser, 1979), 142–4.
- 259** Solf, in Bothe/Partsch/Solf, above (n. 26), 308; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 621 (para. 1955).
- 260** *See* Gillard, above (n. 225), 164–5; Verhoeven, above (n. 222), 280; Dinstein, above (n. 52) 136–8; T. Marauhn and S. Kirchner, ‘Target Area Bombing’, in N. Ronzitti (ed.), *The Law of Air Warfare* (Eleven International Publ., 2006), 87–106; Sassòli, above (n. 11), 421–2; Fleck, above (n. 135), 52–3.

- 261** See Sassòli, above (n. 11), 421–2; Fischer, above (n. 256), 186, 188–9.
- 262** See Solf, in Bothe/Partsch/Solf, above (n. 26), 308 (he mainly refers to Article 51, para. 4 lit. b, AP I); see also Kalshoven and Zegveld, above (n. 22), 176.
- 263** Sassòli, above (n. 11), 422–5.
- 264** See J.M. Spaight, *Air Power and War Rights*, 3rd edn (Longmans Green, 1947), 214–17; Castrén, above (n. 223), 204; Greenspan, above (n. 226), 365–7; Kimminich, above (n. 258), 132–3; Fischer, above (n. 254), 192–3.
- 265** See White/McCoubrey, above (n. 229), 366; Schmitt, above (n. 134), 55; Dinstein, above (n. 52), 148.
- 266** See C. Ney, *Der Einsatz von Atomwaffen im Lichte des Völkerrechts* (Lang 1985), 226; Sassòli, above (n. 11), 424; Byron, above (n. 96), 1893; Dinstein, above (n. 52), 148.
- 267** Solf, in Bothe/Partsch/Solf, above (n. 26), 306; Sassòli, above (n. 11), 424; R. Domínguez-Matés, ‘New Weaponry Technologies and International Humanitarian Law: Their Consequences on the Human Being and the Environment’, in P.A. Fernández-Sánchez (ed.), *The New Challenge of Humanitarian Law in Armed Conflicts* (Nijhoff, 2005), 91–119, at 109.
- 268** Convincingly argued by Solf, in Bothe/Partsch/Solf, above (n. 26), 305.
- 269** Report of the Independent Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/25/65 of 12 February 2014, para. 86.
- 270** Kimminich, above (n. 258), 141–2; Solf, in Bothe/Partsch/Solf, above (n. 26), 305–6.
- 271** See Fischer, above (n. 254), 195; Sassòli, above (n. 11), 427.
- 272** Fischer, above (n. 254), 195.
- 273** P. Herby and A.R. Nuiten, ‘Explosive Remnants of War : Protecting Civilians through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons’ (2001) 83 (841) *IRRC* 195–205, at 198; as to the cluster bomb technology, see T.J. Herthel, ‘On the Chopping Block: Cluster Munitions and the Law of War’ (2001) 51 *Air Force Law Review* 234–5; as to the use of white phosphorous and its problematic results, see I.J. MacLeod and A.P.V. Rogers, ‘The Use of White Phosphorous and the Law of War’ (2007) 10 *YIHL* 75–97.
- 274** See Sassòli, above (n. 11), 426–7, and J. Borne and M. Brehm, ‘Enhancing Civilian Protection from Use of Explosive Weapons in Populated Areas: Building a Policy and Research Area’ (2011) 93 (883) *IRRC* 809.
- 275** Herthel, above (n. 273), 239.
- 276** Herby/Nuiten, above (n. 272), 199; Herthel, above (n. 273), 231.
- 277** ICRC, *Annual Report 2006*, 335–9
- 278** Herthel, above (n. 273), 264–9; Rogers, above (n. 69), 82.
- 279** ICRC, *Official statement* of 6 November 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/cluster-munition-statement-061106?opendocument>.
- 280** Convention on Cluster Munitions of 30 May 2008, 2688 *UNTS* 39; on the details of this convention see G. Nystuen and S. Casey-Maslen (eds), *The Convention on Cluster Munitions: A Commentary* (OUP, 2010).
- 281** So argues Sassòli, above (n. 11), 427–8.
- 282** *Ibid.*, 426–8.

- 283** On Article 51, para. 5, AP I see Solf, in Bothe/Partscht/Solf, above (n. 26), 309–11; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 623–6 (paras 1967–81).
- 284** See Spaight, above (n. 264), 270–81; Greenspan, above (n. 226), 336; Sassòli, above (n. 11), 421–42; Dinstein, above (n. 52), 136–8; Marauhn and Kirchner, above (n. 260), 87–106; Gillard, above (n. 225), 164–5; Verhoeven, above (n. 222), 280.
- 285** See Spaight, above (n. 264), 270–3, 280–1; J. Stone, *Legal Controls of International Conflict* (Stevens 1954), 627–31; R.R. Baxter, ‘Comportement des combattants et conduit des hostilités (Droit de la Haye)’, in UNESCO and Institut Henry Dunant (eds), *Les dimensions internationales du droit humanitaire*, (Pedone, 1986), 117–62, at 148; Blix, above (n. 243), 54–8; A. McDonald and T. Bruha, ‘Bombardment’, in F. Lachenmann and R. Wolfrum (eds), *The Law of Armed Conflict and the Use of Force* (OUP, 2017), 135–40; Rule 13 *CIHL*.
- 286** See Sassòli, above (n. 11), 409–11, with a detailed presentation of the relevant state practice.
- 287** See G.H. Aldrich, ‘New Life for the Laws of War’ (1981) 75 *AJIL* 764–83, at 780; Sassòli, above (n. 11), 411; Blix, above (n. 243), 61–9; A. Rogers, ‘Conduct of Combat and Risks Run by the Civilian Population’ (1982) 21 *RDMilG* 293–322, at, 306.
- 288** See Solf, in Bothe/Partscht/Solf, above (n. 26), 309; see also the US persistence during the negotiations on the condition of a ‘significant distance’ between the different military objectives; cf. Parks, above (n. 11), 161.
- 289** On the customary rule of proportionality see Venturini, above (n. 135), 127–32; Parks, above (n. 11), 168–75; Solf, in Bothe/Partscht/Solf, above (n. 26), 309; Greenspan, above (n. 226), 335; Aldrich, above (n. 287), 778; Doswald-Beck, above (n. 20), Sassòli, above (n. 11), 412–15; Holland, above (n. 68), 51–2; Rule 14 *CIHL*.
- 290** Concerning the rather controversial debate on including criteria of proportionality in AP I see W.J. Fenrick, ‘The Rule of Proportionality and Protocol I in Conventional Warfare’ (1982) 98 *Military Law Review* 91–112; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 683–5 (paras 2204–18); Solf, in Bothe/Partscht/Solf, above (n. 26), 309–10, 361; Sassòli, above (n. 11), 415–18; as to the combination of indiscriminate and disproportionate attacks in Article 51, para. 5, AP I, see Gardam, above (n. 27), 93–6.
- 291** See Solf, in Bothe/Partscht/Solf, above (n. 26), 310; Dinstein, above (n. 52), 152–4; Boothby, above (n. 222), 94–7; E. Cannizaro, ‘Proportionality in the Law of Armed Conflict’, in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP, 2014), 332–52; Gillard, above (n. 225), 165–9; W. Heintschel von Heinegg, ‘Proportionality and Collateral Damage’, in F. Lachenmann and R. Wolfrum (eds), *The Law of Armed Conflict and the Use of Force* (OUP, 2017), 1055–9; M.A. Newton, ‘Reframing the Proportionality Principle’ (2018) 51 *Vanderbilt J. of Transnational L.* 867–85; Boothby and Heintschel von Heinegg, above (n. 197), 134–8.
- 292** As to these problems see Fenrick, above (n. 290), 126, and Solf, in Bothe/Partscht/Solf, above (n. 26), 310.
- 293** See Holland, above (n. 68), 46–7.
- 294** Doswald-Beck, above (n. 20), 156; Kalshoven/Zegveld, above (n. 22), 109; for the subsequent difficulties with respect to the criminal responsibility according to Article 8, para. 2, lit. b (iv), ICC Statute, see T. Stein, ‘Collateral Damage, Proportionality and Individual International Criminal Responsibility’, in W. Heintschel v. Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007), 158–61.

- 295** See BR-Drs. 64/90 of 2 February 1990, 132 (Germany), 125 (Belgium), 127 (Italy), 129 (Netherlands), 130 (Spain); see also Schindler/Toman, above (n. 133), 707, 712, 714, 717; as to the underlying problem see B.J. Bill, 'The Rendulic "Rule": Military Necessity, Commander's Knowledge, and Methods of Warfare' (2009) 12 *YIHL* 119-55, at 133-42.
- 296** See BR-Drs. 64/90 of 2 February 1990, 132; as to the background of the declaration see also Fenrick, above (n. 290), 107; Parks, above (n. 11), 172; Solf, in Bothe/Partsch/Solf, above (n. 26), 311, 325; Sassòli, above (n. 11), 417; Doswald-Beck, above (n. 20), 156-7.
- 297** See Sassòli, above (n. 11), 414, with further references, as well as N. Neuman, 'Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality' (2004) 7 *YIHL* 79-112, at 96-100; see also Watkin, above (n. 68), 19-21.
- 298** See the critical observations by Parks, above (n. 11), 152-6.
- 299** Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, (2000) 39 *ILM* 1279 para. 77.
- 300** See Parks, above (n. 11), 159-68; Oeter, above (n. 78), 59-60; Henderson, above (n. 41), 106-10; Dinstein, above (n. 52), 150.
- 301** See Parks, above (n. 11), 163-4; Sassòli, above (n. 11), 447-53; and Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 627-8 (paras 1989-93).
- 302** See the critical remarks of Parks, above (n. 11), 164-5, on that point.
- 303** *Ibid.*, 174-9; see also Dinstein, above (n. 52), 159-60.
- 304** See Neuman, above (n. 297), 90-6.
- 305** See e.g. Dinstein, above (n. 52), 151, 159-60, and Byron, above (n. 96), 195; see also from a perspective of military ethics C. Abbate, 'Assuming Risk: A Critical Analysis of a Soldier's Duty to Prevent Collateral Casualties' (2014) 13 *Journal of Military Ethics* 70-93.
- 306** See Holland, above (n. 68), 73-4; see further ICRC, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*. Report on the International Expert Meeting, 22-23 June 2016—Québec, p. 51-9, <https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality>.
- 307** See also Dinstein, above (n. 52), 157-9.
- 308** See W. Heintschel von Heinegg, 'The 2009 Kunduz Air Attack' (2010) 53 *GYIL* 833-66.
- 309** See I. Henderson and K. Reece, 'Proportionality Under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 *Vanderbilt J. of Transnational L.* 835-55, at 846-54, in addition I. Robinson and E. Nohle, 'Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas' (2016) 98 (901) *IRRC* 107-45, at 113-34.
- 310** See C.A.J. Coady, *Morality and Political Violence* (CUP, 2008), 137.
- 311** See R.D. Sloane, 'Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality' (2015) 6 *Harvard National Security Journal* 299-343, at 312-15.
- 312** As to this concept, see Dinstein, above (n. 52), 160-2; see also E.-C. Gillard, 'Some Reflections on the "Incidental Harm" Side of Proportionality Assessments' (2018) 51 *Vanderbilt J. of Transnational L.* 827-34, at 829; Katzir, above (n. 251), 860-2.
- 313** See Sloane, above (n. 311), 312-15.

- 314** Ibid., 302; see in addition ICRC, *The Principle of Proportionality*, above (n. 306), 53; Henderson and Sloane, above (n. 309), 839–46; Katzir, above (n. 251), 859–60; Turns, above (n. 87), 369.
- 315** See only G. Gigerenzer, *Simply Rational: Decision-Making in the Real World* (OUP, 2015).
- 316** See Sloane, above (n. 311) 321–3; J.D. Wright, ‘“Excessive” Ambiguity: Analysing and Refining the Proportionality Standard’ (2012) 94 (886) *IRRC* 819–54, at 846–8; M. Wells-Greco, ‘Operation “Cast Lead”: Jus in Bello Proportionality’ (2010) 57 *NILR* 397, at 416–17; Katzir, above (n. 251), 858–60.
- 317** See Gillard, above (n. 225), 169.
- 318** See ICRC, *The Principle of Proportionality*, above (n. 306), 65; see also Wright, above (n. 44), 849–53.
- 319** See Wright, above (n. 316), 839–40.
- 320** See E. Chudnoff, *Intuition* (OUP, 2013); G. Gigerenzer, *Bauchentscheidungen: die Intelligenz des Unbewussten und die Macht der Intuition* (Bertelsmann, 2007); T. Bastick, *Intuition. Evaluating the Construct and its Impact on Creative Thinking* (Stoneman & Lang, 2003); D.G. Myers, *Intuition. Its Powers and Perils* (Yale University Press, 2002).
- 321** See also Sloane, above (n. 311), 316–18.
- 322** See M. Bradley, *Protecting Civilians in War: The ICRC, UNHCR, and their Limitations in Internal Armed Conflicts* (OUP, 2016), 72; Verhoeven, above (n. 222), 300; Dinstein, above (n. 27), 214–15.
- 323** As to the practical problems of such a rule see Doswald-Beck, above (n. 20), 157.
- 324** There is a new interest in the rules on precautions—see G.S. Corn, ‘The Invaluable Civilian Risk Mitigation Contribution of Recognizing the Value of Precautionary Measures’, in R. Geiss, H. Krieger, and H. Lahmann (eds), *The ‘Legal Pluriverse’ Surrounding Multinational Military Operations* (OUP, 2020), 223–8; S. Watts, ‘Chapter 5. Law-of-War Precautions: A Cautionary Note’, in E. Jensen and R.T.P. Alcalá (eds), *The Impact of Emerging Technologies on the Law of Armed Conflict* (OUP, 2019); N. Neuman, ‘A Precautionary Tale: The Theory and Practice of Precautions in Attack’ (2018) 48 *IsrYHR* 19–41; J. van den Boogaard and A. Vermeer, ‘Precautions in Attack and Urban Siege Warfare’ (2017) 20 *YIHL* 163–98.
- 325** As to the history and substance of Article 57 AP I see Sassòli, above (n. 11), 459–89; Solf, in Bothe/Partsch/Solf, above (n. 26), 361–9; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 678–89 (paras 2184–8); Henderson, above (n. 41), 157–96; W. Heintschel von Heinegg, ‘Precautions in Attack’, in F. Lachenmann and R. Wolfrum (eds), *The Law of Armed Conflict and the Use of Force* (OUP, 2017), 1008–12; Dinstein, above (n. 52), 164–74; Boothby, above (n. 222), 118–40; Gillard, above (n. 225), 173–9.
- 326** See Sassòli, above (n. 11), 458.
- 327** See Castrén, above (n. 223), 202; Sassòli, above (n. 11), 456–64; Dinstein, above (n. 52), 164; Rule 16 *CIHL*.
- 328** See Verhoeven, above (n. 222), at p. 300.
- 329** As to the question of who is primarily affected by Article 57 see Sassòli, above (n. 11), 461, 463; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 681 (para. 2197); Kalshoven/Zegveld, above (n. 22), 109; Z. Bohrer and M. Osiel, ‘Proportionality in Military Force at

War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers' (2013) 46 *Vanderbilt J. of Transnational L.* 747-822, at 787-99.

330 Solf, in Bothe/Partsch/Solf, above (n. 26), 366-7.

331 Printed in Schindler/Toman, above (n. 133), 716. See also Sassòli, above (n. 11), 463; Solf, in Bothe/Partsch/Solf, above (n. 26), 362-3.

332 Sassòli above (n. 11), 464-70; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 680-1 (paras 2194-6); Dinstein, above (n. 52), 167; Gillard, above (n. 225), 174.

333 See Solf, in Bothe/Partsch/Solf, above (n. 26), 363, and Henderson, above (n. 41), 161-7.

334 See also Dinstein, above (n. 52), 165-6, and Heintschel von Heinegg, above (n. 325), 1009.

335 See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 680 (para. 2195); see also as to corresponding problems in the course of the Kuwait War 1991 White/McCoubrey, above (n. 229), 366.

336 See R.R. Goldman, 'International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts' (1993) 9 *American University Journal of International Law and Policy* 67-8.

337 Rule 17 *CIHL*; see also US Army Guidelines on 'Civilian Casualty Mitigation', Headquarters, Department of the Army, Doc. ATTP 3-37.31 of July 2012, available at <https://armypubs.us.army.mil/doctrine/index.html>.

338 See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 682 (para. 2200); but also Watkin, above (n. 110), 23-5 as well as Dinstein, above (n. 52), 166-7, and Henderson, above (n. 41), 167-80.

339 See Sassòli, above (n. 11), 470; Castrén, above (n. 223), 202; Kalshoven/Zegveld, above (n. 22), 108; Bothe, above (n. 141), 33; Byron, above (n. 96), 197.

340 Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 682 (para. 2200).

341 Solf, in Bothe/Partsch/Solf, above (n. 26), 364.

342 Concerning the United States practice in Vietnam see Carnahan, above (n. 241), 866 and Parks, above (n. 11), 154 n. 459; see also Henderson, above (n. 41), 1179-80.

343 See Dinstein, above (n. 52), 169-70; C.J. Markham and M.N. Schmitt, 'Precision Air Warfare and the Law of Armed Conflict' (2013) 43 *IsrYHR* 297-319; S.W. Belt, 'Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas' (2000) 47 *Naval Law Review* 115, at 174. see also, however, C.B. Puckett, 'in the Era of "Smart Weapons", Is a State under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?' (2004) 18 *Emory Int'l. L. Rev.* 645-723, at 717-18, 722-3.

344 See also Dinstein, above (n. 52), 164; M. Bothe, 'Legal Restraints on Targeting: Protection of Civilian Population and the Changing Faces of Modern Conflicts' (2001) 31 *IsrYHR* 35, 45; M.N. Schmitt, 'Targeting in Operational Law', in T.D. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP, 2010), 245-75, at 260.

345 See Keenan, above (n. 77), 36.

346 As to background and legal effects of Article 57, para. 2 lit. a (iii), AP I see Sassòli, above (n. 11), 473-4; Solf, in Bothe/Partsch/Solf, above (n. 26), 364-5; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 683-5 (paras 2204-19); see also Rule 18 *CIHL*.

- 347** See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 685 (para. 2216); Zimmermann, *ibid.*, 995–6 (paras 3477–81); Partsch, in Bothe/Partsch/Solf, above (n. 26), 511–22 [516]; in this context, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia undertook an examination as to a possible criminal responsibility of military leaders concerning the NATO attacks during the Kosovo Air Campaign: ‘Final Report to the Prosecutor’ (2000) 39 *ILM* 1257–83; see also Bothe, above (n. 141), 34.
- 348** See G.S. Prugh, ‘American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions’ (1992) XXXI *RDMilG* 272–3.
- 349** See Sassòli, above (n. 11), 485; Solf, in Bothe/Partsch/Solf, above (n. 26), 368; Kalshoven, above (n. 223), 66.
- 350** As to the interpretation of Article 57, para. 3, AP I see Sassòli, above (n. 11), 485–9, and Solf, in Bothe/Partsch/Solf, above (n. 26), 368–9; Gardam, above (n. 27), 96–8; Rule 21 *CIHL*.
- 351** See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 687 (para. 2227); Sassòli, above (n. 11), 487.
- 352** Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 686 (para. 2220).
- 353** See Solf, in Bothe/Partsch/Solf, above (n. 26), 366; Sassòli, above (n. 11), 474–7; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 686 (para. 2221); Kalshoven/Zegveld, above (n. 22), 108; Dinstein, above (n. 52), 167; Henderson, above (n. 41), 1181–4; Gillard, above (n. 225), 176.
- 354** See Sassòli, above (n. 11), 474–6.
- 355** Solf, in Bothe/Partsch/Solf, above (n. 26), 366–7; Gardam, above (n. 27), 98.
- 356** See Heintschel von Heinegg, above (n. 325), 1009.
- 357** See more in detail Henderson, above (n. 41), 159–61.
- 358** See Roberts, above (n. 24), 160; Solf, in Bothe/Partsch/Solf, above (n. 26), 366.
- 359** See D. Fleck, ‘Military Manuals on the Law of Armed Conflicts’, in M. Bothe, T. Kurzidem, and P. Macalister-Smith (eds) *National Implementation of International Humanitarian Law* (Nijhoff, 1990), 185–92, at 192.
- 360** For ‘Obedience to Orders’ in general, see G.D Solis, *The Law of Armed Conflict* (CUP, 2010), 341–64.
- 361** See Heintschel von Heinegg, above (n. 325), 1012.
- 362** See Dinstein, above (n. 52), 166.
- 363** As to the debate on the concept of ‘defended locality’ see Lauterpacht, above (n. 223), 421; Castrén, above (n. 223), 201; Doswald-Beck, above (n. 20), 158; Sassòli, above (n. 11), 355–9; Fleck, above (n. 135), 54.
- 364** See K. Ipsen, ‘Die “offene Stadt” und die Schutzzonen des Genfer Rechts’, in D. Fleck (ed.), *Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte* (Hanseatischer Gildenverlag, 1973), 149–210, at 152–80; Boothby, above (n. 49), 111–14; Dinstein, above (n. 52), 125–8; J.-M. Henckaerts, ‘Non-Defended Towns’, in F. Lachenmann and R. Wolfrum (eds), *The Law of Armed Conflict and the Use of Force* (OUP, 2017), 809–13; see also the *US Field Manual FM 27–10*, para. 39 b and the *US Naval Manual* (1979), para. 8.5.1.3; Rule 37 *CIHL*.

- 365** As to the history and legal effects of Article 25 HagueReg, *see* Ipsen, above (n. 364), 153–60.
- 366** Concerning the declaration of an undefended locality *see* Ipsen, above (n. 364), 160–6; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 703–4 (paras 2282–6).
- 367** As to background, history, and relevance of Article 59 AP I *see* Solf, in Bothe/Partsch/Solf, above (n. 26), 380–5.
- 368** *See* Junod, in *ICRC Commentary*, above (n. 30), 1449–50 (paras 4766–72, and J.-M. Henckaerts, ‘Non-Defended Towns’, *MPEPIL*, para. 8.
- 369** *See* Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 701–2 (paras 2267–74); Solf, in Bothe/Partsch/Solf, above (n. 26), 383; J.-M. Henckaerts, ‘Non-Defended Towns’, *MPEPIL*, para. 13.
- 370** *See* Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 704 (para. 2284).
- 371** *Ibid.* (paras 2285–6), and J.-M. Henckaerts, ‘Non-Defended Towns’, *MPEPIL*, para. 14.
- 372** Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 705–6 (paras 2289–94).
- 373** Solf, in Bothe/Partsch/Solf, above (n. 26), 382; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 701–2 (para. 2268); Dinstein, above (n. 52), 127.
- 374** Solf, in Bothe/Partsch/Solf, above (n. 26), 382; *see also* *US Naval Manual (1997)*, para. 8.5.1.3.
- 375** *See* Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 702 (paras 2271–2); J.-M. Henckaerts, ‘Non-Defended Towns’, *MPEPIL*, para. 13; Dinstein, above (n. 52), 126–7.
- 376** Solf, in Bothe/Partsch/Solf, above (n. 26), 383–4.
- 377** Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 709–10 (para. 2304); Boothby, above (n. 49), 114–16.
- 378** As to the difference between demilitarized areas in peacetime international law and protected zones under Article 60 AP I *see* Pilloud/Pictet, *ibid.*, 709 (paras 2302–3).
- 379** *Ibid.*, 710–11 (paras 2308–9).
- 380** *See* Solf, in Bothe/Partsch/Solf, above (n. 26), 388.
- 381** Concerning such activities there are possible (or even required) specific agreements: Article 60, para. 2, last sentence; *see* Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 711 (para. 2311); Solf, in Bothe/Partsch/Solf, above (n. 26), 389.
- 382** *See* Pilloud/Pictet, *ibid.*, 710 (paras 2305–6); Rule 36 *CIHL*.
- 383** Solf, in Bothe/Partsch/Solf, above (n. 26), 384–5; Pilloud/Pictet, *ibid.*, 706 (paras 2295–7) and 712 (paras 2315–18); J.-M. Henckaerts, ‘Non-Defended Towns’, *MPEPIL*, para. 16.
- 384** Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 712 (para. 2316).
- 385** *Ibid.* (para. 2317).
- 386** As to the system of safety zones according to Articles 23 GC I, 14 and 15 GC IV *see* *ICRC Commentary to Geneva Convention I* (ICRC, 2016), paras 1884–933, and Pictet, *Commentaire IV*, 129–37, 138–43; T. Desch, ‘Safety Zones’, *MPEPIL*, paras 1–18; K. Landgren, ‘Safety Zones and International Protection: A Dark Grey Area’ (1995) 7 *Int’l. J. of Refugee L.* 19–44; Rule 35 *CIHL*.
- 387** The case is mentioned in the *US Naval Manual (1997)*, para. 8.5.1.5, n. 121.
- 388** *See* Junod, in *ICRC Commentary*, above (n. 30), 1417–36.

- 389** Printed in Schindler/Toman, above (n. 133), 295–7.
- 390** See in detail *ICRC Commentary to Geneva Convention II* (ICRC, 2017), paras 1925–2014.
- 391** See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 652–3 (paras 2083, 2088, 2091); Solf, in Bothe/Partsch/Solf, above (n. 26), 336–7; Boothby, above (n. 49), 109–11.
- 392** See A. Cassese, ‘The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law’ (1984) 3 *UCLA Pacific Basin Law Journal* 91; but see also Rule 54 *CIHL*.
- 393** As to the history of Article 54 AP I see Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 652 (paras 2083–5), and Solf, in Bothe/Partsch/Solf, above (n. 26), 336–40.
- 394** Pilloud/Pictet, *ibid.*, 655 (paras 2102–3); Solf, in Bothe/Partsch/Solf, above (n. 26), 339–40; Verhoeven, above (n. 222), 291.
- 395** Pilloud/Pictet, *ibid.*, 655 (para. 2103); Solf, in Bothe/Partsch/Solf, above (n. 26), 340; Dinstein, above (n. 52), 251–2.
- 396** See Pilloud/Pictet, *ibid.*, 655 (para. 2101).
- 397** Solf, in Bothe/Partsch/Solf, above (n. 26), 339; Verhoeven, above (n. 222), 291.
- 398** These examples are contained in the report of Committee III of the Diplomatic Conference—see Solf *ibid.*, 339; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 656–7 (para. 2110); Dinstein, above (n. 52), 252.
- 399** See H. Sue and D. Wippman, ‘Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions’ (2002) 35 *Cornell Int’l. L.J.* 559–79, at 573.
- 400** See Rule 53 *CIHL*.
- 401** On the background of Article 54, para. 1, see Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 653 (paras 2087–91); Solf, in Bothe/Partsch/Solf, above (n. 26), 336–8; see also, however, Dinstein, above (n. 52), 251–7; Bill, above (n. 295), 148–54; J. Kraska, ‘Siege’, *MPEPIL*, paras 9–10; Schmitt, above (n. 344), 267; W.J. Fenrick, ‘Methods of Land Warfare’, in R. Liivoja and T. McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016), 251–65, at 257–8 (all with critical remarks about the implication to ban completely siege warfare).
- 402** See Solf, *ibid.*, 337, and Y. Dinstein, ‘Siege Warfare and the Starvation of Civilians’, in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of F. Kalshoven* (Nijhoff, 1991), 145–52, at 146–7.
- 403** Solf, *ibid.*, 338; Dinstein, above (n. 52), 152; J. Kraska, ‘Siege’, *MPEPIL*, para. 10.
- 404** See Dinstein, above (n. 52), 147–8; Pictet, *Commentaire I*, 148–51, 192–8; Fenrick, above (n. 401), 258–9.
- 405** Dinstein, above (n. 52), 150.
- 406** See Sandoz, in *ICRC Commentary*, above (n. 30), 816–29; Dinstein, above (n. 52), 259–61; Rule 55 *CIHL*.
- 407** See also Verhoeven, above (n. 222), 290; Dinstein, above (n. 52), 253; A. Schwarz and M. Grigat, ‘Scorched Earth Policy’, *MPEPIL*, para. 15.
- 408** See also Dinstein, above (n. 52) 134–5.

- 409** See the report on the investigation undertaken by the International Civil Aviation Organization of November 1988, printed in (1989) 28 *ILM* 900–43, and the Iranian statement of claim filed in the ICJ of 17 May 1989, printed in (1989) 28 *ILM* 842–6.
- 410** See Lauterpacht, above (n. 223), 542; Castrén, above (n. 223), 126–7; Greenspan, above (n. 226), 397–9; see also Rules 64–70 *HPCR Manual*.
- 411** Concerning the character of Article 56 AP I as a completely novel creation see Cassese, above (n. 392), 94. On the drafting history of the rule see Solf, in Bothe/Partsch/Solf, above (n. 26), 350–3, and Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 667–8 (para. 2145).
- 412** Solf, *ibid.* 350; Pilloud/Pictet, above (n. 30), 668–9 (paras 2146–50); Dinstein, above (n. 52), 227.
- 413** Solf, *ibid.*, 350.
- 414** See Parks, above (n. 11), 168–9; Rule 42 *CIHL*.
- 415** Parks, above (n. 11), 206–9.
- 416** See esp. Parks, *ibid.*, who gives the example of the attack by the US Air Force on the Lang Chi dam in Northern Vietnam in 1972.
- 417** See Doswald-Beck, above (n. 20), 158, but also, of the opposite view, Dinstein, above (n. 52), 228.
- 418** See Dinstein, above (n. 52), 227.
- 419** See Solf, in Bothe/Partsch/Solf, 350–7; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 666–70.
- 420** As to the background of this rule see Solf, *ibid.*, 351–2; Pilloud/Pictet, above (n. 30), 669 (para. 2153).
- 421** See Pilloud/Pictet, above (n. 30), 670 (paras 2155–7).
- 422** See the example given by Parks, above (n. 11), 169.
- 423** See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 671 (para. 2162); Dinstein, above (n. 52), 228–9; Verhoeven, above (n. 222), 294.
- 424** As to the interpretation of this clause see Pilloud/Pictet, above (n. 30), 671 (para. 2162); Solf, in Bothe/Partsch/Solf, above (n. 26), 354–5.
- 425** Solf, *ibid.*, 354; Pilloud/Pictet, above (n. 30), 670–1 (paras 2161, 2164).
- 426** See Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 672 (para. 2165); Solf, in Bothe/Partsch/Solf, above (n. 26), 355.
- 427** See Pilloud/Pictet, above (n. 30), (para. 2166).
- 428** C. Zeileissen, *Der völkerrechtliche Schutz vor militärischen Angriffen auf Kernkraftwerke* (Duncker & Humblot, 1997), 193–9.
- 429** Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 672 (paras 2168–9); Fleck, above (n. 135), 55–66.
- 430** See in detail Zeileissen, above (n. 428), 168–87.
- 431** See on one hand Solf, in Bothe/Partsch/Solf, above (n. 26), 355; on the other hand Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 672 (para. 2165); see also Dinstein, above (n. 52), 228–9.
- 432** Solf, above (n. 26), 355; Pilloud/Pictet, above (n. 30), 672 (para. 2165).
- 433** See Solf, in Bothe/Partsch/Solf, 356; Zeileissen, above (n. 428), 203–6.

- ⁴³⁴ See Solf, above (n. 26), 356; Pilloud/Pictet, in *ICRC Commentary*, above (n. 30), 673–4 (paras 2173–6); a critical position towards this provision is taken by Kalshoven/Zegveld, above (n. 22), 111; see also Dinstein, above (n. 52), 228, and Verhoeven, above (n. 222), 295.
- ⁴³⁵ See Dinstein, above (n. 52), 229.
- ⁴³⁶ Zeileissen, above (n. 428), 212–13.
- ⁴³⁷ Commentary to the HPCR Manual, above (n. 198), 351.
- ⁴³⁸ Ibid., 364.
- ⁴³⁹ Ibid., 362.
- ⁴⁴⁰ Rule 147 HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 35; Y. Dinstein, ‘Air Warfare’, *MPEPIL*, para. 66.
- ⁴⁴¹ Commentary to the HPCR Manual, above (n. 198), 359.
- ⁴⁴² Ibid., 358; see also W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, para. 25.
- ⁴⁴³ See also W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, paras 28–31.
- ⁴⁴⁴ Commentary to the HPCR Manual, above (n. 198), 359.
- ⁴⁴⁵ Rule 151 HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 362–3; see also W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, paras 33–7.
- ⁴⁴⁶ See Commentary to the HPCR Manual, above (n. 198), 363–4.
- ⁴⁴⁷ Rule 154 HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 365–6; see also W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, para. 36.
- ⁴⁴⁸ Rule 156 HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 367–9.
- ⁴⁴⁹ See Y. Dinstein, ‘Air Warfare’, *MPEPIL*, para. 40.
- ⁴⁵⁰ See W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, para. 50.
- ⁴⁵¹ See Dinstein, above (n. 52), 258.
- ⁴⁵² See W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, para. 51.
- ⁴⁵³ Rule 157 (a) HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 369–70.
- ⁴⁵⁴ Rule 157 (b) HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 370.
- ⁴⁵⁵ Rule 158 HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 371; see also W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, para. 51.
- ⁴⁵⁶ See Commentary to the HPCR Manual, above (n. 198), 371–3.
- ⁴⁵⁷ Rule 159 HPCR Manual; see also Commentary to the HPCR Manual, above (n. 198), 373–4.
- ⁴⁵⁸ See W. Heintschel von Heinegg, ‘Blockade’, *MPEPIL*, paras 6–23.
- ⁴⁵⁹ See e.g. Dinstein, above (n. 52), 257–62.
- ⁴⁶⁰ See H.H. Dinniss, *Cyber Warfare and the Laws of War* (CUP, 2012), 11–27.
- ⁴⁶¹ See F. Delerue, *Cyber Operations and International Law* (CUP, 2020), 193–272; see also G.P. Corn, ‘Cyber National Security: Navigating Gray-Zone Challenges in and through Cyberspace’, in C.M. Ford and W.S. Winston (eds), *Complex Battlespaces* (OUP, 2019), 345–428; K. Kittichaisaree, *Public International Law of Cyberspace* (Springer, 2017), 233–60; K.

Kraszewski, 'Classification of Cyber Operations under International Law' (2015) 25 *Finnish Yearbook of International Law* 141–71.

462 See Delerue, above (n. 461), 273–342; see also W.H. Boothby, 'Cyber Capabilities', in W.H. Boothby (ed.), *New Technologies and the Law in War and Peace* (CUP, 2019), 83–135, at 115–22; S. Watts, 'Low-Intensity Cyber Operations and the Principle of Non-Intervention', in J.D. Ohlin (ed.), *Cyberwar* (OUP, 2015), 249–69.

463 See M.N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Prepared by the International Groups of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, 2nd edn (CUP, 2017), 375–91; see also Dinniss, above (n. 460), 117–38.

464 See Dinniss, above (n. 460), 127–9, and M. Roscini, *Cyber Operations and the Use of Force in International Law* (CUP, 2014), 122–5.

465 See Dinniss, above (n. 460), 129–34, and Roscini, above (n. 464), 125–41.

466 See *Tallinn Manual 2.0*, above (n. 463), 383–4.

467 See also M.N. Schmitt, 'Wired Warfare: Computer Network Attack and jus in bello' (2002) 84 (846) *IRRC* 365–99, at 373.

468 See *Tallinn Manual 2.0*, above (n. 463), 415–20; see also Delerue, above (n. 461), 273–342; Dinniss, above (n. 460), 129–34; Kittichaisaree, above (n. 461), 153–8; Roscini, above (n. 464), 178–82; O.K. Hathaway *et al.*, 'The Law of Cyber-Attack' (2012) 100 *California L. Rev.* 817–85, at 822–39.

469 *Tallinn Manual 2.0*, above (n. 463), 415.

470 *Ibid.*

471 *Ibid.*, 416.

472 Not all authors agree with this conclusion (see e.g. Dinstein, above (n. 52), 143), although it has become (at the latest with the two Tallinn Manuals) the dominant position in academic writings and state practice.

473 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), *ICJ Reports* 1996, 226, at 79.

474 See e.g. Dinniss, above (n. 460), 180–4; Roscini, above (n. 464), 173–8.

475 *Tallinn Manual 2.0*, above (n. 463), 422–5.

476 *Ibid.*, 434–45, in particular 437 (as far as 'objects' are concerned); see also M.N. Schmitt, 'The Notion of "Objects" during Cyber Operations' (2015) 48 *Israel Law Review* 81–109.

477 *Tallinn Manual 2.0*, above (n. 463), 433–4.

478 As to the concept of 'critical infrastructure' see D. Gritzalis, M. Theocharidou, and G. Stergiopoulos (eds), *Critical Infrastructure Security and Resilience: Theories, Methods, Tools and Technologies* (Springer, 2019); B.E. Biringer, E.D. Vugrin, and D.E. Warren, *Critical Infrastructure System Security and Resiliency* (Taylor & Francis, 2013); M. Dunn Cavelty and K.S. Kristensen (eds), *Securing 'the Homeland': Critical Infrastructure, Risk, and (In)Security* (Routledge, 2008).

479 See e.g. Dinniss, above (n. 460), 193–5.

480 For the latter case, see *Tallinn Manual 2.0*, above (n. 463), 445–7.

481 See Dinniss, above (n. 460), 190–3.

- 482** See also Roscini, above (n. 464), 187–91.
- 483** See *Tallinn Manual 2.0*, above (n. 463), 470–6; Roscini, above (n. 464), 219–29; Dinniss, above (n. 460), 205–9.
- 484** See also C. Droege, ‘Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians’ (2012) 94 *IRRC* 533–78, at 566.
- 485** See Roscini, above (n. 464), 224–7.
- 486** *Ibid.*, 227–9.
- 487** See Dinniss, above (n. 460), 239–43, but also *Tallinn Manual 2.0*, above (n. 463), 529–31.
- 488** See *Tallinn Manual 2.0*, above (n. 463), 531–3, and Dinniss, above (n. 460), 243–4.
- 489** Rule 114 *Tallinn Manual 2.0*; see also the Commentary, *ibid.*, 476–8; Roscini, above (n. 464), 232–7.
- 490** See *Tallinn Manual 2.0*, above (n. 463), 478–83, and Dinniss, above (n. 460), 211–17.
- 491** See *Tallinn Manual 2.0*, above (n. 463), 483–4.
- 492** See Roscini, above (n. 464), 248–53.
- 493** See *Tallinn Manual 2.0*, above (n. 463), 553–4; Roscini, above (n. 464), 246–8; G.K. Walker, ‘Information Warfare and Neutrality’ (2000) 33 *Vanderbilt Journal of Transnational Law* 1079–202, at 1182–4; E.T. Jensen, ‘Sovereignty and Neutrality in Cyber Conflict’ (2012) 35 *Fordham International Law Journal* 815–41, at 826–30.
- 494** See *Tallinn Manual 2.0*, above (n. 463), 555–6.
- 495** See Roscini, above (n. 464), 261–3.
- 496** See *Tallinn Manual 2.0*, above (n. 463), 556–8.
- 497** See Roscini, above (n. 464), 259–60.
- 498** *Ibid.*, 260.
- 499** See J.T.G. Kelsey, ‘Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare’ (2008) 106 *Michigan L. Rev.* 1427–52, at 1433.
- 500** See W. Heintschel von Heinegg, ‘Territorial Sovereignty and Neutrality in Cyberspace’ (2013) 89 *International Law Studies* 122–56, at 17–138; see also Roscini, above (n. 464), 260.
- 501** Roscini, above (n. 464), 260; see also *Tallinn Manual 2.0*, above (n. 463), 559.
- 502** Roscini, above (n. 464), 263.
- 503** See *Tallinn Manual 2.0*, above (n. 463), 558–60; see also Hathaway *et al.*, above (n. 468), 855–6.
- 504** See *Tallinn Manual 2.0*, above (n. 463), 560–1; Roscini, above (n. 464), 273–6.
- 505** See K. Ipsen, ‘Ruses of War’, *MPEPIL*, paras 1–2; Dinstein, above (n. 52), 274–5; Fenrick, above (n. 401), 259.
- 506** See D. Fleck, ‘Ruses of War and Prohibition of Perfidy’ (1974) XIII *RDMilG* 269–314, 298.
- 507** See de Preux, in *ICRC Commentary*, above (n. 30), 443–4 (para. 1521); Solf, in Bothe/Partsch/Solf, above (n. 26), 207; Ipsen, above (n. 505), para. 3; Dinstein, above (n. 52), 275.

- 508** See also A.J. Schaap, 'Cyber Warfare Operations: Development and Use under International Law' (2009) 64 *Air Force L. Rev.* 121-74, at 152.
- 509** Solf, in Bothe/Partsch/Solf, above (n. 26), 202-3; Green, above (n. 46), 46-147; Rule 57 *CIHL*.
- 510** Concerning Articles 24 and 23 HagueReg see Ipsen, above (n. 505), para. 1; de Preux, in *ICRC Commentary* above (n. 30), 440 (para. 1513); Fleck, above (n. 506), 276-85.
- 511** See the classical explanation given in H. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II, above (n. 223), 430: 'Stratagems must be carefully distinguished from perfidy, since the former are allowed, whereas the latter is prohibited. Halleck correctly formulates the distinction by laying down the principle that, whenever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith.'
- 512** As to the drafting history of the prohibition of perfidy in Article 37, para. 1, AP I see in particular H.-P. Furrer, *Perfidie in der Geschichte und im heutigen Kriegsvölkerrecht* (Juris Druck + Verlag 1988), 62-80.
- 513** Furrer, above (n. 512), 81-2; Kalshoven/Zegveld, above (n. 22), 94-5; V. Rusinova, 'Perfidy', *MPEPIL*, paras 4-7; Solf, in Bothe/Partsch/Solf, above (n. 26), 204-5; de Preux, in *ICRC Commentary*, above (n. 30), 435-6 (para. 1500); Dinstein, above (n. 52), 264-9; Fenrick, above (n. 401), 260-2.
- 514** Fleck, above (n. 506), 285.
- 515** See de Preux, in *ICRC Commentary*, above (n. 30), 434 (para. 1498); Solf, in Bothe/Partsch/Solf, above (n. 26), 202.
- 516** Solf, *ibid.*, 205; Ipsen, III *EPIL*, 979; Furrer, 85-6; de Preux, in *ICRC Commentary*, above (n. 30), 436-7 (paras 1502-3).
- 517** As to the interpretation of these examples see de Preux, in *ICRC Commentary*, above (n. 30), 439 (paras 1508-11); Solf, in Bothe/Partsch/Solf, above (n. 26), 206; Rusinova, above (n. 513), para. 7.
- 518** See de Preux, in *ICRC Commentary*, above (n. 30), 438 (paras 1506-7); see also Fleck, above (n. 506), 278, as well as Dinstein, above (n. 52), 264-5.
- 519** So argues convincingly de Preux, in *ICRC Commentary*, above (n. 30), 438 (para. 1506).
- 520** See Solf, in Bothe/Partsch/Solf, above (n. 26), 205-6; see also W.H. Parks, 'Special Forces Wear of Non-Standard Uniform' (2003) 4 *Chicago J. of Int'l. L.* 493-560.
- 521** See Rusinova, above (n. 513), paras 8-9; Solf, in Bothe/Partsch/Solf, above (n. 26), 203-4; Rule 65 *CIHL*.
- 522** See Rusinova, above (n. 513), paras 11-13; Solf, in Bothe/Partsch/Solf, above (n. 26), 203-4; Fenrick, above (n. 401), 260-2.
- 523** See Kalshoven/Zegveld, above (n. 22), 94.
- 524** See Furrer, above (n. 512), 82-3; Kalshoven/Zegveld, above (n. 22), 94.
- 525** See Rusinova, above (n. 513), para. 12.
- 526** See Rules 58-62 *CIHL*.
- 527** See de Preux, in *ICRC Commentary*, above (n. 30), 437 (para. 1504), and 457-8 (paras 1551-6).

- 528** See the detailed description of the rule by de Preux, in *ICRC Commentary*, above (n. 30), 446–60; see also Solf, in Bothe/Partsch/Solf, above (n. 26), 208–11; and Dinstein, above (n. 52), 269–74; as to the misuse of protective emblems by Iraqi forces during the Operation ‘Iraqi Freedom’, see Schmitt, above (n. 83), 31.
- 529** See Solf, in Bothe/Partsch/Solf, above (n. 26), 213, and in great detail de Preux, in *ICRC Commentary*, above (n. 30), 462–5; see also the *US Naval Manual (1997)*, para. 12.3.3.
- 530** As to Article 39 para. 2 AP I, see de Preux, in *ICRC Commentary*, above (n. 30), 465–9 (paras 1572–9); Solf, in Bothe/Partsch/Solf, above (n. 26), 214; Fenrick, above (n. 401), 260.
- 531** Fleck, above (n. 506), 276–85; de Preux, above (n. 30), 466 (para. 1573); the contrary position is taken, however, by the *US Naval Manual (1997)*, para. 12.5.3.
- 532** Concerning the much debated interpretation of Article 23 lit. f HagueReg see Fleck, above (n. 506), 279 *et seq.*; Solf, in Bothe/Partsch/Solf, above (n. 26), 212–13.
- 533** See Solf, above (n. 26), 206 n. 23 and de Preux, in *ICRC Commentary*, above (n. 30), 467 n. 26. A US occupation tribunal came to the opposite conclusion in 1947 in the *Skorzeny* case: see Fleck, above (n. 506), 279 (with critical comments on that judgment *ibid.*, 280 *et seq.*); the position taken in the *Skorzeny* judgment still seems to be the official US position today, see *US Naval Manual (1997)*, para. 12.5.3.
- 534** As to the discussion of this provision see Solf, above (n. 26), 214–15 and de Preux, above (n. 30), 469–71 (paras 1580–1, 1583).
- 535** K. Chainoglou, ‘Psychological Warfare’, *MPEPIL*, paras 5–6; Greenspan, above (n. 226), 322–3.
- 536** See K. Chainoglou, ‘Psychological Warfare’, *MPEPIL*, para. 6.
- 537** *Ibid.*
- 538** See Castrén, above (n. 223), 208–10; Greenspan, above (n. 226), 323; Solf, in Bothe/Partsch/Solf, above (n. 26), 206–7; de Preux, in *ICRC Commentary*, above (n. 30), 443–44 (para. 1521); K. Chainoglou, ‘Psychological Warfare’, *MPEPIL*, para. 2.
- 539** See K. Chainoglou, ‘Psychological Warfare’, *MPEPIL*, para. 3; see also A.H. Paddock ‘Legitimizing Army Psychological Operations’ (2010) 56 *Joint Force Quarterly* 89–93; S. Narula ‘Psychological operations (PSYOPs): A conceptual overview’ (2004) 28 *Strategic Analysis* 177–92; G.L. Whitley, *PSYOP Operations in the 21st Century* (US Army War College, 2000); C.A. Williamson, ‘Psychological Operations in the Information Age’, in A.D. Campen and D.H. Dearth (eds), *Cyberwar 2.0: Myths, Mysteries and Reality* (AFCEA Fairfax, 1998), 179–89.
- 540** The question of the legality of incitement to rebel against one’s government was still disputed at the turn of the twentieth century, see J. Kunz, *Kriegsrecht und Neutralitätsrecht*, (Springer, 1935), 82; in the literature published after 1945, however, the question is generally considered to be solved; see Lauterpacht, above (n. 223), 426–8; Castrén, above (n. 223), 209–10; de Preux, in *ICRC Commentary*, above (n. 30), 444 (para. 1521).
- 541** Greenspan, above (n. 226), 324; see also W.K. Timmermann ‘The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend, in International Law Towards Criminalization of Hate Propaganda’ (2005) 18 *Leiden JIL* 257–82.
- 542** M.G. Kearney, ‘Propaganda for War, Prohibition’, *MPEPIL*, paras 1–19.
- 543** As to the institution of reprisals in general see Kalshoven, *Belligerent Reprisals*, above (n. 231), 11–33, R. Bierzanek, ‘Reprisals as a Means of Enforcing the Laws of Warfare: The

Old and the New Law', in Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Ed. Scientifica, 1979), 232–57, at 232–40; M. Ruffert, 'Reprisals', *MPEPIL*, paras 1–17.

544 Kalshoven, *Belligerent Reprisals*, above (n. 231), 33; Dinstein, above (n. 52), 289–90.

545 Kalshoven, above (n. 231), 42.

546 See Bierzanek, above (n. 543), 237–40; Kalshoven, *Belligerent Reprisals*, above (n. 231), 367–70; Tsagourias/Morrison, above (n. 26), 321–4; Boothby/Heintschel von Heinegg, above (n. 197), 422–4; Dinstein, above (n. 52), 289–96; S. Dary, 'Reciprocity and Reprisals', in R. Liivoja and T. McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016), 492–505.

547 Bierzanek, above (n. 543), 241–3; Kalshoven, *Belligerent Reprisals*, above (n. 231), 5–10.

548 Kalshoven, above (n. 9), 263–77; Kalshoven, above (n. 232), 45–52.

549 See Dinstein, above (n. 52), 291.

550 See Bierzanek, above (n. 543), 241–3; Dinstein, above (n. 52), 290–1; Darcy, above (n. 546), 498–500; Rule 145 *CIHL*.

551 See Kalshoven, *Belligerent Reprisals*, above (n. 231), 45–6.

552 See the detailed explanations given by Kalshoven, *Belligerent Reprisals*, above (n. 231), 263–71, see also Dinstein, above (n. 52), 292–4.

553 Kalshoven, above (n. 231), 272–7.

554 Kalshoven, above (n. 231), 49–52; Bierzanek, above (n. 543), 251–5; Darcy, above (n. 546), 500–1.

555 See Bierzanek, above (n. 543), 249–50; Kalshoven, above (n. 231), 474–9.

556 F. Kalshoven, 'Arms, Armaments and International Law' (1985 II) 191 *RdC* 183–341, at 286; Kalshoven, *Belligerent Reprisals*, above (n. 231), 353–61.

557 As critical voices see e.g. C. Greenwood, 'The Twilight of the Law of Belligerent Reprisals' (1989) 20 *NYIL* 35–69; F.J. Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949' (1988) 37 *ICLQ* 818–43; Dinstein, above (n. 52), 294–5; as a (convincing) response see Kalshoven, above (n. 232), 53–63; the US expressly rejects the bans imposed by Articles 51, para. 6, and 52, para. 1, AP I, see *US Naval Manual* (1997), para. 6.2.3.

558 See Kalshoven, *Belligerent Reprisals* above (n. 231), 348–53.

559 ICTY, *Prosecutor v Kupreškić et al.* (Case IT-95-16), Trial Chamber, Judgment of 14 January 2000; *Prosecutor v Martić* (Case IT-95-11-R61), Trial Chamber, Dec. of 8 March 1996, *ILR* 108, 46–7, paras 15–7; ICTY, *Prosecutor v Kupreškić et. al.* (Case IT-95-16-T), 14 January 2000, 207–9, paras 527–31; for a critical position see also Greenwood, above (n. 104), 342–8; T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239–78, at 250; M. Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (CUP, 2009), 55; Dinstein, above (n. 52), 295; see also *CIHL* Vol. I, 520–3.

Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified

SASSÒLI, Marco

Abstract

This contribution argues that autonomous weapon systems may have advantages from the perspective of ensuring better respect for international humanitarian law (IHL), if they are one day capable of perceiving the information necessary to comply with IHL, then to apply IHL to that information, and if it can be ensured that they will not do what humans who created them did not want them to do. In view of the author, targeting decisions do not imply subjective value judgements, a machine would be unable to make. However, to respect IHL by using such autonomous systems, agreement must be found on how to interpret certain IHL rules discussed in this contribution properly when a machine executes autonomously attacks according to parameters established by human beings. In particular, the accountability of those who produce and program such systems must be clarified; the system must be constantly updated with information on the military advantage to enable it to determine what is a military objective and to apply the proportionality principle; parameters must be established for comparing the performance of autonomous weapon systems [...]

Reference

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Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified

Marco Sassóli*

I. INTRODUCTION

Autonomous weapons are subject to great controversy. They have been defined as weapon systems¹ “that can learn or adapt [their] functioning in response to changing circumstances in the environment in which [they are] deployed.”² Such systems, once developed, should, through sensors that give them situational awareness, be able to identify both legitimate targets and hopefully civilians/civilian objects that may potentially suffer incidental

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1. Hin-Yan Liu, *Categorization and Legality of Autonomous and Remote Weapons Systems*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 627, 635–36 (2012).

2. International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict: Report Prepared for the 31st International Conference of the Red Cross and Red Crescent* 39 (2011), available at <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>.

effects of attack. Identification would then trigger corresponding action through processors or artificial intelligence that would “decide . . . how to respond . . . and effectors that carry out those ‘decisions.’”³ Ideally, autonomous weapons would select and engage targets without ongoing human intervention in an open environment under circumstances which are unstructured and dynamic. At present, no weapon system possesses such capabilities. The absence or presence of human intervention is, however, a relative distinction, as is the distinction between humans “in,” “on” or “out of the loop,” which is therefore not very helpful.⁴ Despite the system’s autonomy, human beings will inevitably be involved, either in overseeing the operation of the weapon, or at least in producing and programming the weapon systems. There is agreement that, although these systems do not yet exist, they could be developed within twenty years. Many request that they be purely, simply and preventively banned, specifically because their use would not be consistent with international humanitarian law (IHL).⁵ The 117 States parties to the UN Conventional Weapons Convention⁶ have agreed to hold this year a four-day intergovernmental meeting to explore questions related to lethal autonomous weapon systems with a view to potentially drafting a Protocol VI to the Convention.⁷ Even the United States, which is among the most technologically advanced States in this field, currently requires that such weapon systems “be designed to allow commanders and operators to exercise appropriate levels of judgment over the use of

3. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report*, ¶ 39, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013) (by Christof Heyns) [hereinafter Heyns].

4. PETER W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY* 124–27 (2009).

5. HUMAN RIGHTS WATCH, *LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS* (2012), available at <http://www.hrw.org/reports/2012/11/19/losing-humanity>; European Parliament Resolution on the Use of Armed Drones ¶ H.2(d) (2014/2567(RSP)) (Feb. 25, 2014); Peter Asaro, *On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 687 (2012).

6. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137.

7. Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, Switz., Nov. 14–15, 2013, *Final Report*, ¶¶ 18, 32, U.N. Doc. CCW.MSP/2013/10 (Dec. 16, 2013), available at <http://daccess-ods.un.org/TMP/4361535.01272202.html>.

force,”⁸ which means that it is not admissible for producers to program machines that make final decisions as to targets against which force shall be used.

It is perhaps because I have been confronted in actual armed conflicts with so many violations committed by human beings, but inevitably never with atrocities by robots⁹ (although admittedly, they did not exist in the armed conflicts I witnessed), that my first feeling is not skepticism, but hope for better respect of IHL.¹⁰ Only human beings can be inhuman and only human beings can deliberately choose not to comply with the rules they were instructed to follow. To me, it seems more reasonable to expect (and to ensure) a person who devises and constructs an autonomous weapon in a peaceful workplace to comply with IHL than a soldier on the battlefield or in a hostile environment. A robot cannot hate, cannot fear, cannot be hungry or tired and has no survival instinct.¹¹ “Robots do not rape.”¹² They can sense more information simultaneously and process it faster than a human being.¹³ As the weapons actually delivering kinetic force become increasingly quicker and more complex, it may be that humans become simply too overwhelmed by information and the decisions that must be taken to direct them.¹⁴ Human beings often kill others to avoid being killed themselves. The robot can delay the use of force until the last, most appropriate moment, when it has been established that the target and the attack are legitimate. Certainly, there may be technical failures, but all those who drive cars and every traffic policeman know that

8. U.S. Department of Defense, DoD Directive 3000.09, *Autonomy in Weapon Systems* ¶ 3(a) (2012).

9. The terms “atrocities” or “violations,” like many other terms which describe human behavior used in this article, are admittedly not appropriate for a machine.”

10. For a detailed, powerful, but not always entirely convincing plea, see RONALD C. ARKIN, *GOVERNING LETHAL BEHAVIOR IN AUTONOMOUS ROBOTS* (2009). For a positive assessment and call for regulation, see Kenneth Anderson & Matthew Waxman, *Law and Ethics for Autonomous Weapons Systems: Why a Ban Won't Work and How the Laws of War Can*, HOOVER INSTITUTE (Apr. 9, 2013), <http://www.hoover.org/publications/monographs/144241>.

11. Ronald C. Arkin, *Ethical Robots in Warfare*, GEORGIA INSTITUTE OF TECHNOLOGY (Jan. 20, 2009), <http://www.cc.gatech.edu/ai/robot-lab/online-publications/arkin-rev.pdf>; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Interim Report*, ¶ 20 (by Philip Alston), *transmitted by Note of the Secretary-General*, U.N. Doc. A/65/321 (Aug. 23, 2010) [hereinafter Alston].

12. Heyns, *supra* note 3, ¶ 54.

13. SINGER, *supra* note 4, at 127.

14. Arkin, *supra* note 11; SINGER, *supra* note 4, at 128.

most accidents are not due to technical, but human, failures (although drivers, unlike soldiers, are usually not seeking to kill or injure).

As soon as robots have artificial intelligence, one must obviously also make sure that such intelligence is not used in the same way as some human intelligence is used, i.e., to circumvent the rules or to decide—from a purely utilitarian perspective—that non-respect of instructions that conform to IHL may make it easier to achieve the main objective of overcoming the enemy. In addition, States developing and producing autonomous weapon systems must—and will in their own interest—take measures to prevent the enemy from tampering with such systems and directing them against the producing State and its civilians.¹⁵

It is obviously not up to me as a lawyer to speculate on whether autonomous weapons that (a) do not share the same disadvantages of human beings fighting wars and (b) are able to function in compliance with the principles and rules on distinction, proportionality and precautions as well as human beings can be developed. I will nevertheless first highlight this technical question which is, in my view, decisive, and one to which I have no answer. It is a question to which a definitive answer must be supplied before such weapon systems may be used (Part II). Next I will address some preliminary issues which either go beyond IHL or are raised by autonomous weapon systems just as they are for other means of warfare (Part III). The principal portion of the article will then be devoted to the specific problems autonomous weapon systems may raise under IHL and whether they may be able to comply—or provide even greater compliance—with the core IHL targeting principles of distinction, proportionality and precautions in attack (Part IV).

II. THE CRUCIAL TECHNICAL ISSUE

As explained above, I consider that weapon systems which do not base the use of force upon an ad hoc human decision offer the advantage of a greater possibility of respecting IHL. However, this presupposes that it is technically possible to make them as accurate as an average soldier in terms of distinction, proportionality and precautions. The main question remains

15. Michael N. Schmitt & Jeffrey S. Thurnher, “Out of the Loop”: *Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARVARD NATIONAL SECURITY JOURNAL 231, 242–43 (2013).

a technical one:¹⁶ is it, or will it one day be, possible to develop a robot able to sense information and thereafter to act such that it distinguishes—in the same manner as a human being—between legitimate targets, i.e., military objectives, combatants, civilians directly participating in hostilities on the one hand, and those protected by IHL from attacks, i.e., civilians and civilian objects, specially protected objects such as cultural property, objects indispensable for the survival of the civilian population, medical units, etc., on the other?

Many experts consider that development of robots with that capability is impossible given the current technology. I have seen no official pronouncement indicating that it is possible, nor am I aware of anyone suggesting that autonomous weapon systems may be used even if such development turns out to be impossible. Governments with the possible ability to produce these kinds of weapons indicate that genuinely autonomous deployment is not currently envisaged.¹⁷ William Boothby, the most renowned weapons law expert I know, and who has a strong military background, envisages their autonomy, without human supervision, only in very limited and predetermined environments.¹⁸ It is claimed that no one envisages developing any system “without restrictive engagement parameters, such as limiting the area of operation or nature of the target” (even among lawful targets).¹⁹ It is also true that wars are full of “friction” and unexpected situations.²⁰ All this makes me skeptical of whether it will be possible to create a machine with the necessary contextual intelligence to adapt to the great variety of situations which may arise in hostilities. Nevertheless, I cannot predict possible future developments.

That autonomous weapon systems will operate in dynamic and unstructured circumstances does not mean that those circumstances are unforeseeable. An important question I am unable to answer concerns whether it is possible to program these weapons to adapt a rule to circumstances not foreseen by the programmer, or whether they can only deal

16. See also Jakob Kellenberger, President, International Committee of the Red Cross, Keynote Address at the 34th Round Table on Current Issues on International Humanitarian Law: International Humanitarian Law and New Weapons Technologies (Sept. 9, 2011), in 94 INTERNATIONAL REVIEW OF THE RED CROSS 812 (2012).

17. Heyns, *supra* note 3, ¶ 29. SINGER, *supra* note 4, at 128, is skeptical. See, e.g., DOD Directive 3000.09, *supra* note 8, ¶ 4(a).

18. WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 282–86 (2009).

19. Schmitt & Thurnher, *supra* note 15, at 241.

20. Asaro, *supra* note 5, at 691–92.

with circumstances foreseen by the programmer. If the latter is true, they would have to be programmed not to act in other circumstances and/or to notify a human being that he/she must make the necessary decision.²¹ However, while it may be impossible to program autonomous weapons for all circumstances which may appear in an armed conflict, might it be possible for them to “learn”?²²

It will indeed be a challenge to translate some aspects of IHL—for example, the International Committee of the Red Cross’s (ICRC) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*²³ or various States’ interpretations of the concept of direct participation in hostilities—into a computer program. This is, however, necessary. It is not simply an issue of distinguishing between combatants and civilians in a Cold War-like situation, but in the real contexts of today’s conflicts. In these conflicts, civilians directly participate in hostilities, rendering application of the principle of distinction difficult for average soldiers, to say nothing of autonomous weapons.

Although I don’t know what is technically feasible, if I take a position in this article it is primarily because I consider that many objections of principle against autonomous weapon systems are either questionable from an IHL point of view, or misunderstand IHL and warfare.

III. PRELIMINARY ISSUES

A. Questions Going Beyond International Humanitarian Law

Many objections against autonomous weapons are situated outside IHL. Some are moral. To me, it seems obvious that robots can neither “behave” “morally” nor “immorally.”²⁴ While I would never claim that robots can be

21. DOD Directive 3000.09, *supra* note 8, ¶ 4(a)(1)(b).

22. Alan Backstrom & Ian Henderson, *New Capabilities in Warfare: an Overview of Contemporary Technological Developments and the Associated Legal and Engineering Issues in Article 36 Weapons Reviews*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 483, 493–94 (2012).

23. See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION UNDER INTERNATIONAL HUMANITARIAN LAW (2009), available at <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>, reprinted in 90 INTERNATIONAL REVIEW OF THE RED CROSS 991 (2008) [hereinafter INTERPRETIVE GUIDANCE].

24. Noel E. Sharkey, *The Evitability of Autonomous Robot Warfare*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 787, 793 (2012).

more humane than humans,²⁵ I am convinced that only human beings can be inhuman. Moral judgments are reserved for the human beings creating, directing and using weapons.

1. May Only a Human Being Decide to Kill Another Human Being?

Many find the very idea that a robot may kill a human being to be horrible. One philosopher even claims there is an implicit requirement in IHL for a human decision to kill a person.²⁶ Others wonder whether it is “inherently wrong to let autonomous machines decide who and when to kill.”²⁷ However, if this were true, all mines would be prohibited, as well as all weapons such as missiles that can be directed at a military objective and combatants, but which do not allow the operator to know who exactly will be killed. Moreover, today computers already open the bomb bays of bomber aircraft or decide which targets to engage in the case of the Aegis naval defense system when used in the automatic mode.²⁸ If the moral requirement of human involvement simply means that a human being must decide what categories of people can be targeted, autonomous weapons, as I understand them, comply because they are programmed by human beings. Sometimes this requirement of human involvement is justified by referring to the requirement under Article I of the Hague Regulations²⁹ that a combatant must be commanded by a person.³⁰ I am, however, not aware of anyone suggesting that robots would instruct and supervise humans.

In addition, to be lawful³¹ autonomous weapons must still be subject to general instructions given to them by humans. The weapon system would simply apply those instructions autonomously to a given situation.

Beyond that, is it not as horrible to imagine one human being deliberately killing another in the absence of an immediate threat from the latter as it is to imagine a machine doing the same? But this horror is war where killing in the absence of a threat is lawful.

25. *Id.* at 793. Here I agree with Sharkey.

26. Asaro, *supra* note 5, at 696–703.

27. Heyns, *supra* note 3, ¶ 92.

28. SINGER, *supra* note 4, at 124.

29. Regulations Concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227.

30. Heyns, *supra* note 3, ¶ 89.

31. *See infra* Part IV.B.4 for the caveat that weapons that could autonomously choose to “go rogue” would be inherently unlawful.

It would be a misconception of existing IHL to claim that the decision to kill someone in an armed conflict must be taken after a value judgment (which a machine is obviously unable to make and must be made by a human being) is made about that person. Whether a person may be targeted in an armed conflict is dependent on their status (combatant/civilian) and/or the objective impression resulting from their conduct (direct participation in hostilities) and not whether that person is innocent or guilty of a crime. What counts, for example, is, not whether a person wants to surrender, but whether he or she indicates their willingness to surrender and the attacker becomes aware of this indication.

2. Do They Make it Easier to Go to War?

Some fear that autonomous weapon systems make it easier for a country to go to war and to use force beyond its borders because it no longer risks the lives of its own soldiers, but only those of civilians on the opposing side.³² This risk is partly mitigated by the fact that it is highly improbable that one side would fight a war only with robots.³³ Additionally, conflict has moved beyond fighting between the knights or samurai of the Middle Ages; today many weapons and delivery system technologies permit cross-border attacks. This risk must be countered by *ius ad bellum* and disarmament.

Importantly, the very decision to engage in an armed conflict must be reserved for humans.³⁴ It is true that the motivation for a State to comply with *ius ad bellum* could be lowered if it could expect that only combatants and civilians suffering incidental effects of the enemy will be affected. However, nothing in the law would hinder the opposing side from attacking the human beings—combatants and civilians—who deploy the robots.

Rules of IHL have long been criticized for attempting to “humanize” war, making it more conceivable and more acceptable. War must be horrible—and horrible for both sides—to deter States and human beings from resort to it. If this line of argument worked in reality, war would have disappeared; unfortunately it has not. Beyond that, it may well be that the possibility of secrecy in the use of autonomous weapons and the resulting difficulties of attribution make the implementation of State responsibility and of international criminal responsibility for an act of aggression more

32. HUMAN RIGHTS WATCH, *supra* note 5, at 4, 39; Heyns, *supra* note 3, ¶ 58; Alston, *supra* note 11, ¶ 44; Asaro, *supra* note 5, at 692.

33. Schmitt & Thurnher, *supra* note 15, at 241.

34. Asaro, *supra* note 5, at 692.

difficult. On the other hand, the fact that computer systems register everything—or could be programmed to do so—would make an inquiry leading to accountability easier.³⁵

3. Unfairness?

A related concern is that the use of autonomous weapons against an enemy not possessing them itself would be unfair, *inter alia*, because it would not involve any risk for the personnel of the attacker, while the defender would have to fight with actual human beings who would be killed. This would include not only combatants, but also civilians as incidental victims of a lawful attack even if IHL is respected. This is, however, a misconception of existing IHL. For a long time war has not been fair in this sense.³⁶ The idea that two knights fight against each other and all civilians stand by wondering who will win belongs to the past. No one suggests that a party may not use its air force or navy if the enemy has no air force or navy, or has no weapons to combat aircraft. As for the unfairness, contemporary reality shows that the technologically weaker side may prevail over the stronger belligerent and impose its political will over the latter. Some claim that the weaker side tries to compensate for its technological deficit by neglecting some of the rules according to which it should fight.³⁷ It is difficult, however, to argue that under IHL this risk prevents a party from using technology not available to the enemy.

4. The Risk of Proliferation

As with all weapons, there is obviously a risk of proliferation, and those developing autonomous weapons are well advised to take that into account. This risk has an aspect specific to autonomous weapons; a risk which is the downside to one of their main advantages. I mentioned above that autonomous weapon systems will not violate IHL if they were programmed to

35. Heyns, *supra* note 3, ¶ 52.

36. Schmitt & Thurnher, *supra* note 15, at 232.

37. Wolff Heintschel von Heinegg, *Asymmetric Warfare*, ¶ 3, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2012), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1809?rskey=phOWN9&result=1&prd=OPIL>; Michael N. Schmitt, *War, Technology and International Humanitarian Law* 33, 46–47, HPCR OCCASIONAL PAPER SERIES (Summer 2005), <http://www.hpcrresearch.org/publications/occasional-paper-series> (then OPS Issue 4 PDF hyperlink).

respect it. They could even be programmed to refuse orders that violate the law. The downside of this absolute “discipline” is that if autonomous weapons fall into the hands of a ruthless leader able to program them, they will never abandon his or her cause as soldiers might because the programmed robots will be unable to come to the conclusion that it is unjust, even when there are repeated and widespread violations of IHL.³⁸ This may indicate that a legal framework on the production, stockpiling and transfer of autonomous weapons may be necessary. It may be possible to make sure that they are automatically deactivated if they fall into the wrong hands or receive instructions contrary to IHL.

5. The Risk of a “Gameboy Mentality” of the Producer?

Some argue that those who build an autonomous weapon and program it (imagine, for example, a programmer in New Jersey who is the last human being in the loop able to make targeting-relevant decisions, but who has no knowledge of where and in what circumstances the weapon is to be used) are psychologically less committed, feel a greater distance from and less responsibility for use of the weapon system, and will therefore more easily adopt a “computer game mentality” than a soldier who is actually on the battlefield among the human beings he or she will kill.³⁹ As far as I know, there is no scientific evidence to support this (or the opposing) opinion. In my experience during the conflicts in the former Yugoslavia, I met people who killed other people face-to-face, and who displayed no more inhibition than my son would in a computer game. I am not so sure that the producers and programmers in New Jersey would see the world simply as a computer game if they were adequately trained, supervised and subject to appropriate accountability systems. In a peacetime activity in which human life is at stake, an increasing number of processes are automated and no one claims that those who devise such processes comport themselves as though they were playing a computer game. No one requires that those who produce medical robots work in a hospital and surgery room environment. Similarly, those who produce aircraft parts know that people’s lives are at risk if they make mistakes, even if they see neither the passengers nor the aircraft.

38. HUMAN RIGHTS WATCH, *supra* note 5, at 4, 38.

39. Heyns, *supra* note 3, ¶ 57; Alston, *supra* note 11, ¶ 44.

6. Lack of Emotions

A related objection is that robots lack “human emotions and the capacity for compassion.”⁴⁰ This is true. In response, however, the human beings programming the robots hopefully have compassion and there is no reason why they should have less of it than a soldier in midst of the battle. Second, I have noticed among those who actually fight armed conflicts at least as many negative emotions as the positive emotions this argument envisages.⁴¹ Third, IHL does not seek to promote “love,” “mercy,”⁴² or “human empathy”⁴³ (a robot is indeed unable to have such feelings), but respect based upon objective criteria. A soldier may not kill a civilian even if there are good reasons to hate him or her, while he or she may kill a combatant even if that combatant is very nice. If “human empathy” was decisive in war, few combatants would be killed, war would finally disappear and only cases of peacetime self-defense and defense of others would persist.

B. *International Humanitarian Law Issues which are not Specific to Autonomous Weapons*

When robots are used certain fundamental questions of IHL may become even more important than would be the case if other means of warfare were employed. However, the answer to those questions remains controversial. The first question is always what is an armed conflict? We know that there is no unique definition. The questions are rather: what is an international armed conflict and what is a non-international armed conflict? What is the threshold of violence necessary to make violence between a State and a non-State actor (or between non-State actors) an armed conflict?

Those questions are not specific to robots and even when autonomous weapons are used, the answers must be given—and will perforce be given—by human beings. The answers simply become even more important when autonomous weapons are used. Indeed, outside an armed conflict, lethal robots could only be used if they were able to arrest a person, which is, as opposed to the use of lethal force, always the solution preferred by human rights law. The deployment of autonomous weapons produced for

40. HUMAN RIGHTS WATCH, *supra* note 5, at 4, 38.

41. *See also* Schmitt & Thurnher, *supra* note 15, at 249.

42. HUMAN RIGHTS WATCH, *supra* note 5, at 34.

43. *Id.* at 37.

armed conflicts will be unlawful outside armed conflicts. Soldiers, on the other hand, can be more easily sent, for example, to ensure security at a football match. One might obviously imagine programming an autonomous weapon equally capable of distinguishing between hostilities and law enforcement operations and applying human rights law to the latter. However, this will be an extremely difficult task. Under human rights law, for example, alternatives to the use of lethal force must be evaluated and the risk the target presents to human life must be assessed.

Many other questions must find an answer before an autonomous weapon can be programmed. What is the relationship between international human rights law and IHL? What is the geographical scope of application of IHL, that is, the scope of the battlefield? Autonomous weapons raise this latter question more acutely, but, legally, the answer must be the same as for an aerial bombardment. May a belligerent attack a target which would be a legitimate target under IHL at a location far distant from the actual fighting, restrained only by the rules of IHL? In such circumstances, does IHL apply at all, but, if so, does international human rights law prevail as the *lex specialis*? Whether drones, missiles or autonomous weapons are used, the answer must be the same, and however intelligent an autonomous weapon may be, I cannot imagine that it can provide the answer itself. The geographical scope of the field of operation of an autonomous weapon and the circumstances under which it may use force according to its IHL program must be defined by human beings.

IV. SPECIFIC IHL ISSUES

A. How to Compare the Performance of Robots with that of Human Beings?

1. For a Given Attack

There is widespread agreement that the ability to use autonomous weapons in compliance with IHL should not be evaluated against a hypothetical ideal, but instead the comparison should be to human beings.⁴⁴ This is particularly true for the question of whether a precautionary measure is feasible, as only feasible precautions must be taken under IHL.⁴⁵ What counts, at a

44. Heyns, *supra* note 3, ¶ 63; Backstrom & Henderson, *supra* note 22, at 492; Schmitt & Thurnher, *supra* note 15, at 247.

45. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 57, June 8, 1977,

minimum, is obviously not whether the precaution is feasible for the robot, but whether it would be feasible for a State employing human soldiers, i.e., whether it would be feasible for a person. If it is technically not feasible to respect certain requirements of IHL with autonomous weapons, this is not a sufficient reason for abandoning those requirements. The use of an autonomous weapon in such cases is simply unlawful. Human Rights Watch is correct in warning that once autonomous weapons are developed their mere availability and military capabilities should never be considered to mean that there is a “military necessity” to use them, even if they are not as able as a human being to comply with IHL in a given attack.⁴⁶ This is simply not the meaning of the principle of military necessity as a prohibitive rule in IHL.⁴⁷ Conversely, if autonomous systems are better than human beings, such as in taking precautions, and a State and a commander have them in their arsenal and don’t need to reserve their use for other militarily more important tasks or tasks involving higher risks for civilians, they must use them.

The bold statement that autonomous weapons may only be used if and where they are as good as human beings in complying with IHL is, however, subject to two nuances. First, artillery and missiles are not—in the same manner as a sniper—able to cancel or suspend an attack at the last moment based on changing circumstances.⁴⁸ Nevertheless, no one claims that such weapons are inherently unlawful. What counts is that either the system itself through technical means, or the human beings using it, are able to acquire information indicating that the attack must be interrupted and either the machine or its human operators are able to react to such information.

1125 U.N.T.S. 3 [hereinafter Protocol I]. For its customary character in both international and non-international armed conflicts, see 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 15–21 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

46. HUMAN RIGHTS WATCH, *supra* note 5, at 35.

47. GABRIELLA VENTURINI, NECESSITÀ E PROPORZIONALITÀ NELL’USO DELLA FORZA MILITARE IN DIRITTO INTERNAZIONALE 127 (1988); William V. O’Brien, *The Meaning of Military Necessity in International Law*, in 1 WORLD POLITY: A YEARBOOK OF STUDIES IN INTERNATIONAL LAW AND ORGANIZATION 109, 138–63 (1957); 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 135 (1968); Robin Geiss, *Military Necessity: A Fundamental “Principle” Fallen into Oblivion*, in 2 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 554 (Hélène Ruiz Fabri, Rüdiger Wolfrum & Jana Gogolin eds., 2008); Robert Kolb, *La Nécessité Militaire dans le Droit des Conflits Armés—Essai de Clarification Conceptuelle*, in SOCIÉTÉ FRANÇAISE DE DROIT INTERNATIONAL, LA NÉCESSITÉ EN DROIT INTERNATIONAL: COLLOQUE DE GRENOBLE 151 (2007).

48. BOOTHBY, *supra* note 18, at 285.

Second, it may well be that the average soldier is better able to respect certain aspects of IHL than an autonomous weapon, while such a weapon is better in other respects. The question then arises whether a consolidated assessment of advantages and disadvantages is admissible or whether an autonomous weapon must be as good as an average soldier with respect to every rule of IHL. In my view, the choice of means is always based upon a consolidated assessment, but such assessment must be made for every attack. It is not sufficient that when compared with alternatives in most, normal or ideal circumstances a weapon minimizes incidental civilian losses. An autonomous weapon would have to make such a determination in relation to the specific circumstances of each attack, and indicate, if necessary, that it cannot execute that attack, but that the attack must, if it is to be carried out, be executed by a human being.

2. When the Autonomous Weapon is Reviewed

In addition, an *in abstracto* assessment of all possible uses is equally necessary to determine whether the autonomous weapon concerned may be produced in the first place. Article 36 of Protocol Additional I prescribes:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Several States, including the United States which is not a party to Protocol I, have implemented this requirement through specific procedures.⁴⁹ Because it is implicit in its substantive obligations—“[t]he faithful and responsible application [of which] would require a State to ensure that the new weapons, means and methods of warfare it develops or acquires will not violate these obligations,”⁵⁰—the ICRC considers that this obligation binds all States. The establishment of an international body monitoring

49. For commentaries, see INTERNATIONAL COMMITTEE OF THE RED CROSS, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE: MEASURES TO IMPLEMENT ARTICLE 36 OF ADDITIONAL PROTOCOL I OF 1977 (2006) [hereafter ICRC GUIDE]; BOOTHBY, *supra* note 18, at 340–52.

50. ICRC GUIDE, *supra* note 49, at 4.

weapons development would obviously be highly desirable,⁵¹ but secrecy concerns are a barrier.⁵²

It is obvious that before autonomous weapons may be deployed, such an assessment must be made.⁵³ It may be that “reviews should take place at the stage of the conception/design of the weapon, and thereafter at the stages of its technological development (development of prototypes and testing), and in any case before entering into the production contract.”⁵⁴ However, an evaluation is only possible once the technical capabilities of a weapon are known, which is not the case at present.⁵⁵ Admittedly, there is a risk that once the technology has been developed at great expense vested interests will make it nearly impossible politically to conclude that the result is unlawful. The solution may be to accompany the development process with constant reviews. In addition, one has to make sure that as much effort is invested in developing the weapon’s capacity to respect IHL as in its lethal capacity, including the development of safeguards against technical and communication errors.⁵⁶ Fortunately, to be accurate and to sense and process as much information as possible is both a military and a humanitarian imperative. As for the actual testing, it is obviously only useful if it can be excluded that autonomous weapons will act unpredictably in unforeseen circumstances,⁵⁷ but here again my technical assumption is that machines act according to algorithms and, therefore, according to a plan established by humans, even if that plan instructs them to adapt in a certain way to certain circumstances.

51. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 88 (2d ed., 2010).

52. BOOTHBY, *supra* note 18, at 343.

53. See Isabelle Daoust, Robin Coupland & Rikke Ishoey, *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 INTERNATIONAL REVIEW OF THE RED CROSS 345 (2002); Justin McClelland, *The Review of Weapons in Accordance with Article 36 of Additional Protocol I*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 397 (2003). Specifically for autonomous weapons, see Backstrom & Henderson, *supra* note 22, 483–514; Schmitt & Thurnher, *supra* note 15, at 271–76.

54. ICRC GUIDE, *supra* note 49, at 23.

55. As submitted by HUMAN RIGHTS WATCH, *supra* note 5, at 22.

56. Alston, *supra* note 11, ¶ 40.

57. Asaro, *supra* note 5, at 692–93.

B. *Machines are not Bound by International Humanitarian Law: Problems of Attribution and of Accountability*

1. Only Humans are Responsible

Only human beings are subject to legal rules. In the case of autonomous weapons, IHL is addressed to those human beings who devise, produce and program them, as well as those who decide upon their use.⁵⁸ I reject the idea that IHL is inadequate to regulate autonomous weapons because they would be situated somewhere between weapon systems and combatants, and further reject the suggestion that a new category with new rules should be created to regulate them.⁵⁹ The difference between a weapon system and a human being is not quantitative but qualitative; the two are not situated on a sliding scale, but on different levels—subjects and objects. A combatant is a human being, only he or she is an addressee of legal obligations. However far we go into the future and no matter how artificial intelligence will work, there will always be a human being at the starting point.⁶⁰ In my understanding, an autonomous weapon system will always operate within the limits of its software; software designed by humans.⁶¹ It is the human being who will decide whether a machine will be created and who will create it. Even if one day robots construct other robots, there will still be the need for a human being to develop the first robot and instruct it as to how to construct new robots. This human being is bound by the law; the machine is not bound by the law.

Human Rights Watch writes that it would be unclear who would be held accountable for unlawful actions a robot commits: “Options include the military commander that deployed it, the programmer, the manufacturer, and the robot itself, but all are unsatisfactory. It would be difficult and arguably unfair to hold the first three actors liable and the actor that actually committed the crime—the robot—would not be punishable.”⁶² I agree with the last part of this statement and I find some suggestions that robots

58. BOOTHBY, *supra* note 18, at 283.

59. Liu, *supra* note 1, at 629.

60. Schmitt & Thurnher, *supra* note 15, at 235, 277.

61. DEFENSE SCIENCE BOARD, U.S. DEPARTMENT OF DEFENSE, TASK FORCE REPORT: THE ROLE OF AUTONOMY IN DOD SYSTEMS 1, 21 (July 2012).

62. HUMAN RIGHTS WATCH, *supra* note 5, at 4. *See also id.* at 40; Asaro, *supra* note 5, at 693; Sharkey, *supra* note 24, at 790–91; Liu, *supra* note 1, at 632.

could be scrapped or disabled as a kind of punishment absurd.⁶³ As for the first options, it is as fair to hold a commander of a robot accountable as it would be to hold accountable a commander who instructs a pilot to bomb a target he describes as a military headquarters, but which turns out to be a kindergarten. It is obvious that a commander deploying autonomous weapons must understand how they function, just as for any other means and method of warfare. In my view, the responsibility of such a commander is not a case of—nor is it analogous to—command responsibility,⁶⁴ but a case of direct responsibility, just as that of a soldier firing a mortar believing that it can land only on the targeted tank, but which will kill civilians he knows are following the tank. This is a question of the *mens rea*, intent and recklessness with which criminal lawyers are familiar, just as it is for a surgeon using a medical robot or, for that matter, prescribing a medicine. Based on their Protocol I, Article 36 assessment, States deploying robots must give military commanders and operators clear instructions as to when and under what circumstances the robots may be actually be used. The operator need not understand the complex programming of the robot,⁶⁵ but must understand the result, that is, what the robot is able and unable to do.⁶⁶ As for the manufacturer and the programmer, domestic criminal laws often hold criminally responsible those who deliberately, recklessly or negligently construct defective buildings or machines that lead to the loss of human life.⁶⁷ I do not think that the possession of autonomous decision-making capacity breaks the causal chain allowing attribution and responsibility,⁶⁸ because I assume that it is always humans who define how this au-

63. See HUMAN RIGHTS WATCH, *supra* note 5, at 45 (referring to some who seriously suggest this).

64. As argued by HUMAN RIGHTS WATCH, *id.* at 42–43; Heyns, *supra* note 3, ¶ 78.

65. As claimed by Heyns, *supra* note 3, ¶ 78.

66. DoD Directive 3000.09, *supra* note 8, ¶ 4(a)(3)(a); Schmitt & Thurnher, *supra* note 15, at 267.

67. See, e.g., Article 229 of the Swiss Criminal Code criminalizing conduct, either deliberate or negligent, by “[a]ny person engaged in the management or execution of construction or demolition work who wilfully disregards the accepted rules of construction.” SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [Criminal Code] Dec. 21, 1937, SR 757 (1938) (Switz.), available at <http://www.admin.ch/opc/en/classified-compilation/19370083/index.html>. Schmitt and Thurnher consider the suggestion that the producer could be criminally responsible “spurious.” They do not explain who would be criminally responsible if the commander and operator trust that the system was correctly programmed, when, in fact, it had not been so programmed. Schmitt & Thurnher, *supra* note 15, at 278–79.

68. Liu, *supra* note 1, at 650.

tonomy will function. This implies the need for drafting specific standards of due diligence for both manufacturers and commanders.

The further question of whether a robot could distinguish lawful from unlawful orders⁶⁹ is equivalent to that of whether they are able to apply rules to a complex situation without human intervention. If they cannot, they may not be used. If they can, it will be easy to program them not to follow unlawful orders.⁷⁰ None of the reasons for which soldiers often obey unlawful orders apply to them.

2. The Problem of the Temporal Field of Application

The discussion above may raise problems concerning the temporal field of application of IHL, as many of those last human interventions—including development of an IHL compliant program instructing the autonomous weapon when to use lethal force—may occur before an armed conflict exists. In terms of criminal accountability, war crimes can only be committed in armed conflicts, thus raising the question of whether pre-conflict conduct is governed by IHL. I would suggest that IHL applies to all conduct of a State aimed at having effects during an armed conflict. But, in any event, a State using a weapon which was programmed in peacetime not to comply with IHL has not taken all feasible precautionary measures in wartime to avoid incidental civilian losses.

For criminal responsibility, the issue is trickier. It might be possible to treat the person who intentionally programs a system, which is used in good faith by an operator during an armed conflict, not to comply with IHL to be the indirect perpetrator of the war crime committed during the conflict. Another option would be to consider the programmer as a guarantor who is obliged to intervene in wartime to avoid the commission of violations of IHL, thus committing a war crime by omission if he or she does not intervene. Obviously, if the operator is conscious of the defect of the weapon, the programmer would be an accessory to the war crime.⁷¹

69. Heyns, *supra* note 3, ¶ 55.

70. Alston, *supra* note 11, ¶ 34.

71. I am grateful to my colleague, Ursula Cassani, Professor of Criminal Law at the University of Geneva, for these suggested solutions.

3. Technology Increases Transparency

On the other hand, technology possessed by autonomous weapons enables more precise reconstructions of events for criminal inquiries, although under IHL, in contrast to human rights law, there is no “mandatory ex-post facto review of all footage in cases of lethal use, regardless of the status of the individual killed.”⁷² If an inquiry is necessary under the obligation to search for persons alleged to have committed war crimes,⁷³ an electronic record will facilitate accountability.⁷⁴ This presupposes that producers must program robots to record such information.

4. May Robots “Go Rogue”?

A further technical question arising in this context is whether there is a risk of an autonomous weapons “going rogue.” Might a weapon one day have the technical ability, either of its own “will” or as a result of system imperfections, to override its programs and instructions and start “deciding” in a truly autonomous manner to violate IHL? A philosopher quoted by Human Rights Watch writes, “[T]he possibility that an autonomous system will make choices other than those predicted and encouraged by its programmers is inherent in the claim that it is autonomous.”⁷⁵ I understand “autonomy,” however, as including equally autonomous decisions within a framework the robot is unable to override. If my understanding is correct, it would not be unfair to hold the developer of the weapon responsible for such a design flaw. The risk that the robot “goes rogue” must be avoided in the way the robot is devised. If this is not possible, such weapons must be outlawed. The entire implementation and accountability system of international law—as with all law—is exclusively addressed to humans. Ac-

72. Heyns, *supra* note 3, ¶ 81.

73. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

74. Alston, *supra* note 11, ¶ 30 (while in paragraph 36 he writes mysteriously that unmanned systems do not archive information).

75. Robert Sparrow, *Killer Robots*, 24 JOURNAL OF APPLIED PHILOSOPHY 62, 70 (2007), quoted in HUMAN RIGHTS WATCH, *supra* note 5, at 43. *Contra* Schmitt & Thurnher, *supra* note 15, at 242.

countability mechanisms and sanctions directly addressed to machines are absurd, because machines are not capable of moral choice.

C. Are Distinction and Proportionality Evaluations Based upon Rational Decisions or Subjective Judgments?

1. Difficulties in Discrimination and Distinction

Concerning discrimination and distinction, advanced technology still remains to be developed before a robot can distinguish as well as a human being between legitimate and unlawful targets. The problem is not only the technological inadequacy of sensors, but also of translating IHL into a computer language.⁷⁶ Human beings may make a lot of mistakes; even more mistakes than a machine would have technical failures. Nevertheless, there are many elements that make a human being understand what is/is not a legitimate target, and those factors must be reproduced in a computer program. A robot must be able to sense all the necessary information in order to distinguish between targets in the same manner as a person. A “civilian with a large piece of metal in his hands” must obviously be distinguished from “a combatant with a rifle in plain clothes.”⁷⁷ It may be particularly difficult to automate the indicators that convince a human being a certain person belongs to a category (combatants; possibly members of an organized armed group who assume a continuous combat function) or is engaged in conduct (direct participation in hostilities) which makes them a legitimate target.⁷⁸ Pending revolutionary technological innovations, this problem may be solved by allowing a weapon system to target autonomously only those categories of objects that are, without question, targetable.⁷⁹ It is suggested, therefore, that autonomous weapon systems incapable of distinguishing meaningfully may be used in an environment where no civilians could be endangered.⁸⁰ However, this solution does not fully work when persons are targets, as anyone may surrender making it unlawful (and militarily unnecessary) to target them.

76. Heyns, *supra* note 3, ¶ 67.

77. *Id.*, ¶ 74.

78. Sharkey, *supra* note 24, at 788–89, and Liu, *supra* note 1, at 641, argue that this is impossible.

79. Backstrom & Henderson, *supra* note 22, at 492.

80. Schmitt & Thurnher, *supra* note 15, at 246.

As for objects, the definition of a military objective depends on its “effective contribution to military action” and the “definite military advantage” the attack offers “in the circumstances ruling at the time.”⁸¹ These requirements imply a need to be aware of plans and the overall development of a military operation. An autonomous weapon system could therefore not be allowed to remain fully autonomous over time without receiving a constant update on those elements, which determine whether an object may be targeted.

It will be equally difficult to formalize factors which convince a human being that he or she must cancel or suspend an attack because the target is not lawful. For a machine to autonomously make such decisions may be even more difficult because the enemy could feign those indicators which cause the robot determine that it is confronted with a legitimate target. As for the reverse situation, that is, the enemy artificially fulfills the indicators which make a robot calculate that it may not attack under IHL, the fascinating question arises as to whether a machine can be “led to believe” something, or whether it is possible to “invite the confidence” of a machine—two elements of the prohibited act of perfidy.⁸²

Another issue of distinction is that an autonomous weapon must be able to recognize when a legitimate human target surrenders or is wounded and abstaining from any act of hostility.⁸³ Beyond that, distinction has, in any case, become a very difficult task in counterinsurgency warfare for both machines and human beings. I simply do not see any reason of principle why a machine could never become better at fulfilling this task than a human being. Admittedly, however, as long as the necessary technology does not exist, human beings must be involved in the process.⁸⁴

2. Difficulties in Determining who Directly Participates in Hostilities

It is unfortunately still controversial as to exactly what constitutes direct participation in hostilities. The ICRC’s *Interpretive Guidance* has suggested an understanding which, as mentioned previously, will be difficult to translate into instructions for a machine. The rule suggested by some critics of the *Interpretive Guidance*, that is, to make any member of an armed group tar-

81. See Protocol I, *supra* note 45, art. 52(2).

82. *Id.*, art. 37; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 45, at 223.

83. Heyns, *supra* note 3, ¶ 67; BOOTHBY, *supra* note 18, at 286.

84. BOOTHBY, *supra* note 18, at 233.

getable,⁸⁵ will be equally difficult to translate because neither a machine nor a human being can determine whether an unknown person is a member of an organization. It is, however, certainly not necessary “to interpret intentions and emotions” in making that determination,⁸⁶ which would be an unrealistic criterion for both robots and soldiers when confronted with an enemy who is not in their control. In any case, if a robot has to be programmed, it cannot be instructed that “it all depends” or to “use reasonable judgment,” or, in other words, to be programmed that the appropriate action depends on the given situation without clarifying what action should be undertaken in which situation. In writing a computer program on the factors on which the targeting decision depends and how those factors can be determined, clarity will be required.

The definition of direct participation in hostilities raises another problem in connection with autonomous weapons. According to the *Interpretive Guidance*, the direct causation of harm, which is one of the requirements for an act to constitute direct participation in hostilities, “should be understood as meaning that the harm in question must be brought about in one causal step.”⁸⁷ Obviously only human steps can count (because the concept of direct participation defines who and not what may be targeted). Therefore, if autonomous weapons are used, the last causal human step leading to the harm caused may be geographically and temporally removed from the effect. The human being performing this step must be considered as directly participating in hostilities. In addition, the *Interpretive Guidance* correctly recalls:

The required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations. For example, attacks carried out by unmanned aerial vehicles may simultaneously involve a number of persons While all of these persons are integral to that operation and directly participate in hostilities, only a few of them carry out activities that, in isolation, could be said to directly cause the required threshold of harm. The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. More precisely, where a specific act does not

85. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5, 24 (2010). For a discussion of the criticism of the *Interpretive Guidance* in this particular regard, see *id.* at 14–24.

86. As Heyns, *supra* note 3, ¶ 68, suggests.

87. INTERPRETIVE GUIDANCE, *supra* note 23, at 54.

on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.⁸⁸

This interpretation must probably be even wider in cases involving the use of autonomous weapons than in cases, such as the one provided by the ICRC in this example, where human-controlled unmanned aerial vehicles are used.⁸⁹ In addition, while direct participation in hostilities does not, in my view, constitute a violation of IHL, IHL inherently requires that States only use combatants to directly participate in hostilities.⁹⁰ This implies that States must entrust to members of their armed forces the last human intervention in the determination of respect or non-respect for the principles of distinction, proportionality and precaution. By requiring this determination to be made by soldiers, it should facilitate training, supervision and accountability.

3. Difficulties in Applying the Principle of Military Necessity

As for the evaluation of military necessity, both soldiers and those who program autonomous weapons have to deal with the controversial issue of whether or not this principle involves an obligation to capture—rather than kill—legitimate targets.⁹¹ For the same reasons discussed below with regard to the proportionality evaluation, I am not convinced that a human being is always better at making this decision, and that a robot is inherently incapable of “determin[ing] whether an intruder it shot once was merely knocked to the ground by the blast, faking an injury, slightly wounded but able to be detained with quick action, or wounded seriously enough to no longer pose a threat.”⁹²

88. *Id.* at 55.

89. *See also* BOOTHBY, *supra* note 18, at 287–88.

90. For a detailed discussion, see LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR, PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 92–107 (2013).

91. On this controversy, see Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 819 (2013); Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, 24 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 855; Ryan Goodman, *The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt*, 24 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 863.

92. HUMAN RIGHTS WATCH, *supra* note 5, at 35.

4. Difficulties in Translating the Proportionality Principle into a Computer Program

The need to translate the proportionality principle into a computer program for autonomous weapons may present an opportunity to improve objectivity. This principle, which is codified in Article 51(5)(b) of Protocol I, prohibits attacks, even if directed at a military objective, if they “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.” Despite the qualities the rule ascribes to military advantage, it is very difficult to conceptualize. Comparing military advantage anticipated against expected civilian losses is a process riddled with inevitably subjective value judgments, especially if there is not an absolute certainty that the advantage gained outweighs the effects on the civilian population, but, instead, the judgment is less certain. It might, however, be possible to identify, with the help of both military and humanitarian experts, indicators and criteria to evaluate proportionality, and to make the implied judgment slightly more objective. So far, such suggestions have been rejected by military lawyers who insisted that evaluations on the matter are dependent on the circumstances of particular situations and the good faith of military commanders.⁹³ A machine, however, needs clear criteria and a formula to calculate proportionality. The need to program autonomous weapons to respect proportionality (assuming in the first place that they are technically capable of acquiring, through sensors, the information necessary to apply the principle) may have the advantage of obliging States to agree on how exactly proportionality must be calculated and also on which parameters influence this calculation.

In my view, the greatest difficulty an autonomous weapon system will have in applying the proportionality principle is not linked to the evaluation of the risks for civilians and civilian objects, but to the evaluation of the military advantage anticipated.⁹⁴ I could imagine a robot gathering the necessary information to evaluate risks to civilians and even to proceed to the necessary evaluation if objective formulas are adopted. However, the “con-

93. Schmitt and Thurnher so state, although they then somewhat mysteriously claim that autonomous systems are not in principle unable to make such an evaluation. Schmitt & Thurnher, *supra* note 15, at 256, 257.

94. *See id.* at 255–57.

crete and direct military advantage anticipated”⁹⁵ from an attack on a legitimate target constantly changes according to the plans of the commander and the development of military operations on both sides. Except where no, or clearly negligible, effects upon civilians can be anticipated, a machine, even if perfectly programmed, could, therefore, not be left to apply the proportionality principle unless constantly updated about military operations and plans. This is in my view the most serious IHL argument against the even theoretical possibility of deploying weapons that remain fully autonomous over considerable periods of time.

5. Must Targeting Decisions be Subjective?

Everything discussed thus far implies that there are considerable challenges for developers of autonomous weapons, and I am not sure they will be ever able to overcome them. Critics object for reasons of principle, however, that should those challenges be overcome, autonomous weapons would still violate IHL because “[e]ven if the development of fully autonomous weapons with humanlike cognition became feasible, they would lack certain human qualities, such as emotion, compassion, and the ability to understand humans.”⁹⁶ Their main objection to the theoretical possibility that a robot could distinguish between targets and make proportionality evaluations in a more objective and reliable way than a human being is that those rules involve subjective judgments,⁹⁷ which can indeed only be made by human beings. I would agree that a machine could never evaluate whether a witness in a trial is reliable. The question is simply whether targeting decisions are subjective. Many individuals in the military apparently agree that such decisions are subjective when they reject—the discussion on autonomous weapons aside—very detailed rules on proportionality, precautions and what constitutes direct participation in hostilities. I agree that “justice cannot be autonomous.”⁹⁸ To target a person is, however, definitely not to render justice or more precisely, it is not a determination that the person deserves the death penalty, but involves exclusively a categorization of the

95. Protocol I, *supra* note 45, art. 51(5)(b).

96. HUMAN RIGHTS WATCH, *supra* note 5, at 29; Heyns, *supra* note 3, ¶ 55.

97. HUMAN RIGHTS WATCH, *supra* note 5, at 4; Asaro, *supra* note 5, at 696–700; Sharkey, *supra* note 24, at 789–90; Heyns, *supra* note 3, ¶¶ 70–74 (more nuanced). Astonishingly, even Schmitt and Thurnher, who fail to explain how a machine could make subjective judgments, merely argue that the subjective decision remains that of the human being involved. Schmitt & Thurnher, *supra* note 15, at 256, 265–68.

98. Asaro, *supra* note 5, at 700.

person (as a combatant) or their conduct (direct participation in hostilities) without any determination of fault or culpability.

Human Rights Watch gives the following example: “Distinguishing between a fearful civilian and a threatening enemy combatant requires a soldier to understand the intentions behind a human’s actions, something a robot could not do.”⁹⁹ I agree only with the last part of the sentence, while the remainder misconstrues IHL.¹⁰⁰ Even a human being engaged in hostilities will never know, and is not required to inquire into, the intent of another human being, but instead will be receptive only to objective indications of the danger a person represents.¹⁰¹ In the example, no one would criticize a soldier who fired upon a civilian who points, out of fear, a weapon at him or her.

A second example given by Human Rights Watch raises more serious questions. “[A] frightened mother may run after her two children and yell at them to stop playing with toy guns near a soldier.” Human Rights Watch is certain that “[a] human soldier could identify with the mother’s fear and the children’s game and thus recognize their intentions.”¹⁰² First, I am not so sure that in some of today’s fighting environments, where there are child soldiers, fanaticized mothers, and differences in language and culture between soldiers and local populations, a human soldier would always be able to easily identify what was happening in such a situation. Second, what the soldier must determine is not the intent of the children (becoming a kind of child psychologist), but the objective risk of harm to him, his comrades and his mission, based upon objective indicators. Even if the mother was inciting the children to hate and the children were crying out in hate and subjectively willing to kill the soldier, the latter could not fire if it was apparent that the pistols were toy guns. Conversely, if the children simply wanted to play, but fired live ammunition as part of their game, the soldier could use force. Third, the example nevertheless shows how difficult devising an autonomous weapon capable of replacing a soldier in all circumstances will be.

99. HUMAN RIGHTS WATCH, *supra* note 5, at 4; Heyns, *supra* note 3, ¶ 55.

100. It is not surprising that Human Rights Watch references writings by a philosopher and a computer scientist, not those of a lawyer, to support this proposition. HUMAN RIGHTS WATCH, *supra* note 5, at 31.

101. International Committee of the Red Cross, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 37, 42, Geneva, Switz., Feb. 5–6, 2008 (May 9, 2008), available at <http://www.icrc.org/eng/assets/files/other/2008-05-report-dph-2008-icrc.pdf>.

102. HUMAN RIGHTS WATCH, *supra* note 5, at 31.

It is true that “common sense,” meaning the ability to make a sound practical evaluation of social situations, is based upon human experience. It would be particularly difficult to create a machine to reproduce this,¹⁰³ but herein could lay an opportunity to create “objective common sense” based, not upon the life history of one individual, but of several persons—ideally of mankind. I do not consider that autonomous weapons would only be lawful if they could demonstrate omniscience, but only if they can, on average, do a better job than an average soldier.

As for the proportionality rule, several authors and military manuals indicate that its application involves a subjective determination.¹⁰⁴ The question is, however, whether this is simply a description of the unfortunate reality, while recognizing that the determination should ideally be as objective as possible, or whether this is a normative proposition that the determination should be subjective. I admit that States have not yet been able to quantify how the risk of losing one civilian life compares with the potential of gaining a certain military advantage, nor what relation between the risk and the advantage would be excessive. I think, however, that both for human operators and for autonomous weapons it would be desirable if a formula for such a calculation, together with indicators of the elements that should/should not be taken into account, could be agreed upon.

Obviously, the determination must be made on a case-by-case basis (and modeling and determining indicators for the infinite variety of possible situations will be a perhaps insurmountable difficulty for producers of genuinely autonomous weapons¹⁰⁵), but I do not see why it should be “subjective.”¹⁰⁶ According to one definition, subjective means

relating to the way a person experiences things in his or her own mind; based on feelings or opinions rather than facts; . . . a characteristic of or belonging to reality as perceived rather than as independent of mind; relating to or being experience or knowledge as conditioned by personal mental characteristics or states; peculiar to a particular individual; modified or affected by personal views, experience or background . . . ; arising from conditions within the brain or sense organs and not directly caused by external stimuli ¹⁰⁷

103. SINGER, *supra* note 4, at 131; Sharkey, *supra* note 24, at 789.

104. HUMAN RIGHTS WATCH, *supra* note 5, at 32; Heyns, *supra* note 3, ¶ 70.

105. Alston, *supra* note 11, ¶ 39; Sharkey, *supra* note 24, at 789–90.

106. HUMAN RIGHTS WATCH, *supra* note 5, at 32; Asaro, *supra* note 5, at 701.

107. *Subjective*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/subjective> (last visited Apr. 16, 2014).

But why should a certain civilian be better protected under the law from incidental effects arising from an attack by one soldier than by another soldier? Why should the soldier's youth, education, values, religion or ethics matter at all? Should not the only consideration be the military advantage to be gained and the incidental effect upon civilians?

When the ICRC *Commentary* states that a commander must use "common sense and good faith,"¹⁰⁸ this does not, in my view, mean that the decision must be subjective. Taking the wide latitude of possible common sense evaluations into account, I would clearly prefer more precise criteria upon which to base decisions. I would not exclude robots from making such evaluations simply because they would do so in a necessarily objective way. Similarly, in my view, the International Criminal Court for the former Yugoslavia (ICTY) did not require that the determination of proportionality be subjective when it held: "In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."¹⁰⁹ This is due to the fact that it tries individual human beings and not, as Human Rights Watch argues, because a proportionality evaluation requires "psychological processes in human judgment."¹¹⁰ To the contrary, the ICTY formula attempts to liberate the evaluation from the purely subjective judgment of the attacker (which must nevertheless be taken into account when assessing his or her *mens rea*).

D. Autonomous Weapons make Additional Precautions Possible

Precautions in attack, in particular those listed in Article 57 of Protocol I, must be taken only if they are feasible. Obviously, whether a certain precautionary measure is feasible has to be measured against the alternatives available to those who plan and decide upon an attack or who execute it,

108. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 182 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). See also Heyns, *supra* note 3, ¶ 72 (who uses the same terms).

109. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 58 (Int'l Crim. Trib. for the former Yugoslavia Dec. 5, 2003).

110. HUMAN RIGHTS WATCH, *supra* note 5, at 33.

and not against the possibility for a machine to take a certain measure. Conversely, however, an autonomous weapon could be a means to render certain precautions, which would not be available to a soldier, feasible.¹¹¹ Because the human life of the pilot or weapons operator is not at risk, using autonomous weapons may result in the ability to take additional precautions. “Robots can thus act ‘conservatively’ and ‘can shoot second.’ Moreover, powerful sensors and processing powers . . . can potentially lift the fog of war for human soldiers . . . thus save lives.”¹¹² Obviously, this advantage is reduced if the enemy is prepared to defend against robot attacks. Those who produce robots will then program them to shoot first to avoid being destroyed by anti-robot weapons. We are then back to the classical situation in warfare.

Intelligent weapons have an additional advantage. The feasibility of precautions evolves through experience. When precautions taken in the past proved unsuccessful, that may imply the need to learn lessons (and belligerents have, in my view, an obligation to foresee pertinent procedures) to avoid such incidents in the future. If artificial intelligence can be created, it is essential to make sure that weapons with such intelligence can be recalled and reprogrammed, and that human beings monitor the development of that intelligence in order to quickly take advantage of lessons learned.

A legal issue arising is that important precautions, such as the obligations to verify the nature of the target and the lawfulness of the attack, to choose means and methods avoiding or minimizing incidental effects on civilians and to respect the proportionality principle, are addressed by Article 57(2)(a) of Protocol I only to “those who plan or decide upon an attack.” Some wonder whether this means that a human being must plan and decide to conduct the attack.¹¹³ As discussed above, in my view, all rules of IHL are addressed only to human beings. This does not, however, preclude human planners and decision makers from being temporally and geographically removed from the attack, as long as they define the parameters according to which the robot attacks, make sure that it complies with them and has the necessary information to apply such parameters.

A major problem in terms of precautions is the obligation to cancel or suspend an attack

111. Kellenberger, *supra* note 16, at 813.

112. Heyns, *supra* note 3, ¶ 69. See also Alston, *supra* note 11, ¶ 30.

113. BOOTHBY, *supra* note 18, at 233.

if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹¹⁴

Does this mean because an autonomous weapon is used and no human perceives the change in circumstances that the rule cannot, therefore, be violated?¹¹⁵ In my view, the State's obligation to ensure that commanders do everything feasible to verify the lawfulness of targets implies that weapon systems must be designed to allow such verification—either through the system itself or by a human. Even those who favor lethal autonomous weapons do not seem confident that such weapons could be intelligent enough for it to become apparent to them that an attack is unlawful. They therefore suggest that there should be “some version of a human override.”¹¹⁶ This may, however, raise the problem that machines process information so quickly based upon such a vast store of information that a human will be unable to really comprehend, evaluate and, if necessary, interrupt the machine's operation.¹¹⁷ In addition, humans will have a tendency to trust the computer and hesitate to override it, as the example of *USS Vincennes* shooting down Iran Air Flight 655 demonstrated. Finally, communications between the human who is supposed to conduct the override and the machine may be disrupted or manipulated by the enemy.¹¹⁸ It is my understanding, logically, if autonomous weapons are able to distinguish in the first place, they should be equally able to sense changes in their situational context and to cancel an attack if the given information indicates it is unlawful. If they are not able to distinguish in the first place, it would be inconsistent with IHL to deploy them autonomously.

For attacks involving autonomous weapons, as for any other attack, greater transparency about the precautionary measures taken and those dis-

114. Protocol I, *supra* note 45, Art. 57(2)(b).

115. As rhetorically asked by BOOTHBY, *supra* note 18, at 285.

116. Jeffrey S. Thurnher, *No One at the Controls: Legal Implications of Fully Autonomous Targeting*, 67 JOINT FORCES QUARTERLY, 4th Qtr. 2012, at 83.

117. Heyns, *supra* note 3, ¶ 41; Alston, *supra* note 11, ¶ 41; BOOTHBY, *supra* note 18, at 286; DEVELOPMENT, CONCEPTS AND DOCTRINE CENTRE, MINISTRY OF DEFENCE, JDN 2/11, THE UK APPROACH TO UNMANNED AIRCRAFT SYSTEMS 5–10 (2011).

118. Singer, *supra* note 4, at 125, 127.

carded as not feasible, would be highly desirable.¹¹⁹ In accordance with international human rights law, States could also initiate inquiries, the outcomes of which would be made public. Planning and decision making are by definition secret, and it is often impossible to determine what the commander knew and what alternatives, if any, were available at the time of the attack. However, a higher degree of transparency after the fact would be useful for both the defendant and the prosecutor before an international or domestic court if criminal charges were brought. It would help prove the unlawfulness of certain behavior or, conversely, prove that IHL was respected. Greater transparency would be particularly useful in setting forth the facts for events that unnecessarily make the headlines or are used for propaganda purposes. The credibility of IHL would in turn be reinforced. Hence, it is regrettable that States and military lawyers often refuse to even start discussing such proposals, perhaps in fear of potential criticism and criminal prosecution.¹²⁰ The fact that operations by autonomous weapons always leave an electronic trail would facilitate such transparency and inquiries.

V. CONCLUSION

I assume even autonomous weapon systems with artificial intelligence, though capable of learning, cannot do what the human beings who created them do not want them to do—or that it is at least possible to limit their autonomy in this regard. Such must be the case because they are not addressees of the law. If this is true, I cannot exclude that it may one day be possible to construct autonomous weapon systems which are capable of perceiving the information necessary to comply with IHL (this appears to me as the main challenge moving forward) and then to apply IHL to that information. For the time being, and pending evidence of revolutionary technical developments, it may be wise to limit the use of autonomous weapons to situations in which no proportionality assessment is needed and where the enemy consists of forces declared hostile in high-intensity

119. Marco Sassòli & Lindsey Cameron, *The Protection of Civilians Objects—Current Status of the Law and Issues de lege ferenda*, in *THE LAW OF AIR WARFARE: CONTEMPORARY ISSUES* 35, 71 (Natalino Ronzitti & Gabriella Venturini eds., 2006).

120. See Marco Sassòli & Julia Grignon, *Les Limites du Droit International Pénal et de la Justice Pénale Internationale dans la mise en Ouvre du Droit International Humanitaire*, in *LE DROIT INTERNATIONAL HUMANITAIRE FACE AUX DÉFIS DU XXI^e SIÈCLE* 133, 142 (Abdelwahab Biad & Paul Tavernier eds., 2012).

conflicts. I believe it will still take time before they can be used in counter-insurgency operations. However, the IHL on targeting does not require subjective value judgments that machines are unable to make, but depends on an objective assessment of facts.

If my two technical assumptions and my understanding of IHL are correct, an attack executed by autonomous weapons would have many advantages in terms of distinction, proportionality and precautions over an attack directly executed by human beings. The development of autonomous weapons may even lead, because of programming needs, to a clarification of many rules that have so far remained vague and whose protective utility currently depends upon subjective value judgments. Most arguments of principle against autonomous weapons either do not withstand comparison with other means and methods of warfare—although the risk of proliferation has to be taken very seriously in this case—or they are based upon an erroneous understanding of IHL.

There are, nevertheless, challenges when applying existing IHL to autonomous weapons which necessitate agreement on the proper interpretation of IHL by every State using them and between States. As with all weapons, users must be appropriately trained and subject to accountability mechanisms, which requires that autonomous weapon systems keep records. Accountability must, however, equally apply to the producers. Such a requirement of accountability implies the need for agreed professional standards, but also that lawyers agree on the temporal field of application of IHL and the application of international criminal law to conduct occurring in peacetime which produces results during armed conflict.

In addition, in an environment in which the proportionality principle must be applied—and theoretically even to determine what is a military objective—autonomous weapon systems must be constantly updated on the plans and progress of operations to enable them to evaluate whether a definite military advantage can be anticipated to result from the attack and whether the risks for the civilian population are excessive compared with the concrete and direct military advantage anticipated.

Finally, parameters must be established for comparing the performance of autonomous weapon systems with that of human beings in carrying out attacks. The feasibility of precautions must be understood to refer to what would be feasible for human beings employing the machine, not to the possibilities available to the machine. A particularly tricky issue is to determine, in case autonomous weapons are used, the meaning of the obligation to cancel an attack when it becomes apparent that the attack is unlawful.

This implies that autonomous weapons possess sensing capability and ability to change behavior.

It is to be hoped that these issues will be discussed in the forthcoming experts' and States' meetings addressing the possible need for new rules on autonomous weapons.

Keywords: nuclear weapons, international humanitarian law, deterrence, disarmament, humanitarian consequences.

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The use of nuclear weapons and IHL: Worth a further look

Much has been written about the compatibility of nuclear weapons with international humanitarian law (IHL), and it might be easy to conclude that nothing new can be said on the subject. However, recent developments have brought renewed attention to this issue. In 2010, the States party to the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT) expressed their “deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons” and reaffirmed “the need for all States at all times to comply with applicable international law, including international humanitarian law”.¹ This marked the first time that the NPT States Parties had collectively acknowledged the relevance of IHL for nuclear weapons. In addition, recent international conferences have shed further light on the effects of nuclear weapons in humanitarian terms and the risks associated with their intentional or accidental detonation. The findings presented at these conferences have highlighted the catastrophic humanitarian consequences of the use of nuclear weapons and have led the president of the International Committee of the Red Cross (ICRC), Peter Maurer, to call for “a reassessment of nuclear weapons by all States in both legal and policy terms”.²

This article will highlight the principal rules of IHL applicable to nuclear weapons and the issues and concerns that would arise were such weapons ever to be used again. Any analysis in this area must begin with the observation that IHL does not expressly prohibit the use of nuclear weapons. This contrasts with several other categories of arms about which there are serious concerns in humanitarian terms, and whose use is prohibited by specific IHL rules and instruments.³

That said, IHL does contain a range of general rules regulating the conduct of hostilities which are customary in nature and apply to all weapons used in armed conflict. Of particular relevance are (a) the rule of distinction; (b) the prohibition on indiscriminate attacks; (c) the prohibition on disproportionate attacks; (d) the prohibition on area bombardment; (e) the obligation to take precautions in attack; (f) the prohibition on using weapons of a nature to cause superfluous

1 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Vol. 1, UN Doc. NPT/CONF.2010/50, 2010, p. 19.

2 Peter Maurer, “Nuclear Weapons: Ending a Threat to Humanity”, speech to the Geneva Diplomatic Corps, 15 February 2015, available in the “Reports and Documents” section of this issue of the *Review*.

3 These include expanding bullets, exploding bullets weighing less than 400 grams, chemical and biological weapons, munitions that have fragments not detectable by X-ray, blinding laser weapons, anti-personnel mines and cluster munitions.

injury or unnecessary suffering; and (g) the rules on the protection of the natural environment. Also relevant are the rules and limitations on belligerent reprisals. The issues to which the use of nuclear weapons would give rise under each of these rules will be discussed below.

In this discussion, it would be remiss not to take account of the International Court of Justice's (ICJ) 1996 Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion).⁴ In this decision, issued twenty years ago, the ICJ recognized the "unique characteristics" of nuclear weapons, which "render the nuclear weapon potentially catastrophic".⁵ It also highlighted that "[t]he destructive power of nuclear weapons cannot be contained in either space or time".⁶ In light of these and other observations, the Court concluded that the use of nuclear weapons would "generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law".⁷ However, the Court could not conclude definitively that the use of nuclear weapons would be unlawful in all circumstances. It left open the question of whether they may be lawful in "an extreme circumstance of self-defence in which the very survival of a State would be at stake".⁸

This conclusion was controversial, not least amongst the members of the ICJ themselves: the Court's decision was adopted only on the casting vote of the ICJ president, and each of the fourteen judges felt the need to append a Declaration, Separate Opinion or Dissenting Opinion. As many capable scholars have considered the Nuclear Weapons Advisory Opinion in detail, this article will not do so.⁹ Nevertheless, and despite the passage of time, a number of the Court's observations remain relevant. As a result, the article will occasionally draw on the Advisory Opinion and the pleadings of States made during the case in the course of the discussion.

The humanitarian concern: The catastrophic consequences of nuclear weapons

Before examining the use of nuclear weapons under the rules of IHL, it is necessary to provide a brief outline of their effects. As noted above, the ICJ found nuclear

4 ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, 8 July 1996 (Nuclear Weapons Advisory Opinion).

5 *Ibid.*, para. 35.

6 *Ibid.*

7 *Ibid.*, para. 105(2E).

8 *Ibid.*

9 See, for example, articles contained in the thematic issue of the *International Review of the Red Cross* on "Nuclear Weapons: The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons under International Humanitarian Law", Vol. 79, No. 823, 1997; Daniel Thurer, "The Legality of the Threat or Use of Nuclear Weapons: The ICJ Advisory Opinion Reconsidered", in *Volkerrecht und die Dynamik der Menschenrechte: Liber Amicorum Wolfram Karl*, Wien, 2012; Shabtai Rosenne, "The Nuclear Weapons Advisory Opinion of 8 July 1996", *Israel Yearbook on Human Rights*, Vol. 27, 1997.

weapons to be unique in that they release a combination of immensely powerful forces, namely powerful blast waves, intense heat in the form of thermal radiation, and high amounts of ionized radiation. Their detonation also creates residual radioactive particles (so-called nuclear fallout) with the potential to spread over great distances.¹⁰ These features give nuclear weapons the capacity for incredible destructive power and severe and widespread consequences for human health, civilian structures and the environment.

Studies have shown that the detonation of a nuclear weapon would cause widespread death, injury and damage, especially if it occurred in or near a populated area.¹¹ There would be extensive casualties from severe burns and blunt force trauma which would occur in the moments after the detonation, as a result of blast effects and the release of thermal radiation. As these effects cause fuel and flammable substances to explode or burn, fires and firestorms are also likely to develop, creating large numbers of additional casualties.¹² Furthermore, many of those who survive the heat and blast effects will later fall victim to radiation sickness, which may not manifest itself until days or weeks after the explosion.¹³ Radioactive fallout could be carried considerable distances downwind to other countries or territories; as a result, people outside the immediate area of the blast would face an increased risk of developing certain cancers, such as leukaemia and thyroid cancer, which may only manifest themselves decades later.¹⁴ Information recently published by the International Committee of the Red Cross (ICRC) and the Japanese Red Cross Society indicates that today, some seventy years after the dropping of the atomic bombs on Hiroshima and Nagasaki, the Japanese Red Cross hospitals in those cities treat several thousand victims each year for cancers and illnesses attributable to the 1945 atomic bombings of those cities.¹⁵ The health of children born to survivors in the years following their direct exposure to the blasts is also being monitored. If it is found that exposure to radiation damaged the genes of their parents, as it has done in animal studies, hereditary transmission of radiation effects will be another long-term concern and there may be another generation of victims requiring long-term treatment.¹⁶

10 United Nations (UN) Department of Disarmament Affairs, *Comprehensive Study on Nuclear Weapons*, Report of the Secretary General, UN Doc. A/45/373, 1991, pp. 71–73.

11 *Ibid.*, pp. 76–80; British Medical Association, *The Medical Effects of Nuclear War*, John Wiley and Sons, Chichester, 1983, pp. 45–56 (looking at estimations of casualties of a nuclear attack on the United Kingdom); Frederic Solomon and Robert Q. Martson (eds), *The Medical Implications of Nuclear War*, National Academy Press, Washington D.C. 1986.

12 UN Department of Disarmament Affairs, above note 10, p. 82.

13 *Ibid.*, pp. 82–84.

14 The extent of radiation illness from fallout will depend on a variety of factors. These include where the detonation occurred (high in the air or close to the ground), the yield of the weapon, local wind patterns and weather conditions, and whether individuals in the area of fallout are able to remain sheltered, especially during the initial days following the explosion, when radioactivity would be most intense.

15 ICRC and Japanese Red Cross Society, “Long-Term Health Consequences of Nuclear Weapons: 70 Years On, Red Cross Hospitals Still Treat Thousands of Atomic Bomb Survivors”, Information Note No. 5, July 2015.

16 *Ibid.*

To compound the situation, assessments undertaken by the ICRC have highlighted that there is a lack of capacity in most countries and at the international level to adequately respond to a nuclear detonation, and to provide assistance that would benefit a substantial portion of survivors in the aftermath.¹⁷ The ICRC has estimated that loss of life and the medical needs of the wounded and sick are likely to be enormous, with an overwhelming number of people in need of immediate treatment for severe and life-threatening wounds.¹⁸ Yet such treatment or assistance is unlikely to be available in the short term, as most local medical personnel would be dead or wounded and most local medical facilities would be destroyed or unable to function. Access to the area is likely to be severely hindered by debris and damage to infrastructure, and the operations of assistance providers are likely to be restricted due to concerns about the health risks of exposure to ionizing radiation.¹⁹ A 2014 study by the United Nations Institute for Disarmament Research (UNIDIR) raised similar concerns and highlighted the lack of planning and capacity on the part of the United Nations system to respond to such situations.²⁰

Studies have also highlighted the impact of a nuclear detonation on the environment, and in particular the effects on the atmosphere and the climate, with potentially serious consequences for humans, plants and wildlife.²¹ They have detailed the possibility that even a limited nuclear exchange could result in reduced sunlight and rainfall, and cause depletion of the ozone layer. Such consequences, it has been argued, would affect farming and food production, causing famine in many parts of the world and putting many millions of people – potentially a billion – at risk of starvation.²²

17 Gregor Malich, then Head of ICRC NRBC Operational Response Unit, “Challenges in Responding to the Use of Nuclear Weapons”, presentation made to the Conference on the Humanitarian Impact of Nuclear Weapons, Oslo, 4–5 March 2013, available at: www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_malich.pdf (all internet references were accessed in December 2015). See also Robin Coupland and Dominique Loye, “Who Will Assist the Victims of Use of Nuclear, Radiological, Biological or Chemical Weapons – and How?”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 329–344; Robin Coupland and Dominique Loye, “International Assistance for Victims of Use of Nuclear, Radiological, Biological or Chemical Weapons: Time for a Reality Check?”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 329–340; Gregor Malich, Robin Coupland and Johnny Nehme, “Chemical, Biological, Radiological or Nuclear Events: The Humanitarian Response Framework of the International Committee of the Red Cross”, in this issue of the *Review*.

18 G. Malich, above note 17.

19 R. Coupland and D. Loye, “Who Will Assist the Victims ...?”, above note 17, p. 335. Depending on the levels of radiation, protective measures may have to be implemented which could include maintaining safe distances from contaminated areas, limiting the number of aid workers and time spent in such areas, and avoiding direct contact with contaminated matter.

20 John Borrie and Tim Caughley, *An Illusion of Safety: Challenges of Nuclear Weapon Detonations for the United Nations Humanitarian Coordination and Response*, UN, Geneva, 2014.

21 See Mark A. Harwell and Thomas C. Hutchinson, *Environmental Consequences of Nuclear War*, Vol. 2: *Ecological and Agricultural Effects*, 2nd ed., Wiley, New York, 1989; Owen B. Toon, Alan Robock and Richard Turco, “Environmental Consequences of Nuclear War”, *Physics Today*, December 2008; Committee on the Atmospheric Effects of Nuclear Explosions, *The Effects on the Atmosphere of a Major Nuclear Exchange*, National Academy Press, Washington, DC, 1985.

22 Ira Helfand, *Nuclear Famine: A Billion People at Risk*, Physicians for the Prevention of Nuclear War and Physicians for Social Responsibility, International Press, Somerville, MA, 2012.

Although much of this information was available and discussed during the Cold War, it received renewed attention at three international conferences on the humanitarian impact of nuclear weapons held in 2013 and 2014. These meetings, which took place in Oslo (Norway), Nayarit (Mexico) and Vienna (Austria), were the first multilateral gatherings devoted to discussing the consequences of nuclear weapons solely in humanitarian terms, and reaffirmed many of the existing concerns about the use of nuclear weapons. Although more fully discussed in other articles in this edition of the *Review*, the main conclusions drawn from these conferences include the following:²³

- The use of nuclear weapons, even on a limited scale, could have severe and potentially long-lasting consequences for human health and well-being, the environment, the climate, food production and socioeconomic development.
- The health effects can last for decades and even impact the children of survivors through genetic damage to their parents.
- There is no effective or feasible means of assisting a substantial portion of survivors in the immediate aftermath of a nuclear detonation, while adequately protecting those delivering assistance in most countries or at the international level.
- Accidental nuclear weapon detonations remain a very real danger. Malfunctions, mishaps, false alarms and misinterpreted information have nearly led to the intentional or accidental detonation of nuclear weapons on numerous occasions since 1945.²⁴
- These effects of a nuclear detonation, irrespective of the cause, would not be constrained by national borders and could have regional and even global consequences.²⁵

These findings reinforce the earlier research on the issue, as well as the conclusions of the ICJ about the features that make nuclear weapons unique and “potentially catastrophic”. They also play a central role in evaluating nuclear weapons under IHL.

23 Select conclusions drawn from the Chair’s Summaries of each conference. See Conference on the Humanitarian Impact of Nuclear Weapons, Oslo, 3–5 March 2013, Chair’s Summary, available at: www.regjeringen.no/en/aktuelt/nuclear_summary/id716343/; Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, 13–14 February 2014, Chair’s Summary, available at: www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/chairs-summary.pdf; Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Vienna, 8–9 December 2014, Report and Summary Findings of the Conference, available at: <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/vienna-2014/ChairSummary.pdf>. See also Alexander Kmentt, “The Development of the International Initiative on the Humanitarian Impact of Nuclear Weapons and Its Effect on the Nuclear Weapons Debate”, in this issue of the *Review*.

24 See also Eric Schlosser, *Command and Control: Nuclear Weapons, the Damascus Accident and the Illusion of Safety*, Penguin Press, New York, 2013; Patricia Lewis, Heather Williams, Benoit Pelopidas and Sasan Aghlani, *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy*, Chatham House, London, 2014.

25 In this regard, the use of nuclear weapons can also raise issues under the law of neutrality, the customary rules of which would be applicable. See Nuclear Weapons Advisory Opinion, above note 4, paras 88–90.

Assessing the use of nuclear weapons through the lens of IHL

As mentioned above, IHL does not explicitly prohibit the use of nuclear weapons. However, IHL does contain general rules that apply to the use of weapons during armed conflict. For the most part, these are rules of customary international law applicable in both international and non-international armed conflicts, and as such are binding on all States and parties involved in the fighting. Many of these rules have also found expression as treaty law in the first Additional Protocol to the Geneva Conventions of 1977 (AP I).²⁶

The customary status of these rules is important because, upon ratifying AP I, France, the United Kingdom and several other States – mainly NATO members – submitted declarations or reservations to the effect that the new rules introduced in AP I were understood to apply only to conventional arms; thus, they were not intended to regulate or prohibit nuclear weapons.²⁷ This view was also expressed in a number of written submissions to the ICJ in relation to its Nuclear Weapons Advisory Opinion.²⁸ Although the Court did not substantively address the issue of AP I's application to nuclear weapons, it confirmed that all States are bound by the pre-existing customary rules of IHL to which AP I merely gave expression.²⁹

As customary law, such rules would govern the use of nuclear weapons by any State in an international armed conflict. Similarly, customary law would govern the use of nuclear weapons by any State or – should it acquire them – non-State armed group in the context of a non-international armed conflict.

Since the adoption of AP I and the Nuclear Weapons Advisory Opinion, the practice of nuclear-armed States has confirmed that general IHL principles and rules on the conduct of hostilities are relevant to the use of nuclear weapons. The 2013 US secretary of defence's report on the nuclear employment strategy of the United States specifies:

The new guidance makes clear that all plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.³⁰

26 Protocol Additional (I) to the Geneva Conventions of 12 August 1949 and relating to the Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

27 These include Belgium, Canada, Germany, Italy, the Netherlands and Spain. The declarations of these countries can be found on the ICRC's IHL database, available at: www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp.

28 See, for example, the written statements of the Netherlands, the Solomon Islands, the United Kingdom and the United States.

29 Nuclear Weapons Advisory Opinion, above note 4, para. 84; Stefan Oeter, "Means and Methods of Combat", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, 3rd ed. Oxford University Press, Oxford, 2013, pp. 158–160; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary), para. 1852.

30 US Secretary of Defence, Nuclear Employment Strategy of the United States specified in Section 491 of 10 USC, June 2013, pp. 4–5.

Similarly, the UK *Joint Service Manual* of 2004 states that “[t]he legality of their [nuclear weapons] use depends upon the application of the general rules of international law, including those regulating the use of force and the conduct of hostilities”.³¹ Despite the UK declaration made when ratifying AP I, the *Joint Service Manual* goes on to identify a range of IHL rules on the conduct of hostilities whose application to nuclear weapons is not explicitly excluded.³² For the most part, these rules follow or use wording similar to the relevant rules of AP I.³³ This contrasts with the *Manual’s* rules for the protection of the environment, which the *Manual* clearly indicates “do not have any effect on and do not regulate or prohibit the use of nuclear weapons”.³⁴

The ICRC study *Customary International Humanitarian Law* (ICRC Customary Law Study) offers, to date, the most comprehensive overview of customary IHL rules, including rules on the conduct of hostilities.³⁵ Although the study did not propose a specific rule on nuclear weapons, it is an appropriate source for the general customary rules on the conduct of hostilities applicable to the use of nuclear weapons.³⁶

The rule of distinction

The rule of distinction is a fundamental tenet of IHL and is the foundation on which other IHL requirements regulating the conduct of hostilities are built. It is, in the words of the ICJ, a cardinal principle of IHL.³⁷ This rule requires the parties to an armed conflict to distinguish at all times between civilians and combatants and between military objectives and civilian objects.³⁸ Attacks may only be directed against combatants or military objectives. All members of the armed forces of a party to the conflict, except medical personnel and chaplains, are combatants.³⁹ Military objectives are those “objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage”.⁴⁰

It follows from this rule that, in areas where civilians and civilian objects are mixed with combatants and military objectives, the attacking party must do

31 UK Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication No. 383, 2004, p. 117 n. 82, which directs the reader to Chapter 5 of the *Manual* on the conduct of hostilities.

32 *Ibid.*, Chapter 5.

33 *Ibid.* See for example, Chapter 5.23, p. 68, and Section D on precautions in attack, p. 81.

34 *Ibid.*, Chapter 5.29.3, p. 76.

35 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

36 In particular, the rules for the protection of the civilian population. For a discussion on the customary status of the rules for the protection of the natural environment, whose customary status has been objected to by some States, see below.

37 Nuclear Weapons Advisory Opinion, above note 4, para. 78.

38 ICRC Customary Law Study, above note 35, Rule 1, p. 3, and Rule 7, p. 25; AP I, above note 26, Art. 48.

39 ICRC Customary Law Study, above note 35, Rule 3, p. 11; AP I, above note 26, Art. 43.

40 ICRC Customary Law Study, above note 35, Rule 9, p. 29; AP I, above note 26, Art. 52(1).

everything feasible to verify that targets are military objectives,⁴¹ and must not launch attacks using means and methods of warfare that are of a nature to strike military objectives and civilians or civilian objects without distinction. Likewise, it cannot treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area with a similar concentration of civilians. Such attacks are classified as indiscriminate, and are discussed below in more detail.

In accordance with the rule of distinction, the use of a nuclear weapon must be directed at a specific military objective. Such a requirement has clear implications for any use, whether employed in offence or defence. Recently released target lists prepared during the Cold War show that nuclear weapons were often envisioned for use against population centres,⁴² and writers on this issue continue to include or perceive this as part of possible use today.⁴³ With the potential exception of employing a nuclear weapon in the context of a belligerent reprisal (discussed below in more detail), directing a nuclear weapon against a city, village or other grouping of civilians or civilian objects would contravene the rule of distinction.⁴⁴

The prohibition on indiscriminate attacks

As mentioned above, attacks of a nature to strike military objectives and civilians or civilian objects without distinction are “indiscriminate” attacks and are prohibited. IHL identifies several kinds of attacks as indiscriminate.⁴⁵ These include those:

- that are not directed at a specific military objective;
- that employ a method or means of combat which cannot be directed at a specific military objective; or
- that employ methods or means of combat the effects of which cannot be limited as required by IHL;

and consequently, in each such case, that are of a nature to strike military objectives and civilians or civilian objects without distinction.⁴⁶ Disproportionate attacks and

41 See ICRC Customary Law Study, above note 35, Rule 16, p. 55; AP I, above note 26, Art. 57(2)(a)(i).

42 Scott Shane, “1950’s U.S. Nuclear Target List Offers Chilling Insight”, *The New York Times*, 22 December 2015. The full archive of declassified US Cold War target lists can be accessed at: <https://nsarchive.gwu.edu/nukevault/ebb538-Cold-War-Nuclear-Target-List-Declassified-First-Ever/>.

43 Jonah Friedman, “Countervalue v. Counterforce”, *Center for Strategic and International Studies blog*, 2 June 2011, on file with authors; Thérèse Delpech, *Nuclear Deterrence in the 21st Century: Lessons from the Cold War for a New Era of Strategic Piracy*, Rand Corporation, Santa Monica, CA, 2012, pp. 35–37; Farah Zhara, “Pakistan’s Road to a Minimum Nuclear Deterrent”, *Arms Control Today*, 1 July 1999, available at: www.armscontrol.org/print/516.

44 See also S. Oeter, above note 29, p. 146: “On an abstract level one can only state that a strategy of ‘massive retaliation’ – at least in the form of a threat of first strike or of escalation – is probably not compatible with the general principles of distinction and the prohibition of indiscriminate warfare. A retaliatory operation against a population centre would only be permissible if it constituted a preemptive strike qualifying as a military reprisal.”

45 ICRC Customary Law Study, above note 35, Rule 12, pp. 40–41; AP I, above note 26, Art. 51(4).

46 ICRC Customary Law Study, above note 35, Rule 12, pp. 40–41; AP I, above note 26, Art. 51(4).

attacks undertaken by “area bombardment” are also classified as indiscriminate attacks under IHL, and are discussed below.

The first prong of the rule on indiscriminate attacks prohibits attacks which are not directed at a specific military objective. This covers situations where no effort is made in the course of the attack to discriminate as required by the rule of distinction. Firing or targeting blindly is forbidden. The attacker should at the very least have precise and recent information as to the nature and location of the specific objective to be targeted to ensure that it is a military objective.⁴⁷

The second and third prongs of the rule focus specifically on the means and methods of warfare used, and are therefore most relevant for assessing the compatibility of nuclear weapons with the prohibition on indiscriminate attacks. With regard to means of warfare, those that can in no circumstances be directed at a specific military objective, or that produce effects which cannot be limited by IHL, may be considered under customary IHL as weapons that are indiscriminate by nature, the use of which would inevitably constitute an indiscriminate attack.⁴⁸ This will be the main focus of analysis for this section.

Are nuclear weapons indiscriminate by nature? The first question to be addressed is whether nuclear weapons can be “directed at a specific military objective” as required by the second prong of the rule. In short, is there any feature in their design or construction that would render such weapons incapable of being properly targeted? Before the ICJ, both the United States and the United Kingdom argued that modern nuclear weapons can be targeted with sufficient precision to satisfy this requirement.⁴⁹ Today, commentators appear to accept this conclusion as nuclear weapons typically incorporate precision guidance features or are delivered much like traditional gravity bombs; thus, there is a reasonable expectation that the weapons can be directed to the intended target.⁵⁰

The second – and central – question in considering whether nuclear weapons are indiscriminate by nature, and one which applies irrespective of whether the nuclear weapons are precision-guided or not, is whether they

47 ICRC Commentary, above note 29, para. 1952, p. 620.

48 ICRC Customary Law Study, above note 35, Rule 71, p. 247. See also Stuart Casey-Maslen, “The Use of Nuclear Weapons under Rules Governing the Conduct of Hostilities”, in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons under International Law*, Cambridge University Press, Cambridge, 2014, pp. 97–103.

49 Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with the Written Statement of the Government of the United States of America, p. 23, available at: www.icj-cij.org/docket/files/95/8700.pdf; letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, p. 52, available at: www.icj-cij.org/docket/files/95/8802.pdf. In its written statement, the United States argued that “[s]ince nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate”: letter dated 20 June 1995, *ibid.*, p. 23. The United Kingdom similarly asserted that “[m]odern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives”. Letter dated 16 June 1995, *ibid.*, p. 52.

50 See, e.g., Robert Chatham, “Tactical Nuclear Weapons”, *The Reporter*, Vol. 37, No. 2, 2010, p. 44 (noting that “[n]uclear weapons, particularly battlefield tactical devices, can be directed at specifically military targets”); S. Casey-Maslen, above note 48, p. 111 (describing this proposition as “relatively uncontroversial” in light of the accuracy of modern delivery mechanisms).

produce effects that cannot be “controlled or limited” as required by IHL (the third prong of the rule on indiscriminate attacks). These terms are not specifically defined in IHL, but several military documents employ the phrase “uncontrollable effects” when speaking about indiscriminate weapons. In a 1976 pamphlet on the conduct of armed conflict and air operations, the US Air Force highlighted that the term “uncontrollable” “refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated”.⁵¹ The South Africa National Defence Force has also highlighted that “[w]eapons which are likely to ... affect both civilians and combatants, without distinction, and whose harmful effects go beyond control, in time or place, are illegal *per se*”.⁵² The ICJ also made observations pointing in this direction when it concluded that “[t]he destructive power of nuclear weapons cannot be contained in either space or time”, although it did not define those terms.⁵³ Nevertheless, these references imply that compliance requires geographical and temporal limits on the effects of the weapon, and precludes too great an element of unpredictability.

It should be noted that the application of this rule to specific weapons is somewhat difficult to assess in practice. The one type of weapon widely agreed as having uncontrollable effects is biological weapons. A variety of other weapons are also perceived as indiscriminate by nature, but State practice rarely specifies whether this is because they cannot be properly targeted, because their effects are uncontrollable, or both.⁵⁴

A primary issue here is whether the forces released by a nuclear weapon, and the effects of those forces, can be sufficiently limited to the specific military objective targeted such that the discrimination required by the rule of distinction can be made and the respect and protection provided by IHL assured.⁵⁵

Perhaps the most significant concern is the spread of radioactive fallout, which has been identified as “the most fundamental difference between nuclear

51 US Department of the Air Force, *International Law: The Conduct of Armed Conflict and Air Operations*, US Air Force Pamphlet No. 110-31, 1976, ss. 6-3(c) (although this pamphlet indicates that it does not necessarily reflect official US government policy).

52 South Africa National Defence Force, *Revised Civic Education Manual*, 2004, Chapter 4, ss. 56(f).

53 Nuclear Weapons Advisory Opinion, above note 4, para. 35: “[The Court] also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.”

54 The ICRC Customary Law Study, above note 35, cites States as identifying the following weapons as being potentially indiscriminate: chemical, biological and nuclear weapons; anti-personnel landmines; mines; poison; explosives discharged from balloons; V-1 and V-2 rockets; cluster bombs; booby traps; Scud missiles and Katyusha rockets; incendiary weapons; and environmental modification techniques.

55 This includes the respect and protection outlined in the rule of distinction as well as the general principle outlined in AP I, Art. 51(1), that “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”

and conventional weapons”.⁵⁶ The severity and spread of radioactive particles will depend on the yield of the weapon and where it is detonated (ground burst, air burst or underwater), as well as a range of geographic, climatic and meteorological factors. These latter elements are generally beyond the control of the parties to the conflict, making the spread of radiation nearly impossible to constrain. Thus, the short- and long-term health effects of nuclear weapons could cross international borders, impacting neighbouring States and many more people than those in the area initially affected by the blast. The scale and dispersion of such radiation has been highlighted in a number of studies. One recent presentation highlighted that the ground-burst detonation of a 200-kiloton bomb would spread and potentially impact the health of civilians over hundreds of kilometres.⁵⁷ In another study, it was found that 75% of the 100,000 estimated casualties from the detonation of a 10-kiloton earth-penetrating nuclear weapon would be caused by nuclear fallout.⁵⁸ As indicated above, the impact of radiation on human health can be long-term, with illness and cancers occurring years or even decades after exposure.

Such effects raise serious concerns in light of the inherent difficulties in controlling or limiting them in space and in time. These consequences would arguably qualify nuclear weapons as weapons that are indiscriminate by nature, the use of which cannot be reconciled with the prohibition on indiscriminate attacks.

Even if, for the sake of argument, nuclear weapons were not to be considered indiscriminate by nature, they can still offend the prohibition on indiscriminate attacks as a result of the circumstances in which they are used. The prohibition on indiscriminate attacks takes into account the fact that means and methods of warfare which can be used legitimately in some situations could, in other circumstances, be of a nature to strike military objectives and civilians and civilian objects without distinction. In light of the blast, thermal and radiation effects and the areas over which these effects are spread, nuclear weapons may still contravene this rule, certainly when used in populated areas.

56 Nuclear Weapons Advisory Opinion, above note 4, para. 35.

57 Matthew McKinzie, Erwin Polrie, Dèlia Arnold, Christian Maurer and Gerhard Wotawa, “Calculating the Effects of a Nuclear Explosion at a European Military Base”, presentation made to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8 December 2014, available at: www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/Presentations/HINW14_SI_Presentation_NRDC_ZAMG.pdf. Also see the article by Hans M. Kristensen and Matthew McKinzie in this issue of the *Review*.

58 National Research Council Committee on the Effects of Nuclear Earth-Penetrator and Other Weapons, *Effects of Nuclear Earth-Penetrator and Other Weapons*, National Academies Press, Washington, DC, 2005, pp. 75–80. See also Victor W. Sidel, H. Jack Geiger, Herbert L. Abrams, Robert W. Nelson and John Loretz, *The Threat of Low-Yield Earth-Penetrating Nuclear Weapons to Civilian Populations: Nuclear “Bunker Busters” and Their Medical Consequences*, International Physicians for the Prevention of Nuclear War, 2003; Robert W. Nelson, “Low-Yield Earth Penetrating Nuclear Weapons”, *Science and Global Security*, Vol. 10, 2002 (citing examples of very low-yield (>1kt) bunker-busting bombs spreading fatal doses of radiation to tens of thousands of people if detonated in or near a populated area).

The prohibition on disproportionate attacks

The prohibition on disproportionate attacks, also known as the rule of proportionality, prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination of these that would be excessive in relation to the concrete and direct military advantage anticipated.⁵⁹ As mentioned above, attacks violating this rule are considered a particular form of indiscriminate attack. It is worth noting that this rule regulates attacks directed against military objectives and will involve an assessment, undertaken before the decision to launch an attack, of the military advantage expected from the operation and the expected incidental civilian harm. The relevant advantage must be military, concrete and direct, and must not be remote, long-term or hypothetical.⁶⁰

The incidental harm and damage that must be factored in when making the excessiveness assessment includes, in the first instance, immediate effects such as direct civilian casualties and damage to civilian objects. In addition, it is generally accepted that the assessment must consider the attack's "reverberating" effects – that is, the indirect second- and third-tier consequences – when these are foreseeable.⁶¹ This is drawn from the wording of the rule of proportionality ("may be expected to cause incidental loss") and the general principle of IHL whereby civilians "enjoy general protection against the dangers arising from military operations".⁶²

As indicated above, the use of a nuclear weapon will have extensive immediate and long-term consequences, especially if used against military objectives located in or near populated areas. One recent study examined the impact of the air-burst detonation of a 20-kiloton nuclear weapon over a European capital city.⁶³ While the effects can be influenced by a number of factors, it was estimated that the blast radius of a weapon would extend more than 5 kilometres from the epicentre of the explosion and that thermal heat would be distributed across some 4.5 kilometres, with tens of thousands of people

59 ICRC Customary Law Study, above note 35, Rule 14, p. 46; AP I, above note 26, Art. 51(5)(b).

60 ICRC Commentary, above note 29, para. 2209.

61 See, e.g., Cordula Droegge, "Get Off My Cloud: Cyber Warfare, International Humanitarian Law and the Protection of Civilians", *International Review of the Red Cross*, Vol. 94, No. 886, 2012, pp. 572–573 (describing it as "largely undisputed" that reverberating effects must be taken into account and that "it is reasonable to argue that foreseeable damages, even if they are long-term, second- and third-tier damages, must be taken into account"); Michael Schmitt and Eric Widmar, "On Target: Precision and Balance in the Contemporary Law of Targeting", *Journal of National Security Law and Policy*, Vol. 7, No. 379, 2014, p. 405.

62 See, e.g., C. Droegge, above note 61, p. 572; Marco Sassòli and Lindsey Cameron, "The Protection of Civilian Objects: Current State of the Law and Issues *de Lege Ferenda*", in Natalino Rozitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues*, Eleven International Publishing, The Hague, 2006, p. 65; Robin Geiss, "The Conduct of Hostilities in Asymmetric Conflicts", *Journal of International Law of Peace and Armed Conflict*, Vol. 23, No. 3, 2010, p. 122.

63 Elin Enger and Thomas Vik, Norwegian Defence Research Establishment, "Scenario of a Nuclear Detonation", presentation to the Conference on the Humanitarian Impact of Nuclear Weapons, Oslo, 4 March 2013, available at: www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_enge.pdf.

swiftly killed or injured in the moments following the detonation.⁶⁴ Massive destruction of civilian buildings and infrastructure would also be expected.⁶⁵

Although this will be influenced by the yield of the weapon and the environment in which it is used, extensive casualties can also result from the fires and firestorms that are likely to occur and burn uncontrollably in the immediate aftermath of the explosion. The course and duration of such forces are difficult to predict, and limiting the casualties and damage caused by the fires would be nearly impossible. In Hiroshima and Nagasaki, for example, fires burned without restraint for hours in the aftermath of the atomic bomb detonation, and many thousands who survived the initial blast were subsequently killed or injured by the conflagration. In Hiroshima alone, the firestorm subsequent to the atomic bomb detonation covered approximately 4 square kilometres.⁶⁶

The immediate casualties and damage caused by the blast wave and thermal heat of a nuclear detonation would clearly need to be taken into account in the assessment of proportionality. In addition, the foreseeable casualties from ionizing radiation and radioactive fallout in the days, weeks and months following the attack must also be appraised. One may question the extent to which casualties that occur years or even decades after the attack are properly to be taken into account in applying the rule, but a good-faith application would surely require it. As was indicated earlier,⁶⁷ such effects are clearly foreseeable given that the long-term effects of radiation exposure on human health have been widely studied, and in light of the experiences of Hiroshima and Nagasaki, where thousands of people died from the consequences of ionizing radiation in the months and years following the explosion of the atomic bombs dropped over those cities. Today, such casualties could not be considered remote or speculative.

It should also be noted that the rule of proportionality does not set or imply a temporal limit on the incidental damage to be considered when applying it. During the discussions on the rule of proportionality and the long-term effects of unexploded and abandoned ordnance (referred to in that context as explosive remnants of war) that took place between 2000 and 2003 amongst the States party to the Convention on Certain Conventional Weapons, such a limitation was never raised, yet the impact of such ordnance was widely known to last years and in some cases decades. In these discussions, States and experts seemed to accept that the rule of proportionality encompassed a forward-looking, long-term element. Finally, viewing these consequences through the general principle of IHL that seeks to protect civilians against the dangers arising from military operations

64 By comparison, the atomic bomb dropped on Hiroshima was estimated to have a yield of 16 kilotons and the radius of destruction from the blast forces was estimated at 1.6 kilometres, with an additional 11 square kilometres destroyed by subsequent fires and firestorms. Some 70,000–80,000 people, including some 20,000 soldiers, were killed during this time. See, Committee for the Compilation of Materials on Damage Caused by the Atomic Bombs in Hiroshima and Nagasaki, *Hiroshima and Nagasaki – the Physical, Medical and Social Effects of the Atomic Bombings*, Basic Books, New York, 1981, pp. 55–56.

65 *Ibid.* In Hiroshima it is estimated that buildings and infrastructure across some 12 square kilometres of the city were destroyed.

66 *Ibid.*, pp. 55–56.

67 See the discussion on the humanitarian consequences of nuclear weapons above.

would further argue for including the casualties and damage expected to occur in the long term.

In light of such impacts, the concrete and direct military advantage to be gained from the use of a nuclear weapon would have to be of paramount value and importance to justify such a high and foreseeable level of death, injury and destruction. In reality, it seems particularly hard to imagine any such advantage arising from an attack in or near a populated area. Indeed, based on what is today known about the effects of nuclear weapons, it can be asserted that the use of nuclear weapons against a military objective located in or near a populated area would contravene the prohibition on disproportionate attacks.

The prohibition on area bombardment

Another form of indiscriminate attack is “area bombardment”, which is defined under IHL as “attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects”.⁶⁸ This rule is intended to outlaw practices such as “carpet bombing”, “saturation bombing” and similar attacks, which were employed in World War II and in later conflicts with severe consequences for civilian populations.

Much of the discussion about this rule has focused on the meaning of “clearly separated and distinct”. There are no specific criteria assigned to these terms in IHL, and as a result their determination remains a somewhat subjective assessment. Yet, when the distance between two or more military objectives is sufficient for them to be attacked separately, taking into account the means available, they must be engaged individually.⁶⁹ Where the distance is not sufficient to render them clearly separated and distinct, other relevant rules, such as the rule of proportionality and the rule on feasible precautions, remain applicable.

The prohibition on area bombardment has not often been discussed in relation to nuclear weapons and is not specifically referred to in the Nuclear Weapons Advisory Opinion.⁷⁰ This may be because the use of a nuclear weapon in a populated area would raise a host of concerns in relation to other prominent IHL rules regulating the conduct of hostilities, as discussed above. Nevertheless, under this prohibition, the principal concerns relate to the wide-area blast and thermal heat effects of nuclear weapons: features which may make a nuclear weapon particularly appealing as an efficient means to collectively destroy multiple military objectives. The rule prohibiting area bombardment would

68 ICRC Customary Law Study, above note 35, Rule 13, p. 43; AP I, above note 26, Art. 51(5)(a).

69 ICRC Commentary, above note 29, para. 1975.

70 But see Louise Doswald-Beck, “International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”, *International Review of the Red Cross*, Vol. 79, No. 823, 1997; S. Casey-Maslen, above note 48, pp. 107–108.

preclude such use in any populated area when the objectives are clearly separated and distinct from each other.

The obligation to take precautions in attack

Parties to an armed conflict are required to take constant care in the conduct of military operations to spare the civilian population and civilian objects.⁷¹ The particular precautions required by IHL with respect to attacks include doing everything feasible to verify that targets are military objectives⁷² and taking all feasible precautions in the choice of means and methods of warfare with a view to avoiding, or in any event minimizing, incidental civilian casualties and damage to civilian objects.⁷³

The references to “everything feasible” and “feasible” precautions are a reminder of the fact that armed forces cannot be required to do what is objectively impossible.⁷⁴ It also leaves room for those acting in good faith to make mistakes, but those acting negligently can be held accountable.⁷⁵ Feasible precautions have been defined as “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.⁷⁶

The obligation to take feasible precautions in the choice of means of warfare with a view to avoiding or minimizing civilian casualties and damage would require that the party planning an attack assess such factors as the importance of the target, the different weapon systems available, and the foreseeable impact of those weapons on civilians and civilian objects.⁷⁷ Although IHL does not dictate the kinds of weapons that are to be used in attacking particular targets, it is largely undisputed that if there is a choice of weaponry that could accomplish the same military task, the rule requires the use of that which would lead to fewer civilian casualties and damage when it is practically possible.⁷⁸

In light of what is known about the severe humanitarian consequences that would arise from the use of nuclear weapons and the requirement to take constant care to spare civilians and civilian objects, the situations where nuclear weapons

71 ICRC Customary Law Study, above note 35, Rule 15, p. 51; AP I, above note 26, Art. 57(1).

72 ICRC Customary Law Study, above note 35, Rule 16, p. 55; AP I, above note 26, Art. 57(2)(i).

73 ICRC Customary Law Study, above note 35, Rule 16, pp. 56–60; AP I, above note 26, Art. 57(2)(ii).

74 Jean Francois Quéguiner, “Precautions under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 809–810.

75 *Ibid.*

76 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, Art. 3(10); Protocol on Explosive Remnants of War, 28 November 2003, Art. 5(1).

77 See, e.g., UK Ministry of Defence, above note 31, p. 83, discussing the factors to be considered in selecting the means and methods of attack under this rule.

78 See J. F. Quéguiner, above note 74, pp. 802–803, arguing that this rule would require the use of precision-guided weapons over other munitions when they are in a State’s arsenal and it is practically possible. See also Michael N. Schmitt and Eric Widmar, “The Law of Targeting”, in Paul Alphons Ducheine, Michael N. Schmitt and Frans P. B. Osinga (eds), *Targeting: The Challenges of Modern Warfare*, Asser Press, The Hague, 2016, p. 138.

could be the weapon of choice would seem to be very limited. The faithful application of the rule on precautions in attack would likely preclude the use of nuclear weapons in or near a populated area and would require the employment of a less destructive and harmful means of warfare. Some commentators note that, in light of recent developments in conventional weapons technology, “virtually any military objective for which [low-yield, ‘tactical’ nuclear] weapons might be used could also be addressed by conventional weapons”.⁷⁹

The prohibition on using weapons of a nature to cause superfluous injury or unnecessary suffering

IHL prohibits the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering. The basis for this rule was first articulated in the Preamble of the 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight. It later found expression in the 1899 and 1907 Hague Conventions with respect to the Laws and Customs of War on Land. Applications of the rule to specific weapons are found in the 1899 Hague Declarations on asphyxiating gases and expanding bullets and the 1925 Geneva Gas Protocol.⁸⁰ Its influence is also reflected in instruments such as the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention, the 1980 Convention on Certain Conventional Weapons and the 1997 Anti-personnel Mine Ban Convention.⁸¹ This rule differs from those discussed above in that it is primarily intended to protect combatants, rather than civilians, from injury and suffering that has little or no military purpose.⁸²

The application of this rule as a legal constraint on the use of a particular weapon raises questions as to how “superfluous” injury and “unnecessary” suffering should be identified and assessed. With regard to weapons, there is wide agreement that this requires an assessment between the military need for the weapon and the nature of the injury or suffering expected from its use. Injury or suffering that exceeds what is required to achieve the military goal sought would violate the rule.⁸³ Like the assessment required by the rule of proportionality, the effects to

79 See Dakota Rudesill, “Regulating Tactical Nuclear Weapons”, *Georgetown Law Journal*, Vol. 102, No. 99, 2013, p. 159, concluding that, as conventional weapons can now be effectively used for most of the military missions for which “tactical” nuclear weapons would previously have been designated, “[t]he battlefield role for [tactical nuclear weapons] is over”. See also Charles Moxley, John Burroughs and Jonathan Granoff, “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty”, *Fordham International Law Journal*, Vol. 34, No. 595, 2011, p. 660.

80 ICRC Customary Law Study, above note 35, Rule 70, pp. 237–244; AP I, above note 26, Art. 35(2). For an overview of the history of this rule, see ICRC Commentary, above note 29, pp. 401–403.

81 ICRC Commentary, above note 29. Reference to the rule is specifically made in the Preamble of the 1997 Anti-personnel Mine Ban Convention.

82 ICRC Customary Law Study, above note 35, p. 240.

83 See, e.g., M. G. Cowling, “The Relationship between Military Necessity and the Principle of Superfluous Injury and Unnecessary Suffering in the Law of Armed Conflict”, *South African Yearbook of International Law*, Vol. 25, No. 131, 2000, p. 142; C. Moxley, J. Burroughs and J. Granoff, above note 79, pp. 618–619. And see ICRC Customary Law Study, above note 35, Rule 70, pp. 240–241, which also cites the ICJ, in its Nuclear Weapons Advisory Opinion, para. 78, defining this as “harm greater than that unavoidable to achieve legitimate military objectives”.

be taken into account in the application of the rule would logically be limited to those that are foreseeable.

As the ICRC Commentary to the Additional Protocols notes, however, neither a weapon's effects on combatants nor the relationship of these effects to military necessity has been "interpreted in a consistent and generally accepted manner", and as a result, the rule is somewhat "relative and imprecise".⁸⁴ The ICRC Customary Law Study also found that State views differ as to how it can actually be determined that a weapon causes superfluous injury or unnecessary suffering – although there is general agreement that suffering which has no military purpose violates the rule,⁸⁵ and that relevant factors include the inevitability of serious permanent disability or death.⁸⁶

In the Nuclear Weapons Advisory Opinion, the ICJ cited this rule as one of the cardinal principles of IHL and identified it as having direct regulatory relevance for the use of nuclear weapons.⁸⁷ Despite this, the application of this rule to the use of nuclear weapons is seldom discussed in existing literature.⁸⁸ The primary concern with regard to nuclear weapons is the impact of radiation on the health of combatants. Given what is known about the intense radiation released by a nuclear detonation and its severe effects on human health, it would be reasonable to conclude that many combatants who may survive the immediate heat and blast effects of a nuclear detonation will fall victim to a slower death caused by radiation in the days, weeks and months that follow. Others would also be at increased risk of developing cancers, such as leukaemia and thyroid cancer, later in life. Such suffering, culminating in their slow death, is foreseeable and would need to be considered in the application of this rule.

A number of States – largely on the basis of this rule – have identified nuclear weapons as causing unnecessary suffering.⁸⁹ The ICRC also stated in 2015 that "[t]he horrific short- and long-term illnesses, permanent disability and suffering caused by radiation exposure raise serious questions about the compatibility of nuclear weapons" with the prohibition.⁹⁰ This conclusion has particular relevance to, and would appear to raise questions about, claims that low-yield nuclear weapons employed against combatants in locations far from civilian areas are consistent with IHL.

84 ICRC Commentary, above note 29, pp. 409–410. See also Simon O'Connor, "Nuclear Weapons and the Unnecessary Suffering Rule", in G. Nystuen, S. Casey-Maslen and A. Golden Bersagel, above note 48, pp. 129–147.

85 ICRC Customary Law Study, above note 35, Rule 70, p. 240.

86 *Ibid.*, p. 241.

87 Nuclear Weapons Advisory Opinion, above note 4, para. 78.

88 See S. O'Connor, above note 84, p. 129.

89 ICRC Customary Law Study, above note 35, Rule 70 n. 55, p. 244.

90 Helen Durham, ICRC Director of International Law and Policy, "The Use of Nuclear Weapons and International Humanitarian Law", statement to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, available at: www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/Presentations/HINW14_S4_Presentation_Helen_Durham.pdf.

It has been argued that the health effects of radiation are not to be considered when applying this rule because radiation is an inherent by-product of a nuclear explosion and is not an effect added to increase the suffering of combatants.⁹¹ This view relies on an interpretation of the rule of unnecessary suffering as formulated in the 1907 Hague Regulations, which states that it is prohibited “to employ arms, projectiles, or materials *calculated to cause unnecessary suffering*” (emphasis added).⁹² This “calculated to cause” formulation is seen as implying that the prohibition only covers situations where a weapon is designed or altered so as to intentionally aggravate the suffering of combatants.

However, the 1907 English-language version of this rule is widely considered to be an inaccurate translation of the authentic and authoritative French text, which used the phrase “*propres à causer des maux superflus*” and which is properly interpreted as having a broader scope and not requiring a specific intent.⁹³ When the rule was reaffirmed and negotiated in the context of AP I, the English version more closely followed the authoritative French text.⁹⁴ Thus, Article 35(2) of AP I prohibits the use of “weapons, projectiles and material and methods of warfare of *a nature to cause* superfluous injury or unnecessary suffering” (emphasis added). Similar wording (“of a nature to cause”) is also used in the Statute of the International Criminal Court and in the equivalent rule under customary IHL.⁹⁵ The “of a nature to cause” phrasing reflects the formulation accepted by nearly all States today. The effect is that the rule is widely understood to apply not only to instances where a weapon is designed or intentionally altered to increase the suffering of combatants, but also to situations where the suffering is not intentional but is foreseeable as a result of the weapon’s design and intended use. Thus, the impact of radiation and the injury and suffering it will cause must be weighed against the military objective being sought. As indicated above, the severe consequences of radiation exposure on the health of combatants raise serious concerns under this rule and appear to undermine arguments that nuclear weapons would be consistent with IHL when used away from populated areas.

Rules on the protection of the natural environment

IHL contains a number of rules intended to protect the natural environment from the effects of armed conflict. In this context, the natural environment is generally

91 Letter dated 20 June 1995, above note 49, pp. 28–29. See also C. Moxley, J. Burroughs and J. Granoff, above note 79, p. 651.

92 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910), Art. 23(e).

93 Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, p. 77 n. 3.

94 S. O’Connor, above note 84, p. 132.

95 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(b)(xx); ICRC Customary Law Study, above note 35, Rule 70, p. 237.

understood in a broad sense and includes air, water, agriculture, livestock, forests, flora, fauna and other biological and climatic elements.⁹⁶

The general rules of IHL regulating the conduct of hostilities protect the natural environment as a civilian object.⁹⁷ Thus, parts of the environment may be lawfully attacked only if they constitute a military objective. In addition, the destruction of any part of the environment is prohibited, unless it is required by imperative military necessity.⁹⁸ Incidental damage to the environment must also be taken into account as part of the proportionality assessment carried out for attacks directed at other military objectives. Such damage cannot be excessive in relation to the concrete and direct military advantage anticipated. Feasible precautions in the choice of weapons must also be taken to avoid or in any event minimize incidental environmental damage.⁹⁹

IHL also has a specific rule that prohibits the use of means and methods of warfare which are or may be expected to cause “widespread, long-term and severe” damage to the natural environment.¹⁰⁰ As indicated above, the customary status of this rule has been disputed, with France, the United Kingdom and the United States asserting that the rule has not achieved customary status with regard to nuclear weapons.¹⁰¹ Nevertheless, these provisions can still have relevance for the use of nuclear weapons for those States that are or may become a party to AP I and that have not submitted declarations excluding the application of this rule in such instances.

The main difference between this rule and the treatment of the environment as a civilian object is that the rule is an absolute prohibition. If widespread, long-term and severe damage is intended or expected, the means or method of warfare under consideration in that instance is prohibited.

The requirements for the damage to be “widespread, long-term and severe” are cumulative and as such fix a very high threshold. These terms were not specifically defined in AP I, but have been summarized as “major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war”.¹⁰² Although the phrase “long-term” is generally understood to be measured in decades and not in months or a season,

96 ICRC Commentary, above note 29, para. 2126, p. 662.

97 ICRC Customary Law Study, above note 35, Rules 43, 44, pp. 143–151.

98 *Ibid.*, Rule 43, pp. 144–145.

99 *Ibid.*, Rule 44, p. 149.

100 ICRC Customary Law Study, above note 35, Rule 45, p. 151; AP I, above note 26, Art. 35(3). This rule is also reinforced in Art. 55(1) of AP I.

101 Specifically, Articles 35(3) and 55 of AP I, above note 26; see ICRC Customary Law Study, above note 35, pp. 154–155. For more views on this subject, see Erik Koppe, “Use of Nuclear Weapons and Protection of the Environment during International Armed Conflict” in G. Nystuen, S. Casey-Maslen and A. Golden Bersagel, above note 48, p. 259 n. 45. For a detailed critique, see Jeremy Marsh, “Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law”, *Military Law Review*, Vol. 198, No. 116, 2008; Jean-Marie Henckaerts, “Customary International Law: A Response to the US Comments”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, p. 482.

102 S. Oeter, above note 29, p. 126; see also German Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts: Manual*, Joint Service Regulation (ZDv) 15/2, DSK AV230100262, May 2013, p. 61.

neither the commentary to AP I nor the ICRC Customary Law Study offer definitions of “widespread” or “severe”.¹⁰³

As indicated above, numerous studies have highlighted the serious consequences that the use of nuclear weapons would have on the natural environment. These include the destruction of flora and fauna by the detonation’s release of blast forces and thermal radiation; contamination of land and water supplies by radioactive particles; and the dispersal of dirt and soot affecting the atmosphere and climate, with potentially serious consequences for humans, plants and wildlife.¹⁰⁴ The dispersal of dirt and soot is of particular concern because of the severe impact it can have on farming and food production, potentially putting many millions of people at risk of starvation.¹⁰⁵ It would equally have an impact on other plants and vegetation upon which animals and insects feed.¹⁰⁶ Although the scale and level of such consequences will vary with the yield of the particular weapon and the context in which it is used, they can be readily expected with the use of large nuclear weapons and even lower-yield weapons as part of a nuclear attack or exchange.

These consequences, like other foreseeable damage and effects, must be taken into account when applying the general IHL rules that seek to protect the natural environment. They have particular bearing on the rule on disproportionate attacks, as incidental damage to the environment or parts thereof must be included in the proportionality assessment. Given the extensive damage to the natural environment that would result in most instances, the military advantage expected from an attack employing nuclear weapons would have to be of very high value for the attack to be lawful. In addition, and in light of the powerful and long-lasting effects of nuclear weapons, the application of the rule on feasible precautions would seem to argue for the use of a conventional rather than a nuclear weapon in the vast majority of instances where one was available and the same military goal could be achieved. It is hard to imagine any conventional weapon causing the kind and level of environmental damage that would result from the use of a nuclear weapon.

Serious problems arise with the use of nuclear weapons under the prohibition on means and methods of warfare which may be expected to cause widespread, long-term and severe damage to the natural environment. The range and nature of the long-term environmental consequences highlighted above would, in most instances, seem to meet the severe, widespread and long-term

103 ICRC Commentary, above note 29, p. 417. These terms are used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), and although they only apply in that context, “widespread” is understood to encompass an area of several hundred square kilometres and “severe” to involve “serious or significant disruption or harm to human life, natural and economic resources or other assets”. UN Environmental Protection Programme, *Protection of the Environment during Armed Conflict: An Inventory and Analysis of International Law*, 2009, p. 5. Under the ENMOD Convention, however, the terms are not a cumulative standard as is the case in AP I.

104 See the references cited at note 21.

105 I. Helfand, above note 22; British Medical Association, above note 11, pp. 92–100.

106 *Ibid.*

criteria set out in the prohibition. The fact that some nuclear-armed States have consistently rejected the application of this specific rule to the use of nuclear weapons serves to highlight its relevance as a limitation.

The use of nuclear weapons as a belligerent reprisal

Despite the legal issues and concerns highlighted above, it has been suggested that nuclear weapons may be used in an armed conflict as a belligerent reprisal.¹⁰⁷ Briefly stated, the law of belligerent reprisals permits (under certain conditions) acts that would normally be unlawful under IHL insofar as they seek to bring an adversary back into compliance with its IHL obligations.¹⁰⁸ Belligerent reprisals have been a traditional method of enforcing the law of armed conflict, but in recent decades the trend has moved towards prohibiting reprisals taken against the civilian population in the conduct of hostilities.¹⁰⁹ Article 51(6) of AP I explicitly prohibits “attacks against the civilian population by way of reprisals”, and although it is not yet considered a rule of customary IHL, there is a strong movement in this direction.¹¹⁰

Although the requirements for a lawful reprisal are not comprehensively settled, customary IHL sets out a number of conditions and limitations.¹¹¹

1. The reprisal must be in response to a serious violation of IHL and employed only for the purpose of restoring the opposing party’s compliance. Thus, belligerent reprisals cannot be anticipatory or pre-emptive acts. In addition, the reprisal must be in response to a serious violation of IHL, and not a reaction to violations of rules deriving from other areas of law. Nor can an adversary against whom the reprisal is directed use that initial reprisal as a justification to employ its own reprisal in response – a so-called “counter-reprisal”.
2. The reprisal must be a measure of last resort. This implies that other measures (e.g. political, diplomatic or economic measures) should be taken in advance of the reprisal in an effort to end the offending behaviour. It also appears to suggest that the adversary must be given due warning of the consequences of any repeat action before a reprisal is taken.
3. The reprisal must be proportionate to the original breach.
4. The decision to employ a reprisal must be taken at the highest level. This normally means high levels of the government or the military. The decision to employ a reprisal may not be made by local commanders.
5. The reprisal must cease once compliance is restored.

107 See S. Oeter, above note 29, p. 205. More generally, see Fritz Kalshoven, *Belligerent Reprisals*, 2nd ed., Brill Academic Publishers, Leiden, 2005.

108 S. Oeter, above note 29, p. 204.

109 ICRC Customary Law Study, above note 35, Rule 145, p. 513.

110 *Ibid.*, pp. 520–523.

111 ICRC Customary Law Study, above note 35, Rule 145, pp. 515–518; S. Casey-Maslen, above note 48, pp. 178–179; C. Moxley, J. Burroughs and J. Granoff, above note 79, p. 661.

These conditions would be applicable to the use of any nuclear weapon as a belligerent reprisal and would act as limitations on any such use.

As indicated above, one requirement for a belligerent reprisal is that it be in response to a serious violation of IHL. Thus, the use of a nuclear weapon against civilians or civilian objects as a belligerent reprisal could not be justified for a violation of *jus ad bellum* or rules deriving from other areas of law.¹¹² A surprise or unexpected attack in violation of a rule of *jus ad bellum* against a clear military objective, initiating an armed conflict, would not substantiate the use of nuclear weapons as a reprisal. Nuclear weapons may be used in response, but their use would need to strictly comply with the IHL rules discussed throughout this article.

In addition, the requirement that reprisals be proportionate to the original breach would appear to limit the use of nuclear weapons to a very small number of situations. Given their severe humanitarian consequences, the use of such weapons as a reprisal would logically require that the violation provoking the reprisal be of enormous severity. It is hard to imagine that a nuclear reprisal could be legitimately employed in response to an attack or attacks involving conventional weapons. More likely, the unlawful precipitating attack would need to involve the use of one or several nuclear weapons, or another weapon of mass destruction, against a populated area, resulting in an immense number of civilian casualties.¹¹³ In this regard, it is highly unlikely that a nuclear-armed State, having been the victim of such an attack using weapons of mass destruction, would first seek to exhaust all relevant political, diplomatic, economic and other measures against the attacker before resorting to a reprisal in response – a necessity that is implied in the second limitation outlined in the list above. It therefore seems unrealistic that this criterion would be fulfilled or strictly applied in practice.¹¹⁴

Finally, while one may be able to envision a situation where a very limited number of low-yield nuclear weapons are used to compel a return to compliance with IHL, this would seem to be a very risky road to take. As has been noted in a number of military manuals, the use of reprisals has tended to escalate attacks on civilians rather than ending them.¹¹⁵ Thus, one use or even a limited exchange of nuclear weapons runs a very real risk of nuclear escalation and further violations of IHL, with the potential for catastrophic consequences in humanitarian terms.

112 Christopher Greenwood, "The Twilight of the Law of Belligerent Reprisals", *Netherlands Yearbook of International Law*, Vol. 20, 1989, pp. 40–43; Stuart Casey-Maslen, "The Use of Nuclear Weapons as Reprisals", in G. Nystuen, S. Casey-Maslen and A. Golden Bersagel, above note 48, p. 184.

113 *Ibid.*, p. 186.

114 A point also noted by F. Kalshoven, above note 107, p. 340. See also Francoise Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949", *International and Comparative Law Quarterly*, Vol. 37, 1988, p. 823.

115 See US Office of the General Counsel, *Department of Defense Law of War Manual*, June 2015, Chapter 18.18.4, p. 1099, highlighting many of the practical consequences to consider in the use of reprisals; C. Moxley, J. Burroughs and J. Granoff, above note 79, p. 664; ICRC Customary Law Study, above note 35, p. 522.

Concluding comments

This article has outlined the IHL rules governing the conduct of hostilities that must be taken into account if a party to an armed conflict were ever to consider the use of a nuclear weapon. It highlights the problems and concerns that arise in light of the severe and extensive consequences for civilians, civilian objects and combatants that the use of nuclear weapons would entail. As pointed out by the ICJ in its Nuclear Weapons Advisory Opinion, the combination and power of the blast, thermal heat and radiation forces that result from the explosion make nuclear weapons unique. Very few existing means of warfare have effects that impact so significantly across such a wide range of IHL rules. These are the factors that have led the International Red Cross and Red Crescent Movement to declare that it “finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality”.¹¹⁶

As highlighted in the introduction to this article, there is no treaty or rule of IHL that specifically prohibits the use of nuclear weapons. Nevertheless, it is difficult to reconcile their use in nearly every circumstance with the customary IHL rules that seek to protect civilians and civilian objects from the effects of military operations. This conclusion holds in respect of low- and higher-yield nuclear weapons, as each would have severe consequences for civilians at the moment of the attack and in the longer term due to the effects of radiation and radioactive fallout on human health. Given such effects, it seems reasonable to conclude that the use of a nuclear weapon in or near a populated area would constitute an indiscriminate attack.

The use of nuclear weapons outside of populated areas is also a concern despite the fact that there might be a possibility of fewer civilian casualties. The situations most regularly contemplated in this regard involve the use of nuclear weapons against vessels at sea or against enemy combatants located in the desert or in an otherwise isolated area.¹¹⁷ It seems logical that these situations must be assessed on a case-by-case basis. As is clear from the discussion above, the application of the relevant IHL rules must take into account the immediate and long-term consequences on the health of combatants from exposure to radiation; the possible impact on the environment in the area of the attack; and the dangers to civilians outside the immediate area given the risk and likelihood that radioactive particles will travel. In addition, the arguments supporting the lawfulness of the use of nuclear weapons in these scenarios often posit the use of a single low-yield warhead and do not consider the cumulative effects if more than one weapon is used. If multiple nuclear weapons are meant to be integrated into the attack, their cumulative effects would also arguably need to be part of the assessment.

116 See Resolution 1 adopted by the Council of Delegates of the Red Cross and Red Crescent Movement, December 2011.

117 Statement of the Government of the United Kingdom to the ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, June 1995, para. 370; Nuclear Weapons Advisory Opinion, above note 4, Dissenting Opinion of Judge Schwebel, pp. 320–321.

Also a concern, albeit not a legal one, is the risk of nuclear escalation and the accompanying consequences if one or more low-yield weapons were used against another nuclear-armed State, as well as the implications for further use if the seventy-year history of non-use of nuclear weapons were to be broken. Thus, the arguments in favour of the lawful use of nuclear weapons in these types of scenarios provide little comfort that the grave humanitarian consequences occasioned by the use of nuclear weapons will not occur again.

Based on what has been learned from extensive research on the humanitarian and environmental consequences of nuclear weapons, and their implications for IHL, it seems appropriate to propose – in addition to the conclusion outlined above regarding the use of nuclear weapons in or near populated areas — a presumption of illegality with regard to the use of such weapons outside populated areas. In theory, such a presumption could be overcome in relation to a specific instance of use.

But concrete scenarios with all the information necessary for a full assessment of the consequences of nuclear weapon use have not often been presented or made by the nuclear-armed States. This was highlighted by the ICJ itself in its 1996 Nuclear Weapons Advisory Opinion and it appears to remain true today.¹¹⁸

The potential use of nuclear weapons has long been a global concern. The increased attention given to their humanitarian consequences in the past few years has helped shed more light on their severe and long-lasting impact. This attention has also raised further questions as to the status of nuclear weapons under IHL, which this article has attempted to illuminate and inform. Though there is greater knowledge about the consequences of nuclear weapons in humanitarian terms, they remain a weapon the use of which is difficult to reconcile with existing IHL rules.

¹¹⁸ Nuclear Weapons Advisory Opinion, above note 4, para. 93.

Nuclear Weapons and Nuclear Energy in New Armed Conflicts

Unfinished Regulation

*Pablo Antonio Fernández-Sánchez*¹

1 Introduction

Since the nuclear weapon was tested in an armed conflict in 1945 and its consequences became known, attempts have been made to regulate its use. It took 72 years before concluding a treaty with which to prohibit said weapons, namely the Treaty on the Prohibition of Nuclear Weapons, of September 20, 2017 (in force since January 22, 2021).

Although it is true that there is a Treaty on the Non-Proliferation of Nuclear Weapons, of July 1, 1968 (in force since March 5, 1972), said treaty does not prevent their use or possession. In addition, there are great powers, such as India or Pakistan, and middle powers, such as South Sudan and South Korea, that are not parties to the Treaty.

The mandatory scope of the Treaty on the Prohibition of Nuclear Weapons of 2017 is considerably extensive, whereby it is prohibited to develop, test, produce, manufacture, transfer, possess, store, use or threaten to use nuclear weapons, or permit their deployment in the territories under its jurisdiction.

Do we really know what we are to understand by nuclear weapon and what its technical-military characteristics should be? Are the effects of releasing nuclear energy or its military use what the IHL ought to prohibit, instead of the nuclear weapon itself?

Once these questions have been answered, the legality of the threat or use of nuclear weapons should be minimally analysed, as stated in the ICJ's Advisory Opinion of July 8, 1996, a view that we share. Herewith, it will be possible to define the general legal framework, both for the threat and the use of nuclear weapons, beyond the conventional framework initiated by the aforementioned Treaty on the Prohibition of Nuclear Weapons. The prohibition of

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nuclear weapons or the use of nuclear energy that also constitutes a violation of environmental protection obligations should in turn be identified.

This Treaty will also require some comments that make it possible to identify the regulations and gaps present in it, taking into consideration the conventional community that it obliges, and without prejudice to pointing out aspects of general International Law that bind all States and all actors, from the point of view of IHL and International Criminal Law.

All these considerations will provide us with an outline of the legal framework for nuclear weapons or the use of nuclear energy in new armed conflicts.

2 Concept of Nuclear Weapon and Its Characteristics

There is no legal instrument that defines what is to be understood by nuclear weapon, which further complicates the identification of the norms that could be applied to instances of its use. We must hence resort to the physical and military sciences in order to establish what we are referring to.

As Professor Velarde Pinacho points out, 'nuclear explosives are based on the transformation of mass into energy, whereby each kilogram (kg) mass can be transformed into 24 billion kilowatt hours (kWh) or 20 megatons (MT) of energy. Currently, there are only two procedures, on an industrial scale, to carry out said transformation: nuclear fission and nuclear fusion'.²

Without delving into scientific details, we can say that nuclear fission³ consists in bombarding the atomic nuclei of elements heavier than iron with neutrons that produce energy, this releasing radioactivity that is substantially polluting and harmful to human life. The elements that are most likely to fission are Uranium 235 and Plutonium 239.

Thus, the bombs dropped on Hiroshima and Nagasaki corresponded to uranium fission and plutonium fission,⁴ respectively.

2 Velarde Pinacho, G., "Concepto y Características Técnico-Militares de las Armas Nucleares", in Fernández-Sánchez, P. A. (Ed.), *La licitud del uso de las armas nucleares en los conflictos armados*, Imprenta Gandulfo, (Sevilla 1997) 12.

3 De Sanctis, E.-Monti, S.-Ripani, Marco, *Energy from Nuclear Fission: An Introduction*, Springer, (Switzerland 2016) 89–113.

4 Blum, G. "The Laws of War and the 'Lesser Evil'", *Yale Journal of International Law*, vol. 35 (2010) 24.

Conversely, nuclear fusion⁵ requires elements lighter than iron, such that, when they collide, fusion gives rise to another heavier element. The hydrogen atom and its isotopes, deuterium and tritium,⁶ are generally used.

There are those who find advantages in nuclear fusion due to the low cost of its raw materials (deuterium, present in water, can supply humanity for millennia and is accessible to everyone, which in turn would avert energy blackmail), and also because the radiation doses are next to nil.⁷

Still, we should not concentrate on nuclear energy on this occasion, but on nuclear weapons as our research topic. Having made these basic clarifications, it is now necessary for us to find a definition of nuclear weapon, which will provide us with the dimension of its restrictions in an armed conflict.

As we have already said, there are no conventional texts that provide the definition of nuclear weapon. There is not even a definition, against all expectations, in the Treaty on the Prohibition of Nuclear Weapons. Said Treaty does not stipulate what is to be meant by nuclear weapon for the purposes of its own prohibition either.

In this way, we will have to turn to a doctrinal definition. The *Diccionario Jurídico y Social/Enciclopedia Online* indicates that ‘this legal term refers to the weapon that produces its effects through a nuclear explosion’.⁸ For its part, USLegal defines a nuclear weapon stating that ‘according to 18 USCS § 832, “nuclear weapon” means any weapon that contains or uses nuclear materials. Nuclear material is defined as material containing any: (A) plutonium; (B) uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature; (C) enriched uranium, defined as uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or (D) uranium 233. [18 USCS § 831 (f) (1)]’.⁹

The glossary of nuclear terms presented by the nuclear-weapon States at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons defines nuclear weapon as the device that can produce

5 Turrell, A., *The Star Builders: Nuclear Fusion and the Race to Power the Planet*, Scribner, (New York 2021) 50–52.

6 <https://www.csn.es/documents/10182/26f1078a-76da-44a1-b106-8be0159d9f41>, de 26 de febrero de 2015.

7 Velarde Pinacho, G., *op. cit.*, 21.

8 ‘Arma Nuclear’ diccionario.leyderecho.org. 09, 2020. <https://diccionario.leyderecho.org/arma-nuclear/>.

9 <https://definitions.uslegal.com/n/nuclear-weapon/>.

an explosion and mass damage and destruction through sudden, instantaneous release of energy from self-sustaining nuclear fission or fusion.¹⁰

Nuclear weapons produce extraordinary explosive damage, quantified in tons of TNT and radioactive fallout that includes iodine-131, in the short term, and strontium-90 and cesium-137 in the long term, which can produce a nuclear winter.¹¹

In this way, the expressions mass damage and destruction are found to serve as a conclusive link with possible preambular paragraphs¹² on International Humanitarian Law and the humanitarian consequences of the use of nuclear weapons.¹³ Therefore, although the nuclear weapon is alien to International Law, its consequences are not.

If this is the case due to the inexistence of a legal concept of nuclear weapon and the inefficient conventional community of TPNW, it would hence be necessary to consider whether it is possible for nuclear weapons to exist whilst respecting the norms of IHL.

The differentiation between strategic nuclear weapons¹⁴ and tactical nuclear weapons¹⁵ is relatively easy to find in the scientific literature. From a military point of view, 'the strategic use is associated with large-scale operations that tend to influence the final outcome of the war or that, at least, are limited to a broad theatre of operations at the national or regional level; tactical use contributes to such operations, but on a smaller scale, in order to satisfactorily resolve a confrontational situation, in a more limited theatre of operations'.¹⁶ Now, this differentiation has nothing to do with the nature of the weapon, but with the consequences depending on the energy that is released, and, thus, with the consequences of its use.

10 www.state.gov/documents/organization/243287.pdf.

11 <http://hyperphysics.phy-astr.gsu.edu/hbasees/NucEne/nwepcn.html#c1>.

12 Of the Treaty on the Prohibition of Nuclear Weapons of 2017.

13 United Nations Conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. New York, March 27–31, and from June 15 until July 7, 2017. Point 8 b), exchange of views: general exchange on views on all the issues, presented by Sweden, Doc. A/CONF.229/2017/WP.5, of May 10, 2017, p. 3.

14 Baker, D., *Strategic Nuclear Weapons*, Haynes Publishing, (United Kingdom 2017).

15 Amirov Belova, D., "Las Armas Nucleares tácticas: Historia, Estado de la cuestión, Armamentos, y Estrategias de los Principales Estados Nucleares", *Revista del Instituto Español de Estudios Estratégicos*, n.º 17 (septiembre), (2021) 209 -250. <https://revista.ieee.es/article/view/3061>.

16 Díaz de la Cruz, F., "Utilización y Efectos de la Energía Nuclear en los Conflictos Armados", in Fernández-Sánchez, Pablo Antonio (Ed.), *La licitud del uso de las armas nucleares en los conflictos armados*, Imprenta Gandulfo, (Sevilla 1997) 29.

The current difficulties in making nuclear weapons, including by the States themselves, are enormous, much more so for infra-State entities, among which terrorist groups are feared the most. However, we must legitimately fear the possible transfer of technology, as well as the theft or sale of nuclear weapons to undesirable groups, which can pose a serious risk to international peace and security.¹⁷

3 The Use of Nuclear Energy in Theatres of Operations

Regardless of whether nuclear energy is used as a weapon, nuclear energy can be used in a military theatre for purposes other than artillery. The use of nuclear energy as an energy source is commonplace. This could cause consequences comparable to those that the nuclear weapon can cause through release of radioactivity and nuclear explosion, even in instances where said nuclear weapon does not intervene.

In a theatre of military operations, there may be nuclear power plants.¹⁸ The Gulf War was a scenario with said characteristics.¹⁹ Any existing facility that transforms nuclear energy through thermo-nuclear, electro-nuclear or simply nuclear power plants can, for example, facilitate the production of nuclear energy for the propulsion of military vehicles in an armed conflict, whereby, these being legitimate instruments of war and, therefore, military objectives, radioactive material could be released in case of an attack.²⁰ The consequences could thus be similar to those caused by a nuclear weapon.

In the current hybrid wars, extreme caution must be exercised with nuclear energy, since although the production of said energy for peaceful purposes is perfectly legal, such as civil energy supply, nuclear power plants can become targets of insurgent groups, terrorist groups, warlords, etc. Given that the consequences can lead to massive destruction, such a practice is prohibited by

17 Beres, L.R., *Terrorism and Global Security: The Nuclear Threat*, Routledge, (New York 2017), specially chapter "Terrorist Access to Nuclear Weapons".

18 Kovynev, A., "Nuclear plants in war zones", in *Nuclear Engineering International*, 15 March (2015), <https://www.neimagazine.com/features/featurenuclear-plants-in-war-zones-4536247/>.

19 Carnahan, B.M., "Protecting Nuclear Facilities from Military Attack: Prospects after the Gulf War", *The American Journal of International Law*, 86, no. 3 (1992) 524–41. <http://www.jstor.org/stable/2203966>.

20 Conca, J., "How The U.S. Navy Remains The Masters Of Modular Nuclear Reactors", *Forbes*, Dec 23, (2019). <https://www.forbes.com/sites/jamesconca/2019/12/23/americas-nuclear-navy-still-the-masters-of-nuclear-power/?sh=3cae8636bcd>.

International Law. On this matter, 'the future of the nuclear energy industry is inextricably linked with the problem of proliferation, as industrial grade uranium and plutonium, in the wrong hands, can be purified for use in the manufacture of weaponry. Such purification techniques are fortunately very complex, and few countries are able to carry them out'.²¹

Radioactive isotopes (products of the decay of radioactive atomic nuclei) are also used in theatres of operations.²² This represents incalculable risks, even after the conflict, similar to the risks posed by anti-personnel mines.²³ In consequence, the effects of the use of nuclear energy in armed conflicts can be similar to that of nuclear weapons, namely, the devastating effects of the blast wave; the consequences of the thermal wave, which can cause fires, smoke pollution and carbonaceous particles; flash of light, which can cause total or partial blindness; electromagnetic radiation; deferred effects of radiation for an indefinite period of time and subject to irregular and changing global distribution.²⁴

4 The Legality of the Threat or Use of Nuclear Weapons

Before starting the analysis of the legality of the threat or use of nuclear weapons, it would be convenient to indicate what should be understood by 'threat', since this will allow us to further improve the specification of the scope of said legality, if that happened to be the case. The Charter of the United Nations uses the expression 'threat' four times. In Article 1-1º, when referring to threats to the peace; in Article 2-4, when addressing threat or use of force; in the title of Chapter VII, which serves as a frontispiece for action in the event of threats to the peace; and, finally, in Article 39, which clearly refers to any threat to the peace.

We can hence deduce that the Charter of the United Nations has a binary concept of threat, whereby it can be a threat to peace and a threat of the use of force. Both concepts do not have the same content or the same legal consequences. When we speak of the threat of the use of nuclear weapons, the full dimension of the threats of the use of force indicated in the Charter arises, and

²¹ https://www.radioactivity.eu.com/site/pages/Military_Applications.htm.

²² 'The many uses of nuclear technology', in *World Nuclear Association*, May 2021, <https://world-nuclear.org/information-library/non-power-nuclear-applications/overview/the-many-uses-of-nuclear-technology.aspx>.

²³ Díaz de la Cruz, F., *op. cit.*, p. 35.

²⁴ *Ibidem*, pp. 36-39.

not threats to peace. Historically, it was normally required to warn of the possible commencement of hostilities, an ultimatum or a conditional declaration of war.²⁵ Article I of the Convention (III) relative to the Opening of Hostilities, The Hague, 18 October 1907, expressly states that:

‘The contracting Powers recognise that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war’.

This could be considered, from today’s point of view, as a threat of the use of force, but in that historical context, it was perhaps intended not to rule out a possibility, however remote, of starting negotiations of a political nature. Therefore, the norm must always be adapted to the time of its adoption and application.

Professor Sadurska defines threat as an ‘act designed to create a psychological condition in the target of apprehension, anxiety eventually fear, which will erode the target’s resistance to change or will pressure it toward preserving the status quo’.²⁶

It is true, as recognised by Professor Rodríguez Carrión, that the prohibition of the threat of the use of force, within the framework of Articles 2–4 of the Charter of the United Nations will take place when it is directed against the territorial integrity or political independence of another State, or in any other way incompatible with said Charter, excluding the illegality of the threat when justified in the framework of Article 51 of the Charter, on self-defence.²⁷

In this regard, the ICJ specifies in its Advisory Opinion of July 8, 1996,²⁸ paragraph 47, that:

In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a ‘threat’ within Article 2, paragraph 4, of the Charter depends

²⁵ Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907, <https://ihl-databases.icrc.org/ihl/INTRO/190?OpenDocument>.

²⁶ Sadurska, R., “Threats of force”, *American Journal of International Law*, vol. 82 (1988) 141.

²⁷ Rodríguez Carrión, A., “Las nociones de ‘amenaza’ y ‘uso’ del arma nuclear”, in Fernández-Sánchez, Pablo Antonio (Ed.), *La licitud del uso de las armas nucleares en los conflictos armados*, Imprenta Gandulfo, (Sevilla 1997) 104–105.

²⁸ As a general guide, see Burroughs, J., *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice*. Transaction, (Piscataway, N.J., 1997).

upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal -for whatever reason- the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.²⁹

It should be noted that we cannot deduce and therefore affirm the existence of a universal and complete prohibition of the use of nuclear weapons. The doctrinal and conventional uncertainties regarding said use and possession as a deterrent further complicates the definition of the legal framework.³⁰ In fact, the ICJ Advisory Opinion of June 8, 1996, ‘after considering the existence of ‘*opinio juris*’ regarding its normative nature (customary norm) or regarding an emerging norm (progressive evolution of the ‘*opinio juris*’ necessary to establish the existence of a new legal rule), and in view of the significant number of negative votes and abstentions, concludes that the existence of an ‘*opinio juris*’ with respect to the illegality of the use of nuclear weapons has not yet been established’.³¹

The existing treaties in relation to the acquisition, production, possession and deployment of nuclear weapons, or nuclear tests, including the recent Treaty on the Prohibition of Nuclear Weapons, do not suffice to consider that they represent a legal limitation on the use of said weapons. Whilst they do imply limitations, including prohibitions for the conventional community, they do not imply a general limitation or prohibition.³²

In fact, not even during the Diplomatic Conference on the Reaffirmation and Development of IHL (Geneva 1974–1977) that drew up the Additional Protocols to the Four Geneva Conventions of 1949, on IHL, was there a debate on the

29 <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>, para. 47, p. 246.

30 Rodríguez-Villasante Prieto, J.L., “El Arma Nuclear y el Derecho de los Conflictos Armados”, in Fernández-Sánchez, Pablo Antonio (Ed.), *La licitud del uso ... op. cit.*, p. 46.

31 *Ibidem*, p. 47.

32 Meyrowitz, H., “Les armes nucléaires et le Droit de la Guerre”, RDP, vol. 88, no. 5 (1972) 299. See, in general, Moxley, C.J., *Nuclear Weapons and International Law in the Post Cold War World*. Austin & Winfield, (Lanham, Md., 2000).

regulation of the use of nuclear weapons.³³ In truth, as Meyrowitz acknowledges, some NATO Member States, at the time of ratification of Protocol I to the Four Geneva Conventions of 1949, of 1977, did not make any declaration whatsoever regarding nuclear weapons (Norway, Denmark, Iceland, Greece and Luxembourg), whereas others did, including Italy, Belgium, the Netherlands, Spain or Germany.³⁴

This does not mean that the rules of IHL do not apply to the use of nuclear weapons.³⁵ The ICJ in its Advisory Opinion of June 8, 1996, paragraph 86, expressly states the following:

Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974–1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect, it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law.³⁶

33 Solf, W.A., *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, (The Hague 1982), 188–192.

34 Meyrowitz, H., “Les armes nucléaires ...” *op. cit.*, 317.

35 García Rico, E.M., *El uso de las armas nucleares y el Derecho internacional. Análisis sobre la legalidad de su empleo*. Tecnos, (Madrid 1999). Also, Cervell Hortal, M. J., *El Derecho internacional ante las armas nucleares*, Diego Marín Librero, (Murcia 1999). Similarly, see Pigrau i Solé, A., “El empleo de armas nucleares ante el Derecho internacional humanitario”, in Rodríguez-Villasante y Prieto, José Luis (Ed.), *El Derecho Internacional Humanitario ante los Retos de los Conflictos Armados*, Marcial Pons, (Madrid 2006) 133–156. See text at https://frdelpino.es/investigacion/wp-content/uploads/2015/09/DE007-06_Empleo_armas_nucleares-Pigrau.pdf.

36 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 86, p. 259.

Therefore, it could be asserted that 'Customary International Law and Protocol I regulate the types of weapons that can be used in warfare. Under Customary International Law, if a weapon fails either of two alternative tests, it is illegal. A weapon's use is prohibited if the weapon is (1) calculated to cause superfluous injury, or (2) inherently indiscriminate'.³⁷ Professor Sheldon has found it convenient to answer said question of whether Customary Law regulates the use of nuclear weapons.³⁸

Be that as it may, as the ICJ provided in its operative provisions of the Advisory Opinion of January 8, 1996, paragraph 105-2 E:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.³⁹

5 The Treaty on the Prohibition of Nuclear Weapons

In 1968, the Treaty on the Non-Proliferation of Nuclear Weapons had been adopted, based on three pillars, namely, non-proliferation, the peaceful use of nuclear energy, and disarmament.⁴⁰ Still, there was a need to take one step further and proceed with the prohibition of nuclear weapons, for which the United Nations system was activated. The journey has not been easy or simple,

37 Vail C., "The legality of nuclear weapon for use and deterrence", *Georgetown Journal of International Law*, vol. 48, (2017) 851. (<https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-3-The-Legality-of-Nuclear-Weapons-for-Use-and-Deterrence.pdf>).

38 Sheldon, Jill M., 'Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?', *FORDHAM INT'L L.J.*, vol. 20, 1996, 183–84.

39 <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>, par.105 (2), E, p. 266.

40 U.S. DEP'T OF STATE, TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS 1–3 (U.S. Delegation to the 2010 Nuclear Non-Proliferation Treaty Review Conference 2010), <http://www.state.gov/documents/organization/141503.pdf>.

and it will remain difficult and complicated.⁴¹ The obstacles have been, and will continue to be, many.⁴² Even the so-called diplomacy of resistance has not been hidden.⁴³

The General Assembly, through Resolution 71/258, of December 23, 2016, in accordance with its Rules of Procedure, decided to hold a Diplomatic Conference in order to develop a convention with which to prohibit nuclear weapons.

In conformity with Article 5 of the Vienna Convention on the Law of Treaties, of May 23, 1969⁴⁴ (VCLT), international organisations may adopt international treaties subject to the Vienna Convention on the Law of Treaties ‘without prejudice to any norm of the organisation’.

This being a Treaty held within an international organisation, the full powers required of the representatives of the States can be the credentials of their permanent representatives, without the need for further accreditation (Article 7-2 c) of the VCLT. As is customary, a Credentials Committee was created.

On February 16, 2017, the conference is inaugurated, and on March 27, 2017, the rules of procedure of the Conference are approved.

Among the 126 States participating in said Conference, there are Member States of the United Nations, and other States that are not, for instance, the Holy See. There are EU States, such as Sweden, the Netherlands or Malta, but none of the big ones, nor those belonging to the Nuclear Club, nor those others that may have nuclear interests, are present.

On a personal note, we are surprised that they decided not to participate in order to condition the results, regardless of their eventually not signing or ratifying said instrument.

The European Union was represented, but only in capacity of an observer, for it lacked, along with other organisations, the right to vote. This does not however outshine its leading role in the negotiation process of organisations, especially the International Campaign to Abolish Nuclear Weapons (ICAN) to

41 Camilleri, J.A., “Nuclear Prohibition: The Long Journey Ahead”, in Camilleri, Joseph, A., Hamel-Gree, Micheal & Yoshida, Fumihiko, *The 2017 Nuclear Ban Treaty: A New Path to Nuclear Disarmament*, Routledge (London 2019) 254–273.

42 Borrie, J.-Spies, M.-Wan, W., “Obstacles to understanding the emergence and significance of the treaty on the prohibition of nuclear weapons”, *Global Change, Peace & Security*, vol. 30, issue 2, June (2018) 95–119.

43 Ritchie, N.-Egeland, K.j, in *Global Change, Peace & Security*, vol. 30, issue 2, June (2018) 121–141.

44 U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force January 27, 1980.

carry out its purposes,⁴⁵ or the International Committee of the Red Cross.⁴⁶ Diplomats addressing the question of disarmament also participated in the conference, this leading to the negotiation of the TPNW.⁴⁷

The negotiation procedure was implemented in accordance with the legal channels established in the rules of procedure of the diplomatic conference convened to this end, where the rules for proposals, discussion and voting were established (Article 33 of the Rules of Procedure).

On July 7, 2017, the final text was adopted,⁴⁸ with 122 votes in favour, 1 against, and 1 abstention. On August 9, 2017, it was opened for signature, being finally signed by 86 and ratified by only 56 States Parties, respectively.⁴⁹

Within the framework of the EU, Austria, Ireland and Malta are Parties. This gives an insight into the failure of the Treaty, as far as a convincing conventional community is concerned. Even the signatory medium-sized States, such as Brazil, Colombia, Peru or Indonesia, which did participate in the conclusion of the treaty and signed at an appropriate stage of the proceedings, have not ratified.

The States may not make reservations to this treaty because it expressly prohibits them. Nonetheless, Cuba has made a declaration, whose nature could be contested for exceeding the scope of an interpretative declaration. Yet, Cuba is not considered to opt out of any of the obligations included in the Treaty. Along these lines, Cook Islands adhered to the Treaty on September 4, 2018, and initially made a statement that does not currently appear as registered in the Treaty at the United Nations, such that it must not be taken into consideration.

In conformity with the Treaty, ninety days after Honduras, as the fiftieth State to ratify it, deposited its instrument of ratification, on October 24, 2020, the Treaty came into force on January 22, 2021.

45 Ruff, T., "Negotiating the UN treaty on the prohibition of nuclear weapons and the role of ICAN", *Global Change, Peace & Security*, vol. 30, issue 2, June (2018) 233–241.

46 Schroeder, L., "The ICRC and the Red Cross and Red Crescent Movement: Working Towards a Nuclear-Free World since 1945", *Journal for Peace and Nuclear Disarmament*, vol. 1, issue 1, May (2018) 66–78.

47 Alexander Kmentt, for instance, Director of Disarmament, Arms Control and Nonproliferation at the Austrian Ministry of Foreign Affairs, is author of a book where he relates the vicissitudes that gave rise to the Conference. See, Kmentt, A., *The Treaty Prohibiting Nuclear Weapons: How it was Achieved and Why it Matters*, Routledge, (New York 2021).

48 A/CONF.229/2017/8, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/209/73/PDF/N1720973.pdf?OpenElement>.

49 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26.

There are currently 86 signatories, of which 56 are Parties, as we have already mentioned. Can it constitute a legal framework whose base of States Parties must comply with? Certainly not, for none of the 5 great nuclear States nor the great world powers, including the European states, are Parties to it.⁵⁰ This greatly weakens the aim and purpose of the Treaty.

It is true that States Parties are in all circumstances prohibited from using or threatening to use nuclear weapons or other nuclear explosive devices. Developing, testing, producing, manufacturing, acquiring in any other way, possessing or storing nuclear weapons or other nuclear explosive devices is also prohibited (Article 1.1 (a) and (d)). Likewise, States Parties are prohibited from transferring nuclear weapons, receiving the transfer or control of nuclear weapons, or allowing the location, installation or deployment of nuclear weapons in their territory or in any place under their jurisdiction or control (art. 1.1 (b), (c) and (g)).

Similarly, it is prohibited to assist, encourage or induce in any way anyone to carry out any activity prohibited under the Treaty (Article 1.1 (e)). This is a very important issue, at least for the States Parties that are held responsible for the transfer of any kind related to development, testing, production, manufacturing, acquisition, possession, storage, etc., to any insurgent group, warlords, terrorist groups, etc., which have a strong presence in today's hybrid wars.

Although that is all well and good, Cook Islands, Tuvalu, Belize, etc., binding themselves to it is groundless, insofar as they are States that do not possess nuclear weapons or nuclear energy, not even for peaceful purposes, or the technological capacity to produce nuclear weapons. In this respect, the above may be seen as playing to the gallery.

It could be argued that, like any Treaty, it contains rules that may be considered customary rules. Also, the interaction between custom and treaty is well known. Nevertheless, it is necessary to take into consideration the practice of the States possessing this type of weapons, the *opinio iuris* of the international community, the persistent objector status of nuclear States and others, etc.⁵¹

Perhaps the greatest achievement of the Treaty is not in relation to the possession of nuclear weapons or their use, but rather their meaning with regard to disarmament, due to the scope of obligations assumed by the States with respect to non-production, non-use, etc., of nuclear weapons. This seems to be the meaning given by part of the doctrine. Black-Branch recognises that

⁵⁰ For a general analysis, see Omari, D., *An attempt to fill the legal gap. The treaty on the prohibition of nuclear weapons*, GRIN Verlag, (The Netherlands 2019).

⁵¹ Casey-Maslen, S., *The Treaty on the Prohibition of Nuclear Weapons – A commentary*, Oxford University Press, (Oxford 2019) 53–58.

the Treaty on the Prohibition of Nuclear Weapons represents a change in the *status quo* of the right to control nuclear weapons, conveniently in line with International Disarmament Law.⁵² This question is of undeniable importance, given that, to date, there are 56 States that recognise obligations in this regard, in addition to the States that recognise the obligation of non-proliferation, which, in effect, represents a positive step towards nuclear disarmament.⁵³

Now, was this the goal of TPNW? If it was, it can be argued to be greatly ungenerous.

6 Additional Conventional Obligations Regarding the Consequences of the Use of Nuclear Weapons or Nuclear Energy in New Armed Conflicts

In the TPNW, it is stated that

Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the rule of distinction, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment.

Therefore, there is an express recognition that, beyond the treaty itself, there are international norms that can be decisive to deduce the prohibition of nuclear weapons and the use of nuclear energy in armed conflicts.

The Treaty on the Prohibition of Nuclear Weapons itself contains *erga omnes* obligations. However, the biggest problem for the invocation of these obligations is that most of the nuclear States do not accept the jurisdiction of the ICJ.⁵⁴ Furthermore, while in human rights norms, such as genocide, torture or slavery, there has been formal recognition as norms of a *jus cogens* status

⁵² Black-Branch, J.L., *The Treaty on the Prohibition of Nuclear Weapons – Legal Challenges for Military Doctrines and Deterrence Policies*, Cambridge University Press, Cambridge, (UK 2021) 1–4.

⁵³ See, Marrero Rocha, I., *La proliferación horizontal de armas nucleares en el nuevo régimen de seguridad*. Universidad de Granada (Granada 2002).

⁵⁴ Black-Branch, Jonathan L., *The Treaty ... op. cit.*, p. 370.

that generate *erga omnes* obligations, this has not occurred in the framework of nuclear weapons.⁵⁵

Still, there is a very broad conventional community on different nuclear aspects that end up influencing the prohibition of the use of nuclear weapons. For instance, all the treaties on the prohibition of nuclear tests, the non-proliferation of nuclear weapons, the establishment of geographic zones free of nuclear weapons, etc., such as the 1959 Antarctic Treaty, the 1963 Partial Nuclear Test Ban Treaty, the 1966 Outer Space Treaty, the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, the 1971 Seabed Arms Control Treaty, the 1987 Intermediate-Range Nuclear Forces Treaty, the START Treaties, the 1996 Comprehensive Nuclear-Test-Ban Treaty, the Regional Nuclear Weapons Free Zones Treaties (Treaty of Tlatelolco, Treaty of Rarotonga, Treaty of Bangkok, Treaty of Pelindaba, Treaty of Semipalatinsk), etc.⁵⁶

The Antarctic Treaty,⁵⁷ in Article v, expressly specifies that:

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.
2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica.

Professor Villamizar Lamus distinguishes the activities prohibited under the Antarctic Treaty, divided into two categories, namely when the protected legal asset is the integrity of the Antarctic territory and, therefore, its execution is prohibited, and when the protected legal asset is the environment, in which the activities are not prohibited but limited.⁵⁸ The activities related to nuclear weapons or the use of nuclear energy fall into said first category, and are hence prohibited throughout the frozen continent.

⁵⁵ *Ibidem*, p. 368.

⁵⁶ For an overview of each of these treaties, see Casey Maslen, S., *The Treaty on the Prohibition of Nuclear Weapons – A commentary*, Oxford University Press, (Oxford 2019) 33–46.

⁵⁷ <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280136dbc>.

⁵⁸ Villamizar Lamus, F., “Tratado Antártico y mecanismos de protección del territorio antártico”, *International Law, Revista Colombiana de Derecho Internacional*, 21 (2012) 267.

Moreover, if the Antarctic Treaty prohibits any military purpose in Antarctica,⁵⁹ *a fortiori*, it is prohibiting nuclear weapons in the geographical area delimited by the Treaty.

The 1963 Partial Nuclear Test Ban Treaty prohibits testing nuclear weapons in the atmosphere, outer space, and underwater.⁶⁰ It has a very large conventional community, including the two great superpowers at the time, the United States and the Soviet Union (now Russia). It is true that other nuclear States are not Parties, such as France or China. The latter signed it, but has yet not ratified it. For their part, UK, India or Iran are Parties.

While it is true that it can be considered a treaty that only limits the spaces in which to carry out tests, and in which the protected legal asset is the environment, there is no express prohibition on tests aimed at making nuclear weapons. However, it is an indication of legal awareness of the harmful consequences of the effects caused by nuclear weapons or the use of nuclear energy.

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, of October 10, 1967,⁶¹ recalls Resolution 1884 (XVIII), which urges States not to place any object carrying nuclear weapons or other kinds of weapons of mass destruction in orbit around the Earth, or place such weapons on celestial bodies, which was unanimously approved by the United Nations General Assembly on October 17, 1963. Article IV expressly states that

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

In relation to the use of nuclear energy in outer space, legal regulation is limited to a list of 'Principles Relevant to the Use of Nuclear Power Sources In Outer Space', which was developed by the General Assembly, in its Resolution 47/68.⁶²

59 For a complete view, see Hemmings, A.D.-Rothwell, D.-Scott, K.N. (Eds.), *Antarctic Security in the Twenty-first Century: Legal and Policy Perspectives*, Routledge, (London & New York 2012).

60 <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801313d9>.

61 <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280128cbd>.

62 <https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/nps-principles.html>.

We have already mentioned the existence of the Treaty on the Non-Proliferation of Nuclear Weapons, 1968,⁶³ as well as host of other treaties that regulate the demilitarisation of spaces, or disarmament, with regard to nuclear weapons, such as the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, 1971,⁶⁴ the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, 1987,⁶⁵ the START Treaties (Start I, 1991–2009; Start II, 1993 which did not enter into force and was replaced by the SORT Treaty, in 2002, this in turn being replaced by the New Start Treaty, which entered into force in 2011),⁶⁶ the Comprehensive Test Ban Treaty, 1996,⁶⁷ and the Regional Nuclear Weapons Free Zones Treaties (Treaty for the Prohibition of Nuclear Weapons in Latin America, 1967, known as Treaty of Tlatelolco,⁶⁸ the South Pacific Nuclear Free Zone Treaty, 1977, known as Treaty of Bankong,⁶⁹ The African Nuclear-Weapon-Free Zone Treaty, 1996, known as Treaty of Pelindaba,⁷⁰ Treaty on a Nuclear-Weapon-Free Zone in Central Asia, 2006, known as Treaty of Semipalatinsk).⁷¹

It could be said that these aforementioned treaties do not imply obligations for the nuclear States. Still, apart from the fact that some of said treaties have been signed and ratified by all or some of said nuclear States, they create an objective situation within the framework of International Law, which obliges third States, even if they are not Parties to them.

Indeed, despite the existence of a general principle of the Law of Treaties that, formulated in Latin, stipulates *res inter alios acta* (agreements only oblige the parties who consent), it is possible to repeal this principle when an objective situation is established. For example, the establishment of a border, which

63 https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002801207f4&clang=_en.

64 <https://treaties.un.org/pages/showDetails.aspx?objid=080000028010aa4c>.

65 <https://treaties.un.org/doc/Publication/UNTS/Volume%201657/v1657.pdf>.

66 At this point in time, the United States and Russia have agreed upon an extension of the New START Treaty until 2026.

67 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-4&chapter=26&clang=_en.

68 <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801273c1>.

69 <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800cea40>.

70 <https://www.un.org/nwzf/content/treaty-pelindaba>.

71 https://treaties.un.org/Pages/showDetails.aspx?objid=080000028023b006&clang=_en.

creates obligations for third States, even if they are not Parties to the Treaty.⁷² Likewise, if there is an International Organisation that has legal personality, its recognition generates *erga omnes* obligations also for third States.⁷³

There are also treaties that manage common interests of a set of representative States that also generate *erga omnes* obligations.⁷⁴ This relativises the obligation of third Parties within the framework of international treaties.⁷⁵

In its comment on Article 34 of the 1969 Vienna Convention on the Law of Treaties, the International Law Commission considered that the source of the obligation for third States was not the treaty itself, but customary rule.⁷⁶ However, in relation to the question of objective regimes, the International Law Commission 'decided not to propose any special provision on treaties',⁷⁷ 'thus reflecting a fundamental split of opinion among its members over the specific source of obligation -treaty vs custom- underlying those special cases in which treaty rights and obligations are effective *erga omnes*'.⁷⁸

The Charter of the United Nations is a good example of the possible repeal of the principle *res inter alios acta*. As Wellens states, 'The Charter-based obligation for States not to conduct themselves in such a way as to cause a threat to international peace and security has an *erga omnes* character. Its expression through Articles 24 and 25 of the Charter, it could be argued, also attributes to the Council the power, if considered to be necessary in the exercise of its primary responsibility, to bypass, or to render inoperative, on a temporary basis, the *res inter alios acta* rule with regard to other treaties to which Member States are not parties'.⁷⁹

72 Lee, S., "Territorial Settlements in Peace Treaties", in Kohen, M.G.-Hébié, M. (Eds.), *Research Handbook on Territorial Disputes in International Law*, Edward Elgar Publishing, (Cheltenham, UK & Northampton, MA, USA, 2018) 288.

73 Tunkin, G.I., *Theory of International Law*, (translated, with an Introduction by Butler, William Elliott), Harvard University Press, (Cambridge, MA, USA, 1974) 364.

74 Álvarez Londoño, L.F., *Derecho Internacional Público*, Pontificia Universidad Javeriana, 4^a edición, (Bogotá, 2007) 164–165.

75 Fitzmaurice, M., "Third Parties and the Law of Treaties", *Max Planck Yearbook of United Nations Law*, vol. 6(1) (2002) 37–127.

76 *Yearbook of International Law Commission*, 1966, vol. 11, para. 2, p. 231.

77 *Ibidem*, para. 4.

78 Handl, G., "Regional Arrangements and Third States Vessels – I the Pacta Tertiis Principle being Modified?", in Ringbom, H. (Ed.), *Competing Norms in the Law of Marine Environmental Protection*, Kluwer, (London & Cambridge, MA, USA 1997) 234.

79 Wellens, K., "The Practice of the (UN) Security Council with regard to Treaties and (Other) Agreements Governed by International Law", *International Law: Revista Colombiana de Derecho Internacional*, núm. 2, diciembre, (2003) 38.

7 General Obligations Conditioning the Use of Nuclear Weapons or Nuclear Energy in Armed Conflicts

In addition to the conventional regimes previously seen, International Law has a profusion of legal instruments that have already been fully accredited in the practice of the States, in the jurisprudence of courts, and in the international conventional incardination and national laws. However, we are only going to address two of them, because of their relevance in the context of the use of nuclear weapons or the use of nuclear energy in areas of armed conflict. In particular, we are referring to the principle of distinction and the principle of proportionality.⁸⁰

These two principles⁸¹ have caused rivers of ink to flow, so we would only like to make, in addition to a small outline with which to focus the question, mere comments on those situations directly related to nuclear weapons or the use of nuclear energy in current armed conflicts.

The principle of distinction was invoked in the declarations of the numerous States that participated before the ICJ in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, of 1996.⁸² Along these lines, it was invoked by Ecuador (para. 39), United States (para. 329), Egypt (para. 40 and 283), India (para. 42), Solomon Islands (para. 48), Japan (para. 43), New Zealand (para. 45), the Netherlands (para. 309), the United Kingdom (para. 50 and 321), and Sweden (para. 316).

The ICJ pointed out that the principle of distinction is a cardinal principle of Humanitarian Law.⁸³

In relation to the nuclear weapon, the ICJ asserts that 'thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited'.⁸⁴

80 The Red Cross has identified, along with the principles of distinction and proportionality, other basic principles of International Humanitarian Law, such as humanity, equality of belligerents, military necessity, and no discrimination. Of the Law of Geneva, immunity, humanitarian priority and limits on hostile action. See http://www.cruzroja.es/portal/page?_pageid=878,12647079&_dad=portal30&_schema=PORTAL30.

81 A summary and a general view can be found in the analyses provided by the Red Cross: https://ihldatabases.icrc.org/customary-ihl/spa/docs/v1_rul_rule1#Fn_F4E1DC86_00001.

82 <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

83 *Ibidem*, para. 78.

84 *Ibidem*, para. 95.

For its part, the Red Cross has not found any official practice contrary to this in either international armed conflicts or non-international armed conflicts.⁸⁵ In fact, the International Criminal Tribunal for the Former Yugoslavia includes said principle,⁸⁶ while the practice of the States, the National Military Codes, the internal and international Courts, the Resolutions of the Security Council, etc., demonstrate its consolidation.⁸⁷ Particularly important are international judicial pronouncements, such as those of the ICJ⁸⁸ and the ICC.⁸⁹

The ICJ acknowledges that 'the destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilisation and the entire ecosystem of the planet'.⁹⁰

If, judging by the documents presented before the ICJ and upon which this paragraph is based, we find this to be correct, then the principle of non-distinction could not be complied with, insofar as it would affect civilians, combatants, the wounded, the sick, etc., equally. In other words, if the effects of nuclear weapons cannot ensure respect for the principle of distinction, said weapons, along with the use of nuclear energy in theatres of operations, would be prohibited by international law.

There has been an endless debate on the question already analysed of strategic and tactical weapons. Yet, it is ineffective, for, on the one hand, the release of radiation into the environment cannot distinguish among the people within the damage zone, and, on the other hand, because said radiation, however small, is known to cause very serious consequences in the long term. Ortega

85 https://ihl-databases.icrc.org/customary-ihl/spa/docs/v1_rul_rule1#refFn_F4E1DC86_00016.

86 ICTY, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', The Prosecutor v. Duško Tadić, Case No.: IT-94-I-AR72, (para. 435, 625, 750 & 882), ICTY Milan Martić case, Initial Indictment (para. 437 & 552) and Kupreskic case, Judgment (para. 441 & 883).

87 https://ihl-databases.icrc.org/customary-ihl/spa/docs/v2_rul_rule1.

88 ICJ *Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v. Uganda)* 2005, para. 208 & 211.

89 ICC, *Kony Case*, Arrest Warrant, 8 July 2005, as amended 27 September 2005, para. 5 & 43; ICC, *Otti Case*, Arrest Warrant, 8 July 2005, para. 5 & 42; ICC, *Ongwen case*, Arrest Warrant, 8 July 2005, Count 32; ICC, *Odiambo case*, Arrest Warrant, 8 July 2005, para. 32; ICC, *Harun Case*, Arrest Warrant, 27 April 2007, ICC, *Kushayb Case*, Arrest Warrant, 27 April 2007, Counts 6, 7, 15, 16, 32, 33, 44 y 45; ICC, *Katanga Case*, Arrest Warrant, 27 April 2007, p. 6; ICC, *Ngudjolo Chui case*, Arrest Warrant, 6 July 2007, p. 4; ICC, *Katanga and Chui case*, Decision of the Confirmation of Charges, 30 September 2008, para. 265–274; ICC, *Mbarushimana case*, Decision of the Confirmation of Charges, 16 December 2011, para. 141–142, 151 & 218.

90 <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>, para. 35.

Carcelén was in favour of distinguishing between different types of weapons⁹¹ within the framework of the 1996 ICJ Advisory Opinion, but this would have also proven catastrophic, since we would only be defining the device and not its consequences.

In new armed conflicts, this would have been absurd, for it would mean legalising different types of nuclear weapons that fall into the hands of insurgent groups, terrorist groups, etc, which could in turn be placed on the international, black or legal markets. In consideration of the above, we share Abi-Saab's view that all these weapons are highly questionable.⁹²

As Professor Cervell indicates, 'the Court determines the illegality (in principle and as a general rule) of the use or threat of nuclear weapons due to their *implicit* contradiction with unwritten principles and norms (although many of them appear in the 1949 Conventions and in Additional Protocol I of 1977); *implicit* because none of those principles and norms refers directly (such that, in no case could it expressly prohibit their use) to the nature (nuclear or not) of the weapons'.⁹³

Recapitulating, this Professor states that 'the fact that the Court decided to admit, immediately after having affirmed the *general* illegality of nuclear weapons, a circumstance in which their use could be justified (*extreme circumstance of self-defence*), undoubtedly disappointed the defenders of the illicitness of nuclear weapons'.⁹⁴

The other principle that we wish to minimally analyse is that of proportionality. Due to its content, we are facing a legal-technical principle, in the terminology used by Giuseppe BARILE.⁹⁵

Like any legal principle, its determination requires a process that may well be initiated by the doctrine, the States themselves invoking or expressly accepting it in documents, treaties, etc., or, finally, by judges or referees.

This principle of proportionality as an applicable principle in International Law has been best pointed out by international jurisprudence. As an example, the Arbitration Award in the Naulilaa case, between Portugal and Germany,

91 Ortega Carcelén, Martín, '¿Cuándo es lícito usar armas nucleares?', in *Meridiano Ceri*, 1997, vol. 14, p. 12.

92 Abi-Saab, G., 'The Court and the bomb: a case of mutual deterrence?', *Transnational Law & Contemporary Problems. Symposium: Nuclear Weapons, the World Court and Global Security*, vol. 7 (1997) 445–456.

93 Cervell Hortal, M.J., 'El Derecho Internacional Humanitario y las Armas Nucleares', *Anales de Derecho*, Universidad de Murcia, 17 (1999) 72.

94 *Ibidem*, pp. 80 y 82.

95 Barile, G., 'La structure de l'ordre juridique international. Régles générales et régles conventionnelles', *RCADI*, vol. 161, III (1978) 58.

mentioned this principle of proportionality, indicating the lack of proportion between the illegal action and the retaliation.⁹⁶

The International Court of Justice, in the Advisory Opinion on the *legality of the threat or use of nuclear weapons* has had, on many an occasion, the opportunity to pronounce on the principle of proportionality, both in relation to self-defence and the application of International Humanitarian Law.⁹⁷

It is hence clear that the principle of proportionality is not only a principle of International Law, but a legal principle that can be invoked in instances of self-defence and in the application of International Humanitarian Law.

However, the problem lies in the scope of the obligations that it generates, especially in the light of today's new non-state actors and the so-called asymmetric warfare.

The origin of the legal source does not stem only from its character as a legal principle, but also from its character as a customary rule.

The customary rule of proportionality arose at the end of the 19th century and the beginning of the 20th in the framework of armed conflicts, whereby its development was related to the protection that States wanted to provide the combatants with.⁹⁸ Said States were convinced that the means and methods of warfare that they were allowed to use were those that were not prohibited and that were commensurate with the military advantages anticipated. This was reflected in the *Saint Petersburg Declaration, at the Convention No. 4 of The Hague of 1907*, and above all, following the indiscriminate air attacks experienced during World War I, in the 1923 The Hague Regulation of Air Warfare (which would subsequently be confirmed in the Spanish Civil War).

Although, with regard to the latter, said Regulation were never ratified, it was not due to reasons related to proportionality. In reality, its Article XXIV included such a question, without there being any objection from the participating States in this regard.⁹⁹

Naturally, in order to accept these rules as customary, we are to accept that there has been a uniform general practice and a legal conviction that said practice is Law. Now, on the issue of proportionality, as in other issues directly connected with International Humanitarian Law, we can view the behaviour of

96 Arbitration Award, July 31, 1928, the Naulilaa Case. *United Nations Reports on International Arbitral Awards*, vol. II, p. 1024.

97 As an example, see para. 30, 42, 43, 46 y 48.

98 Gardam, J.G., *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, (Cambridge 2004) 397.

99 The reasons for the lack of ratification can be seen in PARKS, W.H., "Air War and the Law of War", *Air Force Law Review*, vol. 32 (1990) 168–202.

States in three ways: their military behaviour, their diplomatic behaviour, and their legislative behaviour.

The doctrine is unanimous concerning the customary nature of said rule of proportionality.¹⁰⁰ But it is international jurisprudence that has best attested the customary nature of proportionality.¹⁰¹ In this sense, the International Court of Justice has considered that, by means of the Charter of the United Nations, proportionality has acquired a new meaning in the *jus contra bellum*. Thus, on the *matter of the Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v. United States of America*), it indicates that Article 51 of the Charter does not expressly require proportionality; however, it recognises that the latter is deduced from pre-existing customary rules.¹⁰² Specifically, it considers that there is a specific norm by virtue of which self-defence would only justify measures that are proportional to the armed attack and necessary to respond to it, a rule -it adds- that is well established in international humanitarian law.

In the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice makes it clear that

The entitlement to resort to self-defence under Article 51 is subject to the conditions of necessity and proportionality. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua v. United States of America* (I.C.J. Reports 1986, p. 94, para. 176): “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”.¹⁰³

100 In this respect, for instance, Penna, L.R., “Customary International Law and Protocol I: An Analysis of Some Provisions”, in Swinarski, C. (Ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Nijhoff, (Geneva/The Hague 1984) 201–225.

101 It is true that the only two nuclear experiences that we have are those of World War II. Christopher Weil has had the opportunity to examine the possible application of the principle of proportionality in the cases of Hiroshima and Nagasaki. See, Vail, C., “The legality of nuclear weapon for use and deterrence”, *Georgetown Journal of International Law*, vol. 48 (2017) 850–851. <https://www.law.georgetown.edu/international-lawjournal/wp-content/uploads/sites/21/2018/05/48-3-The-Legality-of-Nuclear-Weapons-for-Use-and-Deterrence.pdf>.

102 *I.C.J., Report*, 1986, para. 176 y 194, 94 y 103.

103 Doc. A/51/218, de 19 de julio de 1996, para. 41, 21.

In addition to the underlying legal principle and the customary nature of the rule on proportionality, there is a large amount of conventional data to also consider it as a conventional general rule.

In fact, no conventional text expressly indicates this rule of proportionality, nor is it defined by any international agreement. Nevertheless, the content of said rule does appear in numerous conventional texts related to the use of the means and methods of warfare.

Surprisingly, the Four Geneva Conventions of 1949 do not expressly contain a rule regarding proportionality, or rather, as Ben Clarke acknowledges, ‘the word ‘proportionality’ appears in several articles of the 1949 Geneva Conventions, but not in the context that we discuss, as a principle’.¹⁰⁴

In spite of this, Article 53 of the (Fourth) *Geneva Convention relative to the Protection of Civilian Persons in Time of War* includes the prohibition of the destruction of personal or real property indiscriminately, *except where such destruction is rendered absolutely necessary by military operations*. The principle of proportionality was intended to be included in said norm in an indirect fashion. Other authors have also expected it to be contained in Article 18 of said Convention,¹⁰⁵ and even in all those articles in which reference is made to military requirements.¹⁰⁶ Yet, in our personal opinion, although proportionality certainly applies in such circumstances, the principle of proportionality cannot be considered to have been included, in a general way, in said Conventions.

Conversely, we consider Additional Protocol I to these Conventions to have done such coding work, yet without its express inclusion.

Article 51.5 of said Protocol is the one that, in the opinion of the vast majority of authors,¹⁰⁷ includes the principle of proportionality, providing it with a conventional character in the field of the International Humanitarian Law of Geneva, nonetheless being previously *conventionalised* in that of The Hague, as we have seen. This article literally stipulates that the following will be considered as indiscriminate attacks, and therefore, prohibited by International Humanitarian Law:

¹⁰⁴ Clarke, B., “Proportionality in Armed Conflicts: A Principle in Need of Clarification?”, *International Humanitarian Legal Studies*, 3 (2012) 76, note 13.

¹⁰⁵ Brown, B.L., “The proportionality principle in the humanitarian law of warfare: recent efforts at codification”, *Cornell International Law Journal*, vol. 10, no. 1, December (1976) 137.

¹⁰⁶ Krüger-Sprengel, F. “Le concept de proportionnalité dans le droit de la guerre”, *Revista de Derecho Penal Militar y de Derecho de la Guerra*, vol. XIX, 1–2 (1980) 20.

¹⁰⁷ See, for example, Baxter, R.R., *Los deberes de los combatientes y la conducción de las hostilidades. El Derecho de La Haya*, in *Las dimensiones internacionales del Derecho Humanitario*, Instituto Henry Dunant, UNESCO, Ed. Tecnos, (Madrid 1990) 134.

an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, *which would be excessive in relation to the concrete and direct military advantage anticipated*

This means that at the conventional level, the principle of proportionality is connected with indiscriminate attacks.

If the use of nuclear weapons cannot guarantee the principle of proportionality, which, as has been seen, has a diverse and simultaneous legal nature, it is not lawful to use it in the framework of armed conflicts, whereby any State, insurgent group, individual person, etc., will be subject to the rules of IHL and International Criminal Law.

8 Conclusions

There is no legal concept of nuclear weapon that could serve as a basis for identifying the possible norms that regulate its use. However, we can resort to the descriptions made by scientists and the legal doctrine, even the State one, in order to discern whether we are before an artifact whose use may generate consequences prohibited by International Law.

In this day and age, we can affirm that nuclear weapons are weapons of mass destruction, regardless of their power or scope, given their indiscriminate and long-lasting effects.

Like any weapon of mass destruction, it is susceptible to being used by non-State components that do not abide by the rules of IHL. Being aware of this circumstance, the States have drawn up a Treaty for the absolute prohibition of said weapons, its scope being however limited.

It is true that the conventional community of this Treaty does not include the majority of the Nuclear States, but as the ICJ indicated, 'State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition'.¹⁰⁸

The legal source of this prohibition derives from the existence of a quite extensive conventional community regarding both the non-proliferation of weapons and the exclusion of numerous nuclear-weapon-free spaces, which result in obligations even for those who are not part of a given specific

¹⁰⁸ <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>, para. 52.

community. The regime that is established in this type of treaty is of an objective nature, whereby *erga omnes* obligations are generated.

The greatest achievement of the TPNW is not in relation to the possession of nuclear weapons or their use, but rather to the scope of obligations assumed by the States with respect to non-production, non-use, etc., of nuclear weapons and their possible transfer to armed groups, terrorist groups, warlords, insurgent groups, etc., operating in its territory.

We can thus argue that the existence of the TPNW, which currently binds 56 States, and the obligations generated by the Treaties on the Non-Proliferation of Nuclear Weapons are very positive steps towards nuclear disarmament.

However, the legal framework that establishes the obligation of their illegality is presented in concrete terms, for the effects of the nuclear weapon are incompatible with the basic principles of distinction and proportionality. Even if the existence of nuclear weapons of limited power could be ensured, the release of radioactive products would have expansive, perdurable consequences that could not comply with the principles of distinction and proportionality. Said principles, as well as legal principles, constitute customary, conventional and even national norms. The military, diplomatic and legislative behaviour of the States is consistent with the nature of these norms.

The use of nuclear energy, either as a source of heat or as fuel for the propulsion of other weapons or means of transport, which could provide a considerable military advantage, can also result in radioactivity release. Thus, the consequences could be similar to those of the use of nuclear weapons, such that said use ought to be prohibited in theatres of military operations. Nevertheless, to date, there is no regulation in this regard, whereby the consequences would be regulated as collateral damage, this encompassing different implications for the civilian population and the environment.

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The Use of Chemical Weapons and Toxic Substances in Contemporary Conflictual Framework

Fernando Villena-Sánchez

1 Introduction

‘Armis bella non venenis geri’ goes the Roman adage.¹ A maxim that, although full of honor, has been broken since the very beginning of history itself, as the Hittites did in Arawazan, as Homer recounted in the Iliad and as we have recently seen in Syria.²

Even though chemical weapons have always been despised, they have also enjoyed a special attraction throughout history, all along the 20th century and even today. This attraction appeals to both states and non-state armed actors (NSA) such as guerrillas, organised crime, terrorists, etc.

The First World War represented a turning point in the international community’s approach to this phenomenon. For the first time, the effects of the large-scale use of these weapons became as real as ever before, and so did the repugnance by the so called “civilised” society. This is how the path towards the prohibition of use, the non-proliferation and its destruction began.

And yet, despite the unbalanced consideration of these weapons with respect to other weapons of mass destruction (WMD) such as nuclear weapons,³ some states considered, and still consider,⁴ that if they cannot have

1 “Maximus Valerius”, *Book 6, paragraph 5, part one*. Later recovered by Grotius H., *De iure belli ac pacis* (Paris: 1625) and finally used in the 1969 UN report on Chemical and Biological Weapons.

2 Villena Sánchez, F., “War is made with weapons, not poisons”, *Tiempo de Paz Magazine* 102 (2011) 34.

3 Its possession and use has not yet been unequivocally condemned by the international community, not even within the UN, which has only gone so far as to state that its use is contrary to the spirit of the UN Charter (see UNGA resolution 51/218 of 19 July 1996, ‘... the Court cannot pronounce definitively on whether ... it would be licit or illicit in extreme circumstances ...’).

4 As of today there are four states not bound by the obligations of the Chemical Weapons Convention, in force since 1997; 193 states are committed to the Convention. Vid <https://www.opcw.org/evolution-status-participation-convention>. Last visited on November 3, 2021.

nuclear weapons due to budgetary, technical or political limitations, they will have the so-called 'atomic weapon of poor countries'.⁵ An instrument of regional deterrence that has proved to be very useful in regional contexts.

Moreover, within the conflictual framework (in which asymmetric confrontation is today's reference), the new threats to international society as a whole mean that chemical weapons remain relevant as such a threat. Thus, the international response should evolve accordingly.

This chapter approaches the phenomenon of chemical weapons from a broad approach that encompasses definitions, as well as legal, military and political approaches to the phenomenon. Then we will focus on the risks and threats that the existence of these weapons projects on different contemporary conflict scenarios. Next, we will analyze the efforts in the field of non-proliferation, the regimes in force, as well as the international response to it, and possible answers for the incoming future.

The aim of this effort is to have a clearer idea of the real risk posed by the chemical weapons and, more specifically, the current risk that their use by non-state actors, such as terrorist groups, might pose to Western societies. Taking into account that the threat is an international one, this chapter will come to an end with an approach to the international regimes in force and their operativeness.

We will try to answer questions such as what is the real nature of the chemical threat today and how it has been dealt with until today. We searched political, economic, diplomatic and legal open sources in order to reach the following conclusions: the real threat is much more limited than it may seem, international efforts to counter it have serious practical, economic and political limitations, and, finally, that the ultimate responsibility lies within the state as the only entity capable of managing the complexity that the threat of the use of chemical weapons entails.

2 Chemical Weapons. Contextualization

2.1 *Historical Approach to Its Consideration*

We are not going back in this study to the origins of mankind in the use of chemical and toxin weapons,⁶ it will be enough to remember that the use

5 Borreda Juste, F., "Las armas químicas y biológicas", *Security and Defence Documents* 27 (2009) 75.

6 For an in-depth study of the use of these weapons in antiquity read Mayor, A., *Greek fire, Poison arrows and Scorpion bombs*, Gerald Duckworth & Co Ltd, Basingstoke, (UK 2003).

of the first poisoned arrows already represents a historical milestone in this matter.

For the purposes of this study, we would like to refer to the First World War, the real turning point,⁷ the moment when chemical weapons were introduced as a strategic factor in a conflict.

We find the first international legal references to the prohibition of the use of these weapons in the Hague Conferences of 1899 (Declarations 2 and 3 concerning the 'use of explosive projectiles' and 'projectiles whose sole purpose is to develop asphyxiating or deleterious gases' (the Gas Declaration)⁸ and in a second Hague Convention in 1907, which reiterated the prohibitions on the use of poisons or poisoned weapons. But it was not until the Interwar period that an express reference to their use was materialised in the 1925 Geneva Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare, prohibiting the 'use in war of asphyxiating, poisonous, other gases or liquids'.⁹

During the Second World War, against all odds, these weapons were not used in the European operational theater,¹⁰ so there was no need to modify the Geneva regime. But the Cold War gave birth to a race on Weapons of Mass Destruction (WMD) that evolved into the accumulation of some sixty thousand tons of chemical weapons by the two superpowers alone.¹¹ Thus, the risk of their use by the superpowers and the risk of proliferation to states and Armed Non-State Actors (ANSAs) increased exponentially.

The Geneva Protocol was not even remotely enough to deal with these new risks any more. It became necessary to address an effective non-proliferation regime, together with the destruction of existing stockpiles and the establishment of a regime of confidence-building measures based on a mutual verification/investigation system in order to ensure the disappearance of these weapons. This undertaking took some twenty years and culminated in the 1992

7 Specifically on 22 April 1915 in Ypres, with the release of 168 metric tons of chlorine gas over a 6.5 kilometer front, from the taps of more than 5,700 pressurized containers, causing some 5,000 casualties between dead and wounded.

8 Borreda Juste F., "Las armas químicas y biológicas", *Security and Defence Documents* 27 (2009) 42.

9 It prohibited 'the use of projectiles whose sole purpose is to spread asphyxiating or deleterious gases', although it did permit their use in retaliation for such an attack.

10 Except for the use of Zyklon B in the Nazi death camps, and the use by the Japanese in the East front against China

11 Borreda Juste F., "The Chemical Weapons Convention: from the exclusion of these new risks. It became necessary to confront not only their superpowers, but also their proliferation, from their use to their complete destruction", *Peacetime Magazine* 102 (2011) 43.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction¹² (CWC).

2.2 *Conceptual Approach*

What really are chemical weapons? First and foremost, they are weapons of mass destruction as defined in 1946 at the 17th session of the UNGA ‘(...) all other major weapons capable of causing significant collective destruction (...) their indiscriminate nature (...)’.¹³

When considering a certain compound as a chemical weapon, it will be necessary to consider the intentionality of use and some defining characteristics: they do not produce material destruction, they are cheap and easy to manufacture, they are easily concealed, and a great variety of them can be manufactured. These weapons are classified into three groups (lethal, incapacitating and phytotoxic) and if we consider their effects they are usually classified as a) suffocating, e.g. chlorine gas, b) blistering, such as mustard gas, c) blood toxic, such as hydrocyanic acid, d) neurotoxic, such as sarin gas, and e) incapacitating, such as tear gas.¹⁴

As for their effectiveness in terms of mortality, we refer to a study by the University of Bradford¹⁵ entitled “Biothecnology, Weapons and Humanity” in which it can be read that about 1000 kg of sarin (neurotoxic agent) might cause from 300 to 8000 deaths depending on the conditions surrounding its use (weather conditions, population concentration, etc.).¹⁶

Finally, special attention should be paid to the definition proposed by the CCW. Article II “Definitions and Criteria”,¹⁷ refers both to chemical agents and their precursors, their delivery vectors and any other equipment specifically

12 “Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction” (Geneva: 1992). Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-3&chapter=26.

13 Guisande Gómez J., “Multilateral non-proliferation initiatives”, *Documentos de Seguridad y Defensa* 27 (2009) 32.

14 Fuente Sánchez JM., *La Gestión del Desarme. (¿Aproximación a la Paz o Estrategia Indirecta?)*, Ministerio de Defensa (Madrid: 2004) 89 and following.

15 *Idem.*, 96.

16 Not much if we compare the results, in the same conditions, of the use of 100kg of Anthrax (biological agent) that could cause up to three million deaths, or the use of a nuclear weapon of one megaton that could cause up to less than two million deaths, according to the study referenced.

17 “Definitions and Criteria”, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* (Geneva: 1992) 3–6. Available at: <https://www.opcw.org/es/convencion-sobre-las-armas-quimicas/articulos/articulo-ii-definiciones-y-criterios>. Last visited on November 3, 2021.

designed to be used as a chemical weapon. This definition may be overly ambitious but is intended to maintain the spirit of the convention and avoid its violation. Therefore, the consideration of a chemical weapon as such comprises all components that are part of it, whether they are assembled and/or combined or not. As for chemicals for civilian use and susceptible of becoming chemical weapons (dual use), the CCW will only consider them as such when their production exceeds the needs of civilian activity.

3 Today: Risk/Threat. Strategic/Tactical Approach to Its Use

3.1 *On the Battlefield – Surprise or Nothing*

According to NATO doctrine, chemical warfare is defined as ‘the use of chemical agents to kill, injure, or incapacitate (...) people and animals, and to prohibit or hinder the use of areas, facilities or materiel’.¹⁸

On April 22, 1915, large-scale chemical warfare was inaugurated with 5,730 canisters that released 168 tons of chlorine that opened a very extensive breach in the Allied lines in Ypres (Belgium). This same locality became famous for the first use of iperite (mustard gas) in July 1917.

At the end of the war there was a general understanding on the fact that the use of gases, even if their cost was exorbitant, was already an inextricable part of modern warfare. A total of 124,200 tons of mustard gas, chlorine among other chemical agents were released, more than 90,000 soldiers died for that reason and nearly a million crippled, blinded or disfigured men returned from the front line. Rather curious that ‘the use of chemical weapons during the war had in no way proved decisive; the use of gas had not helped the Germans to avoid defeat nor had it achieved victory for the Allies’.¹⁹

Apparently, in Ypres, the German command did not expect such and large and successful effect, therefore they did not know how to take advantage of the success and did not make use of the surprise factor. A surprise that would not happen again since the allied troops would be prepared with handkerchiefs wet with water (or urine). The allied forces covered their nose and mouth with those. Later the use of masks and protective equipment was introduced.

In view of the aforementioned data, one can say that the success of the use of chemical weapons is inextricably linked to the surprise factor, a

18 NATO *glossary of terms and definitions (English and French)* (2020). Available at: <https://www.unap.ro/ro/news/aap6.pdf>. Last accessed November 3, 2021.

19 Garrido V., “Immorality, Inhumanity, Opportunity, Impunity of the Use of Chemical Weapons: the case of Syria”, *Electronic Journal of International Studies* 40 (2020) 4.

condition without which their effects would be scarce and not very “profitable”. Furthermore, care must be taken to ensure that the target is not dispersed, since it is necessary to ‘[...] achieve a sufficiently high concentration in the target area, [...]’ in order to reach the lethal dose when inhaled.²⁰ Thus the quantity (which will vary accordingly to the lethality of the chemical agent) is another indissoluble factor for the success of these weapons. In the open field, meteorology dramatically influences the behavior of the toxic cloud, so that the quantity of chemical warfare agent to be used will have to be much higher than the one estimated in a laboratory previously.

3.1.1 Use: Military Doctrine and International Reaction

The use of chemical agents in battle not just kills, wounds or incapacitates the enemy, but also forces him to use means to protect himself, thus reducing his ability to move and deploy. In military operations, chemical agents are classified as “non-persistent”, which act by inhalation and whose objective is to open a breach in the enemy line that can be occupied by own troops without the need for protective equipment, and “persistent” chemical agents, which act fundamentally by contact, seek to contaminate for a long period of time the target and terrain and deny their use and access to the enemy.

During WWI, protective measures were developed. Once the surprise factor was lost, it became necessary to develop more elaborate tactics that would give their use a certain guarantee of success. Thus, Lieutenant Colonel George Bruchmüller developed tactics known as ‘multicolored crosses’ (Buntkreuz), or ‘multicolored shots’ (Buntshiessen).²¹ These combined the use of shells loaded with iperite and “mask-breaking” shells, followed by shells with phosgene. On the other hand, the British followed another doctrine based on chemical attacks on specific units, in order to weaken them, by means of a continuous harassment, which produced a devastating effect on the enemy’s morale.²²

The experience of WWI created a deep unease and disgust among the public opinion about the use of this type of weapons, so that in the interwar period the first international legal framework to prohibit their use was drafted, the Geneva Protocol of 1925. We must take into account that this repugnance was not necessarily shared by all social and military sectors that did not quite see

20 For examples of times and doses necessary for the desired effect of substances such as chlorine and sarin see Álvarez, J.D. *La doctrina química, Pa Ná* (2018). Available at: <http://cbrn.es/?p=1315>. Last consulted November 3, 2021.

21 Idem, Last accessed November 3, 2021.

22 Heller, C.E., “Chemical Warfare in World War I: The American Experience, 1917–1918 (Leavenworth Papers)”, *Combat Studies Institute* (1984).

the inhumanity in the use of these weapons in comparison with traditional ones: Is a piece of shrapnel in the entrails that takes up to a week to cause death more humane than the inhalation of poisonous gases? Or are the wounds produced in the extremities by an explosion more humane than those produced by blistering agents? And why limit their use against savages?²³ On the other hand, everyone did recognize how complicated, expensive and difficult their use was in the face of the logistical and tactical challenges in combat. In any case, the “Protocol for the Prohibition²⁴ of Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare” was finally signed in 1925 in Geneva.²⁵ Its legal and political significance is crucial because it codifies the intention to prohibit their use completely, or almost completely.²⁶

Its provisions were soon violated by Italy which in 1935 used iperite in the invasion of Abyssinia, by Spain and France in the RIF war between 1922 and 1925 (iperite and phosgene mainly), Japan in the Sino-Japanese war between 1937 and 1945. Violations that produced only a mild reaction on the part of the League of Nations which in no case implied or was understood as a reaction that could dissuade the perpetrators from using these weapons again. In the 1930s, for example, the USA had a “Chemical Warfare Service” which developed a doctrine of use from aircraft and the Japanese developed a doctrine of using persistent agents, iperite and lewisite, to slow down the withdrawal of enemy troops.

Against all odds, chemical weapons were not used during World War II,²⁷ but this did not prevent the interest in the development and production of

23 ‘I do not understand the revulsion about the use of gas. I am very much in favour of the use of gas against uncivilized tribes’. Attributed to Winston Churchill, quoted by Palao Pons, P., *Los misterios de los venenos*, De Vecchi Ediciones (Barcelona: 2012).

24 Unlike the letter of the Hague Conference of 1907, which could justify its use in a dispute.

25 For this protocol see *Protocolo sobre la prohibición del uso en la guerra, de gases asfixiantes, tóxicos o similares y de medios bacteriológicos (G.BC)* (Geneva: 1925). Available at: <https://www.icrc.org/es/doc/resources/documents/misc/treaty-1925-gases-and-bacteriological-protocol-5tdm2p.htm>.

26 ‘On one hand it is true that some countries that ratified the Protocol did so with the reservation that the prohibition would disappear the moment the enemy or its allies did not respect the Protocol, on the other hand the Protocol prohibited the use of chemical and biological weapons, but not their production, stockpiling or transfer. Furthermore, the Protocol prohibited the use of chemical and biological weapons, but not their production, stockpiling or transfer’. Álvarez, J.D. *La doctrina química, Pa Ná* (2018).

27 Garrido V., “Immorality, Inhumanity, Opportunity, Impunity of the Use of Chemical Weapons: the case of Syria”, *Electronic Journal of International Studies* 40 (2020) 5–6.

new compounds (such as nerve agents, tabun and sarin, by the Germans) for possible use in combat, (or in extermination camps).

After World War II, the rejection by the international public opinion continued, so did the violations of the international commitments that were being adopted. In 1972, the Convention on the Prohibition of the Development, Production and Stockpiling of Biological Weapons was signed, in force since 1975 and was ratified by 131 countries. On the other hand, violations continued in Vietnam by the United States and in Afghanistan by the Soviet Union. Earlier, in the 1960s, Egypt used phosgene and mustard gas during the civil war in Yemen. In the 1980s, in context of the Iran-Iraq war against Kurds and troops.²⁸

Despite the fact that their use on the battlefield presents serious drawbacks, this did not prevent certain states from using them and maintaining an intense program of development, production and stockpiling. During the Cold War, this development reached astronomical heights. The development of new nerve agents was spectacular. The United States created the vx, thirty times more toxic than sarin, tabun or soman. The Soviet Union developed the novichock agent.²⁹ In addition, countries such as China, France, the United Kingdom, North Korea, South Korea, Egypt, Iran, Iraq, India, Israel, Libya, Syria, South Africa and Sudan also had their own chemical weapons development and production programs.

The main reason why such weapons continued to be developed (by the superpowers as well as medium and small powers) could be found in the need to have a “credible” retaliatory weapon. This policy would serve to maintain the top leadership positions in their respective regions or, at least, to have a deterrent weapon against aggressive neighboring powers.

The “chemical option”³⁰ increased the risks of proliferation of a WMD which is hated by everyone but at the same time available to everyone. This situation

28 *UN Security Council Resolutions 612 and 620* (1988), expressing ‘grave concern about the continued use of chemical weapons by Iraq and, allegedly, by Iran’.

29 Composed of the deadliest family of nerve agents ever produced and developed in the Soviet Union in the 1970s and 1980s. They belong to the ‘fourth generation chemical weapons’, part of the secret Soviet program called “Foliant”, whose existence was openly admitted by the Russian military-industrial complex in the early 1990s.

30 Virtually all states with WMD aspirations began their programs in all three WMD domains: chemical, biological, and nuclear. As they progress in their programmes, nuclear is usually discarded due to technical difficulties and high cost, biological is found to be extremely complicated when it comes to “vectorising” biological agents, and its use has unpredictable results at both the tactical and strategic levels, with the result that the chemical option is finally presented as the most accessible option-‘the atomic bomb of the poor’.

leads us to the 1992 UN Convention on the Prohibition of Chemical Weapons, in force since 1997. We will not now go into the analysis of the functioning of this Convention which is still the most complete and successful multilateral disarmament instrument to date thanks to the Organization for the Prohibition of Chemical Weapons (OPCW) and its system of inspections, control lists and mutual vigilance.³¹

Since the creation of the OPCW, efforts for the complete elimination of chemical arsenals have been exemplary, especially in the destruction of arsenals of both the United States and the former Soviet Union.

And yet, its provisions have continued been violated. The most recent (and most flagrant) case happened in Syria where chemical weapons (sarin and chlorine) were used against soldiers and civilians (targeting even medical personnel). These actions have earned the Syrian regime dozens of complaints by the OPCW which in 2014 created the Fact-Finding Mission³² to 'establish the facts surrounding allegations of the use of toxic chemicals, presumably chlorine, for hostile purposes in the Syrian Arab Republic'. As of 2020, the OPCW has deployed its fact-finding missions to the area more than eighty times.³³ In addition, the UN Joint Investigative Mechanism confirmed the use of mustard gas by ISIS in 2015 against troops and civilians in Syria and Iraq.³⁴

In view of these facts, we can only conclude that the real utility of these weapons at the tactical level (because at the strategic level they do not seem to have much utility beyond deterrence) lies in their use against an unsuspecting urban civilian population (the framework in which the current conflicts are taking place), which would constitute a war crime or an act of terrorism.

The efforts of the international community to erase these weapons have been met with serious limitations: a) systematic violations that are only possible on the basis of prior non-compliance with OPCW standards and b) a growing importance at the political/military level of non-state groups at the expense of the state's authority. This combination makes the access of non-state groups to chemical weapons more and more feasible. It would also be

31 For more information, see *Organization for the Prohibition of Chemical Weapons* (OPCW) <https://www.opcw.org/>.

32 Hidalgo García, M., "Syria, a challenge for the OPCW", *Spanish Institute for Strategic Studies* (2021).

33 Garrido V., "Immorality, Inhumanity, Opportunity, Impunity of the Use of Chemical Weapons: the case of Syria", *Electronic Journal of International Studies* 40 (2020).

34 *Fact Sheet OPCW – UN Joint Investigative Mechanism* (2017). Available at: <https://www.un.org/disarmament/wp-content/uploads/2017/07/JIM-Fact-Sheet-Jul2017.pdf>. Last accessed November 3, 2021.

convenient however to study operability and efficacy of use by such groups either as a chemical weapon itself or as a “pollutant”.³⁵

3.2 *Armed Non-State Actors (ANSAs). Terrorism*

Chemical terrorism. The challenge of production and “vectorization”.³⁶

In view of what we have studied and the success (relative success, because everything is relative in the field of disarmament) of the OPCW in the destruction of state-owned arsenals, the most serious threat we are facing today is the use of chemical weapons by ANSAs, either for targeted assassination or to sow panic and death on a large scale among the civilian population.

Some terrorist groups in the second half of the 20th century did not fail to show interest in WMD. In the 1970s, terrorism of a nationalist separatist or liberation movement nature, such as the PLO or the IRA, proliferated. Extreme left-wing groups such as the Baader-Meinhof in Germany, the Red Brigades in Italy and extreme right-wing groups such as the “Raising Sun” in the USA proliferated in the West. Some of these groups possessed the ability to acquire or produce their own biological/chemical substances with the intention of committing mass murder.³⁷

In those years there were only three recorded terrorist incidents involving the use of these weapons.³⁸ There were many, many threats, and quite a few groups that despite having the compounds, never actually used them. The reasons why all the attacks that could have occurred did not materialize range from moral reasons and technical difficulties in the production and dispersion of the weapon on the part of the terrorists, to political strategy (since the use of these weapons could diminish the necessary popular support that “the cause” needed). These features were repeated in the 1980s. There was some concern in the international community about the possibility of “nuclear terrorism³⁹”. Paradoxically, there was not such a concern about “chemical or biological terrorism⁴⁰”, although it could be seen that the interest of terrorist groups in

35 Generally, when it is not possible to weaponize (“vectorize”) the toxic compound, so as to optimize its toxicity and effectiveness against as many targets (people) as possible, it will be used as a contaminant, which will dramatically limit its effectiveness.

36 In this context it is understood as the transposition of a toxic element into an effective weapon.

37 Cole, B., *The Changing Face of Terrorism. How Real is the Threat from Biological, Chemical and Nuclear Weapons?*, I.B. Tauris & Co Ltd. (London: 2011).

38 In the USA in 1973; in the Middle East and in Italy.

39 That led to the constitution of the *International Task Force On the Prevention of Nuclear Terrorism*, in 1985.

40 This did not prevent some events such as the one that took place in the Rajneeshpuram sect in 1984 in the USA.

this type of weapon did not wane, as attested by the compounds found by the police in the hands of Baader-Meinhof terrorists, neo-Nazi groups or members of the PLO.

In the 1990s the situation worsened, especially among extreme right-wing groups in the USA and Japan (the Aum Shinrikyo sect is a case study “per se”). Attempts by these groups to get hold of these weapons multiplied, but in the rare cases in which they succeeded, they usually failed at the time of “vectorising” the “poisons” at their disposal.

Although there is a common understanding that as time goes on, it becomes easier for ANSAs to get hold of chemical weapons, in this essay we will focus primarily on the technical issues surrounding the production and use of these weapons by non-state actors as well as the challenges and dilemmas they have to face before they might be able to attack.

There are two means by which ANSAs can acquire chemical weapons: First, the production and development of the poison and delivery device. Second, the acquisition of the weapon already assembled and ready to use.

For a terrorist group, if it decides to produce such a weapon, the first step would be to acquire the know-how. nowadays there are many open sources, mainly in the Internet, with instructions on how to manufacture sarin or VX, but the vast majority of them are false, erroneous or incomplete since they generally do not offer guidelines on how to vectorize/deliver the poison that might have been produced, and without vectorization there is no dispersal, therefore, no desired effect.

Even if complete and accurate information on the manufacture of “poisons” is acquired, a chemist or a biologist is needed to produce the compound. Even so, it will take time, trials and experimentation to reach the desired result. The Aum Shinrikyo⁴¹ sect, which had the time, money and scientists, needed two years to produce the first samples of sarin. This fact gives us an idea about the existing technological barrier not so easy to overcome.

Naturally, this barrier will be more or less severe depending on the desired compound, which will be conditioned by the means available to the ANSAs, and by the desired degree of effectiveness/mortality. It is true that there are chemical compounds suitable to be used as a weapon and that are “easy” to acquire in the open market, such as certain insecticides or industrial chlorine. But high effectiveness can only be reached with nerve agents such as tabun, sarin or soman, which kill by inhalation, or VX, the most dangerous of the

⁴¹ In Cole, B., *The Changing Face ... op. cit.*, numerous references are made to the activity of Aum Shinrikyo in the preparation and execution of their chemical weapons attacks.

above (except for novichok), which acts through the skin. But the manufacture of those is extremely complex.

Moreover, effectiveness varies according to factors such as the volatility of the compound. Thus, for open-air attacks, “persistent” substances such as mustard gas or VX will be preferred, furthermore poisons have to be released in enormous quantities if significant lethality⁴² is to be achieved. In an optimal situation a little more than one kilogram of chlorine or 10 grams of sarin could kill, in theory, five thousand people. The less sophisticated the method of dispersal and exposure, the lower the lethality.

The production of these compounds is far from simple, even more, the production in sufficient quantities to be able to carry out an effective attack is even more difficult due to the need to improve the qualities in the production first, and then to reach an industrial scale, which is a necessary step to achieve a mass effect.

The issue of compound vectoring is critical and probably presents even more of a technological challenge to potential terrorists than the manufacture of a poison. If aerial delivery of the poison is chosen, it is necessary to maintain a high concentration of the element in a given area so that potential victims receive the required dose. The use of explosives is very ineffective because it can cause the degradation or vaporization of the toxic. The best solution is the use of an aerosol spray from a suitable height that allows the compound to be released progressively, continuously, in sufficient quantity and over the same area long enough, under the right atmospheric conditions. If these difficulties are not solved, the only option left is contamination. But poisoning through contamination of, let's say, water reserves is not easier than aerial poisoning for different reasons. The more targeted or individualized attack (on people or groups in enclosed spaces), the more effective, although the result might be far from the objectives of publicity and media repercussions that terrorist action seeks.⁴³

If manufacture of the device is out of reach, the other option for a terrorist group would be to acquire (buy or steal) a ready-to-use chemical weapon.

42 It would take about four tons of VX aerosol to cause several hundred thousand deaths in a densely populated area according to Cole, B., *The Changing Face ... op. cit.*

43 Cases of targeted assassinations using chemical weapons such as the 2017 assassination in Kuala Lumpur of Kim Jong-un using VX and the 2018 attempted assassination of former Russian spy Sergei Skripal and his daughter Yulia in Salisbury using a “novichok” agent show that the use of chemical agents is no more effective than the use of firearms, but they do have the potential to cause chaos at the organizational and political level of a country.

Cases of theft⁴⁴ or attempted sale⁴⁵ are scarce. 'Chemical weapons, precursor chemicals are the easiest to acquire in a developed State, biological weapons are slightly more difficult, and nuclear materials are the most difficult to acquire'.⁴⁶ Many of the chemical compounds used to make a weaponizable element are dual-use, valid for both: civilian and weapons industries.⁴⁷ This is a particularly thorny issue that affects the entire WMD nonproliferation regime and poses serious challenges to the efforts to control chemical weapons proliferation on the part of the OPCW and the Australia Group.⁴⁸

As of March, 2022, The United States still has 715 tons of chemical agents and munitions left to be destroyed at the Pueblo and Blue Grass facilities. According to the Chemical Weapons Convention, the U.S. must finish destroying its remaining 3% of its chemical weapons stockpile by September 2023. Russia possessed the world's largest chemical weapons stockpile, approximately 40,000 metric tons. On September 27, 2017, the Organization for the Prohibition of Chemical Weapons announced that Russia completed the destruction of its chemical arsenal. But although the territories of the former Soviet Union seem to be the most prone to unintentional proliferation, due to the low export control standards, the reduction of budgets allocated to the control and "securitization" of the stockpiles, or the precarious salaries that those responsible for these substances may be earning, the truth is that there is no information about thefts or subtractions of these substances. In the event that these materials or weapons might enter the black market, it is very likely that no terrorist group intending to use them would be able to match the offer made by a proliferating state seeking to acquire these weapons, thus the weapons would in any case remain out of the hands of interested ANSAs.

At this point, it seems appropriate to point out two remarks. First: the logical conclusion is that the use of chemical weapons (or biological weapons for practically the same reasons) as WMD in the short term is beyond the reach of terrorist groups and that the use of these weapons, if any, will prove to be of very limited effectiveness. Second: two issues that cannot be ignored: a) as ANSAs become more sophisticated and the technology becomes easier and more accessible, the

44 Like the one involving 53 litres of mustard gas in Germany in 1975.

45 The case of the Austrian chemist Eichard Konigstorfer in 1976 or the 1996 case in which Turkey seized 19 containers of mustard gas from a smuggler who had bought them from a former KGB agent.

46 Cole, B., *The Changing Face ... op cit.*

47 This issue becomes even more evident and complex in the case of biological compounds that could be used for the creation of a biological weapon.

48 An informal group of countries, created in 1985, which assist each other on a voluntary basis to identify controllable exports to prevent the spread of chemical and biological weapons.

possibility of one of them successfully “vectoring” a toxin will increase; b) if we take into account that the International Atomic Energy Agency itself states that in 67% of the reported cases of loss and theft of nuclear material, this material is never recovered, we can only assume that illegal thefts or sales of toxins and/or chemical weapons have most likely taken place, therefore the risk is real.

4 Threat Response Assessment Control. Non-Proliferation and Counter-Proliferation Measures

There are several multilateral mechanisms designed to address the proliferation of chemical weapons risk, such as the Australia Group or the “International Partnership against Impunity for the Use of Chemical Weapons”⁴⁹

This chapter focuses on the CWC and the Resolution 1540 as they are perhaps the two most far-reaching multilateral mechanisms which also have the greatest potential to address the threat posed by non-state actors in the short/medium term.

4.1 *Approach to the “Chemical Weapons Convention”. The Role against the ANSA Threat*

We will not go into a study of the Convention (CWC) nor of the Organization for Chemical Weapons (OPCW)⁵⁰ and its verification system (a complex system, much more complete and effective than the one of the IAEA). It is true that the text of the CWC, in force since 1997, was designed with states in mind and not for NSAA, but the breadth of its definitions (especially in Articles I and II) may provide an answer for the fight against non-state proliferation.

The “General Purpose Criterion⁵¹” contained in the text of the convention prohibits the development, production, stockpiling, transfer and use of any toxic chemical for hostile purposes, and to this end there are three lists of products subject to control. The facilities where these products⁵² are produced

49 A platform of 40 states focused since 2018 on the accountability of those who use these weapons. It is based on the CWC rules and issues political statements condemning those responsible for their use, publications of lists with persons involved in the use and proliferation of these weapons, and identifies legal means to prosecute those responsible). For more information go to *The International Partnership against Impunity for the Use of Chemical Weapons*. Available at: <https://www.noimpunitychemicalweapons.org/>.

50 For further information, please consult the OPCW website: <https://www.opcw.org/>.

51 Tucker, J.B., “The Role of the Chemical Weapons Convention in Countering Chemical Terrorism”, *Terrorism and Political Violence*, 24 (2011).

52 Schedule 1 refers to compounds whose use is exclusive for the manufacture of chemical weapons. Schedule 2 and 3 for dual-use items.

(member states have to declare them to the OPCW) are subject to inspection. The OPCW checks that their production complies with the declared purposes. There is also the OCPF (Other Chemicals Production Facilities) system, which seeks to keep firms with the capacity to produce more than 200 metric tons of any type of dual-use product (listed or not) under the OPCW radar.

However, there are numerous limitations to the OPCW's ability to monitor potential violations in terms of production quantities. We will outline some of the possible measures to improve compliance with the CCW objectives in preventing ANSAs access to these weapons.

A – Effective implementation of national legislation in line with the “General Purpose Criterion”.⁵³ The volume of international commercial traffic is immense, therefore much of the responsibility for the control of production ‘for hostile purposes’, especially where non-state actors are involved, lies within the state and its commitments under the CCW which compels States to create and implement legislation in line with the Convention.⁵⁴

To date, less than 50% of the state parties have passed the legislation to cover all the obligations of the CWC. Fulfillment of this obligation by all States parties will undoubtedly make a significant improvement in the global effort to prevent chemical terrorism. The impossibility of monitoring the entire global trade in chemicals turns the state into the responsible agent for warning, investigating and, if necessary, drawing attention to suspicious activities.

In this regard, the OPCW has a relevant role in terms of support and advisory actions to States Parties. This activity is in line with the expectations of the international community towards the OPCW.⁵⁵

B – Together with the effective implementation of the CCW at the domestic level, the universality of the provisions of the convention (currently only Egypt and Israel remain outside the Convention) turns them into “erga omnes”, that is a reference that the international community and especially the UN should emphasize so that any person/group involved in the handling and/or transfer of chemicals for hostile purposes will not find refuge in any territory, nor in legal loopholes.⁵⁶

In this regard, it is worthwhile to consider UN resolution 1540.

53 This concept is the very cornerstone on which the OPCW's control and verification system is built.

54 See Article VI of the CWC.

55 See in this regard the background paper *The OPCW and the Global Struggle Against Terrorism* of 2001; or the *UN General Assembly Resolution 60/288* of September 2006.

56 Japan did not have legislation on this issue until 1997, so despite evidence that Aum Shinrikyo had been involved in chemical weapons activities since the early 1990s, it was legally impossible for the police to act against them before the attacks.

4.2 *The UN Resolution 1540*

This Security Council resolution, passed in April 2004, prohibits all UN states from engaging in WMD proliferation activities. It also compels them to implement domestic measures to prevent non-state actors from obtaining WMD or any of their delivery and/or dispersal vectors. These obligations go beyond the text of the CCW. Furthermore, while the convention has a basically military and State focus (the CCW addresses chemical weapons and their precursors),⁵⁷ the 1540 targets all chemicals that may be used for hostile purposes by a non-State actor.⁵⁸

In any case, non-State actors might be able to keep a low profile in terms of volume of precursor production, this would make it very difficult or even impossible for the State to detect them. This vacuum could be filled with a more proactive attitude on the part of the states, in collaboration with the OPCW. Such an attitude should be oriented towards equipping themselves with legislative instruments aimed at monitoring the production, storage and transportation of toxic industrial chemicals. This is the case of the 'chemical facility anti-terrorism standards' of the US Homeland Security,⁵⁹ which has listed more than six thousand industrial plants producing toxic chemicals and tries to keep, in collaboration with the industry, a close monitoring on the final destination of those chemicals.

Regardless of the debate on the international legitimacy of the Res 1540,⁶⁰ the fact is that today it is considered to be one of the pillars of contemporary non-proliferation policy. The monitoring system is based on the annual reports that states are required to send to the 1540 Committee, in which progress⁶¹ in implementing the obligations of the resolution is reported. In the last 15 years, the work of the 1540 Committee has focused on ensuring that all states comply with the submission of the report and that it is standardized. The fulfillment of this objective is being achieved little by little. In 2004, 86 states complied, and

57 Chemicals necessary for the manufacture of a toxicant.

58 For more information, please visit *1540 Committee Security Council Committee established pursuant to resolution 1540* (2004). Available at: <https://www.un.org/en/sc/1540/national-implementation/general-information.shtml>.

59 *Chemical Facility Anti-Terrorism Standards (CFATS)* (2021). Available at: <https://www.cisa.gov/chemical-facility-anti-terrorism-standards>.

60 In this regard, see Shirazyan, S., "Building a Universal Counter-Proliferation Regime: The Institutional Limits of United Nations Security Council Resolution 1540", *10 Journal of National Security Law & Policy* 125 (2019).

61 Only since 2005 has there been a standard reporting format with 300 questions for states to complete.

in 2017 there were 179 compliant states (in 2020 only 33 submitted the report, although the exceptionality of this year prevents us to use it as a reference).

In any case, the number of states submitting the report and the number of internal measures adopted by states to prevent proliferation, especially among non-state actors, do not seem to be sufficient indicators in the fight against the threat.

A verification system inspired by that of the OPCW would be desirable although unlikely due to the lack of resources of the 1540 Committee and the political opposition of some states. Moreover, the reporting system does not evaluate the content of the information reported, or the adequacy of the measures taken by the states or their veracity, as the dramatic case of Syria proved. The Syrian case casts a shadow on how many states are submitting false data. In addition, the technical assistance system set out in the resolution has been described as dysfunctional at best,⁶² and there are very few cases in which the response to a state's request for assistance matched the object of the request itself.

Many of these shortcomings were addressed in the 2011 mandate⁶³ of the Security Council, which extended the functions of the 1540 Committee 10 years more (until April 2021) and also provided it with three tools to improve the implementation of the resolution. Those tools are based on a more direct contact between member states and the Committee: a) assistance in the elaboration of National Implementation Action Plans; b) on-site visits; and c) mutual reviews between states parties. Nevertheless, these tools are based on a voluntary and cooperative system in which the states unilaterally establish whether and how they will be applied, so that the objectivity of the conclusions drawn from the use of these tools is not as high as one might wish.

How could this system be improved? It should be borne in mind that the doctrine is not peaceful when it comes to defining what constitutes a violation under 1540 and who should react to it: the Committee, the Security Council, the UN Secretary General?⁶⁴

Even so, with all its limitations, the 1540 nonproliferation regime, based on the principles of voluntarism and cooperation between states, is a benchmark for the international community. In any case, there is no prospect of transforming it into a mandatory verification regime, so that any potential improvement measure will have to be framed in terms of cooperation and voluntarism.

62 Shirazyan, S., "Building a Universal Counter-Proliferation ... op cit. 19.

63 See *UN Security Council Resolution S/RES/1977* (2011). Available at: [https://undocs.org/S/RES/1977%20\(2011\)](https://undocs.org/S/RES/1977%20(2011)).

64 Shirazyan, S., "Building a Universal Counter-Proliferation ... op. cit. 38.

On the other hand, this does not preclude proactive measures to improve the effective implementation of 1540.

Some of the proposed measures⁶⁵ are: (a) –Reprioritizing the use of the Committee’s resources, focusing them on risks and threats from countries of concern in thematic order (protective measures, trade and transport, protection of facilities, proliferation financing, etc.); (b) – The civil society and academia should be involved in raising awareness of the threat, sharing best practices, etc.; (c) – The implementation of a “gift basket diplomacy” in an annual 1540 conference in the style of the “Nuclear Security Summit”, in which states should bring new commitments, ideas or initiatives to the forum; and (d) – More resources and funding should be provided to the 1540 Committee for the necessary human and material assets.

5 Conclusions

Taking into account the provide analysis, we can conclude by saying that:

- Chemical weapons arrived in 1915 and they are going to stay;
- That at no time has it lost its label of weapon of mass destruction, nor its presentation as a definitive weapon despite the fact that empirical evidence tells us that its usefulness on the battlefield has only been demonstrated when combined with surprise and target concentration. Those factors can be found in urban scenarios where these weapons have shown their effectiveness against the civilian population; and
- That it has not been possible to demonstrate that their use has had any dramatic influence on the outcome of any battle.

On the other hand, at present, the state, due to its capabilities, continues to be the main actor and responsible for controlling the threat from non-state armed groups. In any case, in the fight against this threat that affects the international community as a whole, the OPCW and the Res 1540 are of vital importance in: a) drafting and implementing domestic and international measures against proliferators, terrorists and other ANSAs; b) eliminating geographic “free zones” or legal loopholes that might allow them to traffic, prepare and attack; and c) ensuring that there will be no impunity for those responsible. The two mechanisms studied can play, and in fact are already playing, a crucial role.

65 Idem, 40.

Finally, we would like to point out that the “Comprehensive Review of the status of the implementation” of the resolution 1540⁶⁶ was scheduled for April this year, although the pandemic has postponed the event one more year.⁶⁷ This will be a good opportunity to evaluate the level of compliance according to the established parameters. But it will also serve to check the political will of the international community in terms of its determination to deal more firmly and resolutely with the threat to global stability posed by the relationship between non-state actors and WMD.

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66 Vid <https://www.un.org/en/sc/1540/documents/2021%20CR%20Modalities%20Paper.pdf>. Last consulted on November 3, 2021.

67 Vid https://www.un.org/en/sc/1540/documents/Press%20Release_1540%20Comprehensive%20Review%20Postponement_E.pdf last accessed on November 3, 2021.

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The International Partnership against Impunity for the Use of Chemical Weapons.

Biological Weapons and Their Incompatibility with IHL

Ana Cristina Gallego-Hernández¹

1 Introduction

Since ancient times, despite the fact that the use of pathogens in warfare was considered an unfair practice,² the use of biological material as a tool of war has its roots in the first armed conflicts,³ whereby, by directly or indirectly infecting the enemy, the main objective pursued in combat was achieved: massive casualties.

The greatest boom in biological warfare (like chemical warfare), due to technological expansion, took place during the World Wars.⁴ Thus, a number of countries, such as the United States, Canada or the United Kingdom,⁵ among others, began to design their own biological warfare programmes. Even some States with the most developed research on biological weapons (BW) did not miss the opportunity to evaluate their effectiveness on the battlefield, such as Japan after the outbreak of the war against China. 'From late 1939 through to 1942, Unit 731 engaged in a number of BW attacks against both enemy military forces and civilian populations in Manchuria and China. (...) The attacks, while technologically unsophisticated, caused significant devastation. Tactics included the poisoning of wells and rivers with cholera, the dropping of

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2 Gómez Martínez, R., 'Percepción y control de la amenaza biológica', *Revista Ejército* 845 (2011) 69.

3 López Muñoz, F et al., 'Amenazas biológicas intencionadas: implicaciones para la Seguridad Nacional', *Revista Sanidad Militar* 77. 2 (2021) 98.

4 López Muñoz, F. et al., 'Amenazas biológicas' 99.

5 'In February 1942 Britain began collaborating with Canada and the USA in all aspects of BW research. By the end of the Second World War, allied research into BW and methods of dissemination had accelerated'. Jefferson, C., *The Taboo of Chemical and Biological Weapons: Nature, Norms and International Law*, 135 (University of Sussex: 2009).

ceramic ‘bombs’ filled with biological agent, and the introduction of plague-carrying fleas and rats into cities and towns’.⁶

However, ‘the history of biological warfare is not as well documented’,⁷ mainly because it is unpredictable in terms of effects, its consequences being possibly devastating for the human being; also, ‘the diseases allegedly caused by biological weapons might be similar to those occurring naturally’,⁸ whereby the identification and responsibility of the aggressor State are difficult to establish. As a consequence, said type of weapons ‘has a less extensive history of international condemnation’.⁹

In this sense, in accordance with the International Humanitarian Law drawn up in the last century, the vast majority of the international community renounces the use of biological weapons through a continuous practice of rejection, crystallising, by means of different legally binding instruments, the condemnation of their use, production and stockpiling.

In the light of the above, this research aims, as a general objective, to study biological weapons, which, as the title itself already advances, are prohibited. Notwithstanding that, and before continuing to develop the specific purposes of the present work, it seems appropriate to question the current situation of International Humanitarian Law through two ideas.

First, there is a ‘changing nature of military operation’,¹⁰ and for more than a decade, a new concept of warfare has been formulated,¹¹ which causes ‘the erosion of the distinction between armed conflict and situations other than war’.¹² Thus, the initial difficulty that has been raised amounts to identifying whether the situation can be considered as an ‘armed conflict’ in accordance with International Humanitarian Law,¹³ given that “new wars” fall in many cases in the grey area between the two, repeatedly breaching the ‘threshold’

6 *Ibidem*, 125.

7 Allen, k.- Spence, S.- Escauriaza Leal, R., ‘Chemical and biological weapons use in the Rome Statute: a case for change’, Vertic Brief 14 (2011) 4.

8 Goldblat, J., ‘The Biological Weapons Convention – An overview’, International Review of the Red Cross 318 (1997). Available at: <https://www.icrc.org/en/doc/resources/documents/article/other/57jnnpa.htm>.

9 Allen, k.- Spence, S.- Escauriaza Leal, R., ‘Chemical and biological’ 4.

10 Mathews, R., ‘Chemical and Biological Weapons’, Melbourne Legal Studies Research Paper 723 (2015) 20.

11 Ilchmann, K. – Revill, J., ‘Chemical and Biological Weapons in the “New Wars”’, Sci Eng Ethics, 20. 3 (2014) 758.

12 Mathews, R., ‘Chemical’ 20.

13 ‘The continued durability of the prohibitions requires states parties to respond to and manage changing contexts to avoid the erosion of this norm’ Ilchmann, K. – Revill, J., ‘Chemical and Biological’ 754.

and falling below it – where it is not clear if the situation is an armed conflict or not'.¹⁴

Second, whilst it is true that notable advances in biotechnology¹⁵ have been observed since the 1970s, today 'normally harmless organisms which do not cause diseases can be modified so as to become highly toxic and produce diseases for which there is no known treatment'.¹⁶ In consequence, scientific advances not only permit the improvement of former biological weapons, but also the creation of new ones of greater incidence and dissemination.

In this vein, this research starts from the premise that 'the threat of biological warfare remains real',¹⁷ and not only because of the colossal consequence of massive destruction, but because its use can cause many other effects, including: contamination of products or the environment, physical and mental health issues, localised discomfort in large areas, and, above all, fear.¹⁸

In this regard, as specific objectives, the author intends to examine the concept of biological weapon, its legal basis, the reaction of the United Nations to its possible non-compliance, and how individual responsibility can be imputed by international Courts. Therefore, the current threat of biological weapons being used in terrorist activities will not be our direct object of study, nor will it be discussed whether it is appropriate to set up a special international organisation or a particular control body for biological weapons.

Finally, with respect to methodology, we will be guided by the general theory of international sources, specially principles, custom and treaties. For there is no jurisprudential development available, induction will be used as the main methodological technique. Accordingly, we will fundamentally use primary sources (treaties, acts of normative content of international organisations, internal norms, and also numerous soft law instruments), and secondary sources (doctrine, documents, relevant internet sites, etc.), such as the monograph on the Protection of the Environment in International Humanitarian Law¹⁹ by Professor Domínguez-Matés, which has been especially illustrative.

¹⁴ *Ibidem*, 759.

¹⁵ Mathews, R., 'Chemical' 12.

¹⁶ Goldblat, J., 'The Biological'.

¹⁷ *Ibidem*.

¹⁸ Ilchmann, K. – Revill, J., 'Chemical and Biological' 758.

¹⁹ Domínguez Matés, R., *La protección del Medio Ambiente en el Derecho Internacional Humanitario* (Tirant lo Blanch-Cruz Roja Española: 2005).

2 What Are Biological Weapons?

The study of the prohibition of biological weapons requires starting by defining what they are. Yet, as happens sometimes when regulating ambiguous or controversial issues,²⁰ the conventional instruments that define the use, creation and supply have 'not defined the prohibited items nor the targets to which the prohibitions relate'.²¹

Certainly, there is no absolute ignorance or disagreement. In fact, although the term 'biological weapon' is relatively controversial, the concept of 'biological agent' has been defined with international consensus. In this vein, the World Health Organisation (WHO hereinafter) prepared the Report 'Health Aspects of Chemical and Biological Weapons'²² in compliance with the request made by the General Assembly at the end of 1968,²³ and in cooperation with the Secretary-General,²⁴ in which, as a working definition, it was determined that:

Biological agents include those that depend for their effects on multiplication within the target organism, and are intended for use in war to cause disease or death in man, animals or plants.²⁵

As a matter of fact, in similar terms and shortly before the publication of the aforementioned WHO Report, 'the General Assembly, (...) Declares as contrary to the generally recognised rules of international law (...) the use in international armed conflicts of: (...) Any biological agents of warfare -living organisms, whatever their nature, or infective material derived from them- which are intended to cause disease or death in man, animals or plants, and which

²⁰ Although the issue will be examined in depth in Section 4 of the present work, we refer to the Protocol for the prohibition of the use in war of asphyxiating, toxic or other similar gases, as well as bacteriological means, known as the 1925 Geneva Protocol, and to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 1972.

²¹ Goldblat, J., 'The Biological'.

²² World Health Organisation, Geneva, 1970.

²³ General Assembly, Resolution 'Question of general and complete disarmament', adopted on 20 December 1968, 2454 A (XXIII).

²⁴ Resolution 2454 A (XXIII) asked the Secretary-General to make a concise report. In this sense, 'on 29 January, 1969, the Secretary-General of the United Nations requested the Director-General of the World Health Organisation to co-operate with the United Nations Group of Consultant Experts on Chemical and Bacteriological (Biological) Weapons in the preparation of a report on this subject'. World Health Organisation, 'Health Aspects of Chemical and Biological Weapons', Geneva, 1970, 9.

²⁵ *Ibidem*, 12.

depend for their effects on their ability to multiply in the person, animal or plant attacked'.²⁶

This does not establish that both parties ended up taking a similar position and coincidentally over time, but rather that the position of the Assembly was clearly inspired by said WHO Report, a thesis that can be confirmed if we pay attention to the dates. Although the WHO Report was officially published in 1970, it was completed on November 21, 1969, and presented on November 28, 1969, to the Secretary-General of the United Nations, eighteen days before the cited resolution.

Concerning the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,²⁷ hereinafter referred to as the Convention on Biological Weapons or simply the Convention,²⁸ the report of the maximum responsibility in health exerts influence in the same terms.

As the great expert in the field Jozef Goldblat confirms, and as we modestly verify, there is no opposition on the concept of biological agent previously mentioned. Nonetheless, due to how controversial the clarification of the term biological weapon may be, there have been certain conflicting positions on the scope of said main object. Thus, for instance, when Switzerland ratifies the Convention in 1976,²⁹ in one of its three reservations, it reserves 'the right to decide for itself which auxiliary means fall within' the definition of 'weapons, equipment or means of delivery designed for' 'the use of biological agents or toxins'.³⁰

This being the case, we can consider that despite the fact that there is not a universally accepted decision, biological weapons consist of an instrument or set of resources that use biological agents, and a dissemination device,

26 General Assembly, Resolution 'Question of chemical and bacteriological (biological) weapons', adopted on 16 December 1969, 2603 (XXIV).

27 Adopted on October 4, 1972, in Washington, Moscow and London (capitals of the three depository States). Authentic texts in Spanish, Russian, French, English and Chinese. Entry into force on March 26, 1975. Currently, 183 States have ratified it. United Nations Treaty registration number Series: 14860. United Nations Treaty Series. Available at: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280101653>.

28 As Jozef Goldblat explains, the Convention does not only include biological agents prepared for warlike and inanimate purposes, but also takes into account 'all natural or artificially created toxins'. 'Since toxins are chemicals by nature, their inclusion in the BW Convention was a step towards the projected ban on chemical weapons'. Goldblat, J., 'The Biological'.

29 May 4, 1976. United Nations Treaty Series. Available at: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280101653>.

30 Vol. 1015, 1-14860 United Nations Treaty Series, 236.

mechanical or living one, to generate diseases in humans, animals or plants, indiscriminately. As a weapon of mass destruction,³¹ whose ‘destructive effects are multifaceted and protracted’,³² it can cause excessive damage to the population (civil and military),³³ the environment, the economy³⁴ and politics. ‘However, the utility of biological weapons is not limited to mass infectivity per se, and terrorists or State actors could be attracted to biological weapons for their psychological effects in order to attract attention, create fear and undertake’.³⁵

Along these lines, ‘biological weapons are microorganisms with the ability to inflict damage or cause disease, which are not used for prophylactic, protective or other peaceful purposes’.³⁶ That is, although the limits are set out in common instruments, biological weapons are absolutely different from toxin and poison weapons.³⁷

3 Biological Weapons and Their Absolute Incompatibility with all the Principles of International Humanitarian Law

Before delving into how the subjects of International Law have imposed self-limiting restrictions on the development, stockpiling and, above all, use of

31 Security Council, Resolution of April 3, 1991, 687 (1991), 2981th Session. Adopted with 12 votes in favour, 1 against (Cuba) and 2 abstentions (Ecuador and Yemen).

32 Tuzmukhamedov, B., ‘Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction’, United Nations Audiovisual Library of International Law (2021). Available at: <https://legal.un.org/avl/ha/cpdpsbbtwd/cpdpsbbtwd.html>.

33 Thus affecting life, physical health, and also, importantly nowadays, mental health, since the threat or use of biological weapons will generate psychological consequences with a ‘disproportionately greater strategic impact’. Ilchmann, K. – Revill, J., ‘Chemical and Biological’ 760.

34 ‘For example contamination of land, machinery, or crops’ *Ibidem*.

35 It consists in what James Revill and Catherine Jefferson call ‘Tacit knowledge’, i.e. ‘explicit, fully articulable knowledge that can be conveyed from the knower to a recipient by means of language’. Revill, J. – Jefferson, C., ‘Tacit knowledge and the biological weapons regime’, *Science and Public Policy*, 41 (2014) 598–599.

36 Allen, K. – Spence, S. – Escauriaza Leal, R., ‘Chemical and biological’ 10.

37 ‘Toxins are poisonous substances produced by a living being. Therefore, toxin weapons are either toxins or chemicals. The BWC prohibits the misuse of ‘microbial or other biological agents, or toxins,’ implying these are distinct categories. Since biological weapons are named distinctly from toxin weapons, the term ‘toxin’ excludes biological weapons by implication. Being neither toxins nor chemicals, biological weapons do not fall under the category of ‘poison.’. *Ibidem*.

biological weapons, we consider that it is necessary to begin by substantiating why International Humanitarian Law is incompatible with the use of these weapons in accordance with the General Principles that support the aforesaid branch of International Law. In fact, it is peculiar that the use of biological weapons, as we intend to explain next, violates each of the Basic General Principles. In this respect, and in order to show this absolute incompatibility, a detailed study of each Principle will be carried out, albeit, as is well known, they are not watertight compartments.

- The principle of limitation on hostile action restricts the right of the belligerent to use any method or means of combat that causes “superfluous injury or unnecessary suffering”.³⁸ In this respect, the use of biological weapons could not be justified by ‘an absolute military interest’,³⁹ not only because these would uselessly aggravate the suffering of men or even make their death inevitable,⁴⁰ but because International Humanitarian Law, without prejudice to provisions in specific instruments -such as those addressing this type of weapon-, prohibits the use of weapons that are not, or may not be, directed against military objectives and that produce indiscriminate effects,⁴¹ equally prohibiting means of combat that do not serve humanitarian reasons. In view of the above, biological weapons that seek to achieve massive casualties and that, generally, affect without distinction, would clearly cause unnecessary damage to the opposing party.⁴²
- The purpose of the principle of military necessity is to ensure that disproportionate and unnecessary damage is not inflicted on the enemy in order to legitimately obtain the rapid submission.⁴³ As Professor Domínguez-Matés masterfully clarifies, military necessity is a concept “as old as the Law of War itself”,⁴⁴ which can be used to justify ‘the recourse to any means of combat or warlike action that the belligerent considers

38 Article 35.2, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977. Entry into force on December 7, 1978. 1125 UNTS 3.

39 Salmón, E., ‘Introducción al Derecho Internacional Humanitario’, CICR, IDEHPUEP, 2004, 57.

40 Domínguez Matés, R., *La protección* 350.

41 *Ibidem*, 352.

42 Article 22, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

43 Salmón, E., *op.cit.*, 56.

44 ‘Francisco de Vitoria indicated that ‘in war, it is lawful to do whatever is necessary for the defence of the common good’. Domínguez Matés, R., *La protección* 303–304.

necessary to obtain a particular goal in the war'.⁴⁵ Still, as cannot be otherwise, military necessity is currently an exception⁴⁶ that has limits,⁴⁷ since it can justify only in singular instances an *a priori* illicit conduct.⁴⁸ For example, and without prejudice to a more complete and updated analysis in the following section, the famous reservation that 37⁴⁹ States formulated when binding themselves to the Geneva Protocol of 1925, to guarantee the right to retaliate using biological weapons if an adverse party did not comply with the terms of the agreement,⁵⁰ consisted in a clear exception that justified and permitted said means of combat, this being expressly considered as an exception to the principle of limitation on hostile action and, of course, the principle of military necessity, provided that the action continued to be adjusted to the principle of proportionality.

- Thus, the principle of proportionality,⁵¹ specifically in International Humanitarian Law, aims to ensure that there is a balance between the means or methods of warfare used and the military advantage proposed as an objective.⁵² Therefore, as Professor Domínguez-Matés explains, the notion of proportionality has two dimensions. On the one hand, it reduces 'the military violence used to a minimum of force that is adequate for the

45 *Ibidem*, 304.

46 Despite the fact that the 1998 Rome Statute of the International Criminal Court in its Article 31.1 recognises said principle as a general clause of exemption from the responsibility of the individual for the violation of norms relating to the conduct of hostilities. *Ibidem*, 312.

47 *Ibidem*, 307.

48 *Ibidem*, 306.

49 Australia, Belgium, Bulgaria, Canada, Chile, Slovakia, Spain, Estonia, France, Ireland, New Zealand, the Netherlands, the United Kingdom, the Republic of Korea, Romania, Russia and South Africa have to date withdrawn the reservation, but it remains in force for Algeria, Angola, Bahrain, Bangladesh, China, Fiji, India, Iraq, Solomon Islands, Israel, Jordan, Kuwait, Libya, Nigeria, Pakistan, Papua New Guinea, Portugal, Democratic People's Republic of Korea, Viet Nam and Yugoslavia.

50 For example, Union of South Africa, on January 22, 1930, stated that: It 'shall cease to be bound by the Protocol towards any Power at enmity with Him whose armed forces, or the armed forces of those allies, do not respect the Protocol', which other States, such as Australia and New Zealand, availed themselves of as a reservation.

51 The principle of proportionality is included in multiple instruments, for example, in Article 2.4 of the Charter of the United Nations, Articles 51 and 57 of Protocol I additional to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts, of 1977, Article 8.2 of the Rome Statute on the International Criminal Court of 1998, etc.

52 Salmón, E., *op.cit.*, 56.

achievement of the foreseen objectives, which are differentiated by the purpose they pursue', while, on the other hand, it reinforces 'the principle of immunity of the population and civil property',⁵³ as will be pointed out when we address the principle of distinction. With regard to how the correct application of said principle is evaluated and how an optimum balance between damage and military advantage is sought, each State will individually assess the damage caused, as well as the extent of the suffering, in conformity with 'public conscience'⁵⁴ and its own values and interests. On this point, there is absolute instability against the preservation of the damage if the biological weapon is used, for it would have a disproportionate impact on the civil and military population, and could even affect that of the State that employs it.

- The principle of equality between the belligerents⁵⁵ implies that Humanitarian Law is to be applied indiscriminately to all the opposing parties⁵⁶ regardless of the origin or nature of the conflict, or the status of the parties involved in it. Consequently, in line with the above principles, the same rights and obligations must be recognised for the combatants of each party. In the aforementioned case, a flagrant violation of the use of the biological weapon would have been committed by the Japanese against the Chinese by considering them an inferior race,⁵⁷ as well as when the former developed their biological weapons programme by conducting experiments against Chinese nationals, among others. Thus, not only 'Han Chinese, but Soviet prisoners, Mongolians, Koreans and Europeans of various nationalities accused of spying, as well as the mentally handicapped, were also victims of human experiments'.⁵⁸
- The principle of humanity tries to ensure that in situations of armed conflict, the combatants be treated with benignity whilst respecting their

53 (Author's translation) Domínguez Matés, R., *La protección* 366.

54 International Criminal Court, Advisory Opinion, of July 8, 1996, para. 78.

55 Preamble of Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 1977.

56 Red Cross, Fundamental Principles of International Humanitarian Law. Available at: http://www.cruzroja.es/portal/page?_pageid=878,12647079&_dad=portal30&_schema=PORTAL30.

57 'Those living abroad belonged to population groups whom the Japanese commonly referred to as "lower races". (...) this understanding – one that was indoctrinated from youth – has implications for understanding how otherwise taboo practices, such as human experimentation and the use of BW on human subjects came to be normalized in the Japanese BW program'. Jefferson, C., *The Taboo* 121.

58 Ibidem, 123.

dignity, in accordance with the principle of limitation on hostile action,⁵⁹ and specially, civilians and ex-combatants (for example, the sick, or prisoners). Thus, this principle is based, as stated in the preamble of the 1972⁶⁰ Biological Weapons Convention itself, on the prohibition of using, developing or stockpiling biological weapons, insofar as this undermines basic human rights, such as health or life itself, and hence prevents the guarantee of dignity and humane treatment of individuals who are *de facto*, or hypothetically, subject to said circumstance.

- The principle of distinction,⁶¹ which is directly complemented by the principle of humanity, and is intrinsically connected with the principle of military necessity, establishes that attacks may only be directed against combatants and military objectives,⁶² whereby military actions must ‘distinguish’ and respect, at all times and under all circumstances, the population and the civilian property. Said personal and material prohibition not only constitutes a customary norm⁶³ but, as confirmed by Professor Domínguez-Matés, has also been recognised by the doctrine as an imperative norm that, in consequence, does not admit an agreement to the contrary.⁶⁴ Thus, as the General Assembly itself acknowledges, the effects of biological weapons would not only injure combatants and non-combatants without distinction,⁶⁵ but could be uncontrollable in the personal dimension as well. In this regard, their use in the material dimension could not be justified either, for if diseases are spread, for example, via plants that feed the combatants, it would continue to be considered as economic/industrial resources [which], in principle, do not directly contribute to military action.⁶⁶

59 Cruz Roja, Principios Generales Básicos del Derecho Internacional Humanitario. Available at: http://www.cruzroja.es/portal/page?_pageid=878,12647079&_dad=portal30&_schema=PORTAL30.

60 ‘For the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons, convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk’, Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. Open for signature on April 10, 1972 in London, Moscow and Washington. In force since March 26, 1975. Registration Number 14860 United Nation Treaty Series.

61 Article 48 of Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 1977.

62 Salmón, E., *op.cit.*, 54.

63 Domínguez Matés, R., *La protección* 332.

64 *Ibidem*, 334.

65 General Assembly, Resolution ‘Question of chemical and bacteriological (biological) weapons’, adopted on 16 December 1969, 2603 (XXIV).

66 Domínguez Matés, R., *La protección* 337.

Today, as we introduced in the first pages, we are witnessing a change in circumstances. 'In "new wars", violence is directed against civilians to establish control over territories for purposes of access to State or political power for certain groups that are frequently defined by ethnic, religious or tribal identities rather than any nationality or ideology *per se*. Under such circumstances, the principle of discrimination in targets in warfare is undermined. The distinctions between combatant and non-combatant and the involvement of 'civilians' are breaking down – either through direct targeting or as a consequence of conflicts being fought out in densely populated areas or urban'.⁶⁷ In view of the above, this paradigm shift weakens the weight of International Humanitarian Law in general, but also of specific regulations on risks such as the use of biological weapons.

- Lastly, the principle of non-discrimination, which, as an extension of the principle of humanity, prohibits the norms of International Humanitarian Law from being applied in a discriminatory fashion on race, colour, sex, religion, political belief, nationality, social origin or other grounds of a similar nature.⁶⁸ In this connection, due to the circumstances inherent to the armed conflict, there is a difference between a combatant and a civilian, but neither of the two may be distinguished unjustifiably for other reasons, as is also developed in the Human Rights instruments. Thus, the aforementioned example of the Japanese imposing their superiority in combat, whilst violating the prohibition on the use of biological weapons, also embodied a violation of the principle of non-discrimination, whereby the experiments, and the main reason for the use of said weapons, was based on an unjustified, yet evident, discrimination because of race and religion.

4 Conventional Obligations: Is There an Absolute Prohibition of Use?

In 1899, with the aim of revising the Project⁶⁹ of an International Declaration concerning the Laws and Customs of War,⁷⁰ Brussels, 1874, and, especially, to

⁶⁷ Ilchmann, K. – Revill, J., 'Chemical and' 758.

⁶⁸ Red Cross, Fundamental Principles of International Humanitarian Law. Available at: http://www.cruzroja.es/portal/page?_pageid=878,12647079&_dad=portal30&_schema=PORTAL30.

⁶⁹ It 'prohibited inter alia, 'the employment of poison or poisoned weapons'. This Declaration was never ratified because not all governments were willing to accept it as a binding treaty'. Mathews, R., 'Chemical' 3.

⁷⁰ Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874. Available at: <https://ihl-databases.icrc.org/ihl/INTRO/135>.

achieve the limitation of armaments, the First Hague Peace Conference was convened in 1899.⁷¹ Along these lines, a Convention on War on Land⁷² was approved, which was relatively revised at the Second International Peace Conference of 1907, this giving rise to the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 1907.⁷³ Said instruments stand out, insofar as they ‘embody rules of customary⁷⁴ international law’,⁷⁵ whilst, in relation to chemical and biological weapons (CBW), ‘for the first time, the historical norms against the use of CBW were enshrined in multilaterally agreed treaties.’⁷⁶ Specifically, they prohibited the use of poisons and poisoned weapons,⁷⁷ since ‘at that time, these prohibitions were generally understood to include the large scale release of toxic chemicals and biological agents (disease),’⁷⁸ albeit

71 ‘The Conference, at which 26 governments were represented, assembled on 18 May 1899 and adjourned on 29 July 1899. It failed to reach agreement on the primary object for which it was called, namely the limitation or reduction of armaments, but adopted the three Conventions and the other acts mentioned in the Final Protocol’. Final Act Of the International Peace Conference. The Hague, 29 July 1899. Available at: <https://ihl-databases.icrc.org/ihl/INTRO/145>.

72 ‘Seventeen of the States which ratified the 1899 Convention did not ratify the 1907 version (Argentina, Bulgaria, Chile, Colombia, Ecuador, Greece, Italy, Korea, Montenegro, Paraguay, Persia, Peru, Serbia, Spain, Turkey, Uruguay, Venezuela). These States or their successor States remain formally bound by the 1899 Convention in their relations with the other parties thereto. As between the parties to the 1907 Convention, this Convention has replaced the 1899 Convention’. *Ibidem*.

73 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Entry into force: 26 January 1910. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/195>.

74 ‘By the latter part of the 19th century, it was generally accepted that the use of poisons and poisoned weapons in armed conflict was contrary to the law of nations. But the various early norms were not always fully respected. The ‘Lieber Code’, an instruction signed by President Abraham Lincoln in 1863, represented a significant early attempt to codify the laws of war. Article 16 of the Lieber Code states that ‘It does not admit to the use of poison in any way’, and Article 70 states ‘The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself beyond the pale of the law and the usages of war’. Mathews, R., ‘Chemical’ 3.

75 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 1907.

76 Mathews, R., ‘Chemical’ 4.

77 Article 23 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 1907.

78 Mathews, R., ‘Chemical’ 3.

at present, as have been initially defined, we have specified conceptual and regulatory differences.

Notwithstanding that, it is worth mentioning that World War I showed that the unquestionable potential of biological warfare, as well as the extensive development of chemical warfare, made evident the limited effect of the initial prohibition adopted at the Hague Conferences.⁷⁹ In fact, as the only case in recent history, several States admitted to employing biological weapons, specifically anthrax, against horses.

This being the case, after World War I, already under the auspices of the League of Nations, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare,⁸⁰ of 1925, was adopted (hereinafter, the 'Geneva Protocol'). This international treaty, which is still in force, was the first legally binding instrument in which the prohibition of the use of biological weapons was embodied, thanks to the fact that at the end of the negotiation phase, Poland proposed its express reference,⁸¹ this way extending the initial agreement that up to that time was going to be only on chemical weapons.⁸²

However, before long, the Protocol showed four major weaknesses. Firstly, the prohibition of biological weapons was confined to their own use, whilst ignoring their manufacture, development or stockpiling, given the fact that many a State wanted to continue keeping their reserves and arsenals. Secondly, the aforementioned prohibition would only become effective before officially declared wars. Thirdly, we understand that, due to a setting of tension and instability, a total of 37 States⁸³ reserved their right to retaliate if an adverse party breached the terms of the agreement, such that 'the Protocol ended up constituting a *de facto* prohibition on first use in warfare rather than a

79 Ibidem, 4.

80 Open for signature on June 17, 1925, in Geneva. In force since February 8, 1928. Registration Number 2138 United Nations Treaty Series. At present, 145 States are Parties to the instrument. Available at: <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280167ca8>.

81 'In as much as the materials used for bacteriological warfare constitute an arm that is discreditable to modern civilization (...) any decisions taken by the Conference concerning the materials used for chemical warfare should apply equally to the materials used for bacteriological warfare'. None of the Delegations opposed or objected to the proposal, despite the fact that France considered the express reference unnecessary. Dando, M. R., Nixdorff, K., 'An Introduction to Biological Weapons', in McLaughlin, K.- Nixdorff, K., (eds.), *BioWeapons Prevention Project Biological Weapons*, 13 (Reader:2009).

82 Mathews, R., 'Chemical' 5.

83 See footnote 48.

comprehensive prohibition on any use in warfare'.⁸⁴ And finally, being strictly contained within the instrument 'bacteriological methods of warfare', pathogens other than bacteria, such as the smallpox virus, could be excluded from the ban. It is in the light of the above that the 1972 Convention began to use the term 'bacteriological (biological) weapons'.

'Despite the "ambiguous legacy", over time the Protocol has become widely accepted as part of customary international law and is therefore binding upon all States, whether they have entered into the agreement or not'.⁸⁵

In awareness of the danger⁸⁶ posed by this type of weapons, 'attempts to achieve a complete ban were made in the 1930s in the framework of the League of Nations, but with no success'.⁸⁷ For this reason, after the constitution of the United Nations (UN), the General Assembly called for the prohibition of atomic weapons and all other weapons of great power applicable then or in the future to mass destruction.⁸⁸ Yet, this objective did not begin to be addressed effectively until the Eighteen-Nation Committee on Disarmament⁸⁹ included biological weapons in its programme in 1968, this way sheltering, at the Conference of the Committee on Disarmament, the negotiation,⁹⁰ between 1969 and 1971,⁹¹ of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,⁹² which was adopted by the General Assembly⁹³ on December 16, 1971. As the title itself announces, it extends the restriction, for

84 Mathews, R., 'Chemical' 6.

85 Ilchmann, K. – Revill, J., 'Chemical and Biological' 756.

86 'In Japan, military doctor Shirō Ishii (...) contended that BW were a weapon of the future'. In his opinion, these offer endless possibilities, because they would not have been prohibited otherwise. Jefferson, C., *The Taboo* 120.

87 Goldblat, J., 'The Biological'.

88 General Assembly, Resolution on the 'Principles governing the general regulation and reduction of Armaments', of December 14, 1946, 41 (I).

89 Created by the General Assembly, Resolution 502 (VI), of 1952, and directed by the Security Council, until 1978, when a new Disarmament Commission was established as a subsidiary organ of the Assembly, made up by all Member States of the United Nations.

90 Using a draft treaty drawn up by the United Kingdom in 1969. Mathews, R., 'Chemical' 11.

91 United Nations Disarmament Commission, 'History of the Biological Weapons Convention'. Available at: <https://www.un.org/disarmament/es/biological-weapons/about/history/>.

92 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. Open for signature on April 10, 1972, in London, Moscow and Washington (after the United States renounced them on February 14, 1970). In force since March 26, 1975. Registration Number 14860 United Nation Treaty Series.

93 General Assembly, Resolution on the 'Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction', of December 16, 1971, 2826 (XXVI).

preventive purposes, to the development, production and stockpiling of biological weapons, and stipulates the obligation to disarm.⁹⁴

As Professor Domínguez-Matés notes, ‘despite the progress that this 1972 Convention entails with regard to arms control and the prohibition of weapons of mass destruction, it has certain “cracks” in its articles that certain States have taken advantage of in order to maintain the “biological threat”, this being one of the signs of our times’.⁹⁵ On this matter, in the following lines we will proceed to point out the main weaknesses of said instrument and how this affects its own effectiveness.

- The first far-reaching issue is that the instrument in question does not directly prohibit the use of biological weapons,⁹⁶ which is the main basis for confirming that the Geneva Protocol is not only fully valid, but absolutely necessary. That being said, not all States of the international community are bound by both instruments. Nowadays, 183 States are linked to the BW Convention,⁹⁷ which shows the high degree of commitment of said international community, specially because the States with the most powerful armies are committed to it. For its part, the Geneva Protocol, as has already been mentioned, has the support of 145 States, which are not always the same as those that have extended their commitment to the 1972 Convention.

For example, despite not being bound by the 1972 Convention, Israel did adhere to the 1925 Protocol in 1969.⁹⁸ Still, it was one of the 37 States that availed themselves of the reservation, already commented, on the right to retaliate and breach the purpose of the instrument, should the other party use the biological weapon. We mention this case in particular because of its peculiarity to the Law, since, as has been mentioned, at present, 17 States, such as Spain, have

94 Article 2 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. In this regard, ‘the United States was the only State to announce that its stockpile of biological and toxin agents and all associated munitions had been destroyed, except for small quantities for laboratory defensive research purposes. It also made it known that former biological warfare facilities had been converted to medical research centres’. Goldblat, J., ‘The Biological’.

95 (Author’s translation) Domínguez Matés, R., *La protección* 174.

96 ‘Nothing in this Convention shall be interpreted as in any way limiting or detracting the obligations assumed by any State under the Protocol (...) [of] Geneva (...)’. Article 8 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.

97 Office for Disarmament Affairs, United Nations. Available at: <https://treaties.unoda.org/t/bwc>.

98 Israel adhered to the 1925 on February 20, 1969. Available at: <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280167ca8>.

formally withdrawn their reservation on the right to retaliation, this however implying that the remaining 20 States still maintain said exception concerning the prohibition of the use of biological weapons. Nevertheless, 19 of them, such as Portugal, China or Irak, among others, by being bound by the subsequent 1972 Convention and by renouncing development, production and stockpiling, tacitly nullify said reservation, insofar as there is a complementarity of obligations whereby the widest one prevails.

As for Israel, along with the reservation continuing to be effective in accordance with the Law of Treaties, said State has reaffirmed its position on the right to retaliate using biological weapons in the 2006 second edition of 'Manual on the Laws of War',⁹⁹ of 1998. Thus, it can be interpreted that Israel is a persistent objector to the absolute prohibition of the use of biological weapons, which, as we have defended, can be considered to constitute part of customary international law. Thus, in our view, said opposition and defence of exception, as shown by means of previous grounds, we consider is contrary to the general principles of International Humanitarian Law, whereby biological weapons may not be used or justified, not even in cases of their previous use by the opposing party in combat.

- The specific objective of the Convention, relative to developing, producing or stockpiling, does not entail an absolute prohibition, but, in accordance with its own terms, the manipulation, research and reserves of biological agents are permitted for prophylactic, protection or other peaceful purposes.¹⁰⁰ In this vein, although subject to obvious limits (type and quantity of biological agents), and being justified for a legitimate purpose, the reality is that said treaty does not finish the risk posed by the evolution and possession of biological weapons. In our opinion, and without prejudice to the fact that many States, unilaterally or through other regional organisations such as the EU,¹⁰¹ intensify their commitment to this cause, the prohibition

99 'In 1925, the countries of the world gathered in an international congress in Geneva and signed a protocol completely banning the use of chemical and bacteriological (biological) weapons. All the leading countries in the world signed the Protocol, with the exception of the United States and Japan. Today, 133 countries have signed the Protocol, and its provisions are considered to be overriding, that is to say that they are binding on every country in the world, including those that never signed the Protocol'. - Israel, 'Rules of Warfare on the Battlefield' in Military Advocate-General's Corps Command, IDF School of Military Law, 2 (2006).

100 Article 1 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.

101 On December 12, 2003, the European Council adopted the EU Strategy against proliferation of Weapons of Mass Destruction. On this basis, the Organisation has promoted a

of the actions that are included in the title of the treaty has a relative nature, mainly for two reasons. To begin with, there are not regulations or criteria or control mechanisms that evaluate the quantities of agents or toxins that the States manipulate or reserve; in fact, the Parties are not obliged to declare them.¹⁰² And, on the other hand, the three reasons stipulated to justify possession or manipulation can be considered of a reckless nature. The 'prophylactic' concept, in pursuing the preservation of health, may well justify -as cannot be otherwise, for a necessary greater guarantee of the Right to Health- the use of biological agents for any medical activity. The term 'protection', despite its breadth, implies 'the development of protective masks and clothing, air and water filtration systems, detection and warning devices, and decontamination equipment, and must not be interpreted as permitting possession of biological agents and toxins for defence, retaliation or deterrence',¹⁰³ given that this would imply an absolute contradiction with the prohibition embodied in the Protocol of 1925. Finally, the concept of other peaceful purposes is an irremediably broad form of justification, and somewhat unclear. In the light of the above, as Professor Domínguez-Matés deduces, said unrestricted biological research can lead us to understand that scientific experimentation can be justified in this third cause.¹⁰⁴ However, this in turn entails two major risks: on the one hand, that, generally, for many a reason, States may conduct biological research in secrecy; and, on the other hand, that it is especially difficult to tell apart research aimed at developing agents for civilian purposes and research for military purposes.¹⁰⁵

- No specific mechanism is stipulated to verify that the States comply with the objectives described, but rather, as the Preamble itself recognises, they avail themselves of international control. Thus, they agree to cooperate with each other;¹⁰⁶ hold conferences¹⁰⁷ every five years to review the

number of initiatives, such as the 'Council Decision (CFSP) 2019/97 of 21 January 2019 in support of the Biological and Toxin Weapons Convention in the framework of the EU Strategy against Proliferation of Weapons of Mass Destruction', which has been recently amended by Council Decision (CFSP) 2021/2033 of 19 November 2021.

102 Goldblat, J., 'The Biological'.

103 *Ibidem*.

104 Domínguez Matés, R., *La protección* 176.

105 *Ibidem*.

106 Article 5 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.

107 Since the Convention entered into force, 8 Conferences have been held, the ninth one being postponed over the COVID-19 pandemic. At the 2nd Conference, of 1986, it was agreed to strengthen the Treaty. Thus, in 1991, a group of experts was established to

treaty;¹⁰⁸ and, should they be aware of non-compliance, said States are to denounce the cases before the Security Council.¹⁰⁹ Hence, since the Security Council, as is well known, is not empowered to verify compliance with agreements on arms control¹¹⁰ in accordance with its own founding Treaty, it will only be able to take action if said violation involves international friction (under Chapter VI of the Charter), or if it poses a threat to international peace and security (Chapter VII of the Charter).¹¹¹

5 Responses of International Law to the Use of Biological Weapons in Situations of Armed Conflict

5.1 *What Can the United Nations Do to Control the Use and Proliferation of Biological Weapons?*

As the maximum guarantor of international peace and security, and since the proliferation of biological weapons poses a clear threat¹¹² to said goals, the UN performs two major functions, namely, the investigation of the origin of the alleged use of biological weapons and the identification of the subjects responsible, as well as the adoption of measures to mitigate and control the effects of the attack.¹¹³ Both tasks are discussed below.

– Investigation of the origin of the alleged use of biological weapons

As has already been pointed out, the 1972 Convention provides the possibility of turning to the Security Council to denounce the breach of the Treaty by another State bound by it. In this respect, said accusation cannot be unfounded, such that, as the precept itself specifies, it must be accompanied by all possible

elaborate a protocol to the Convention for the control and inspection of biological industry activities. 'A "Compromise Text" developed by the Chair of the AHG was presented to the 23rd session of the AHG in May 2001. Several BWC States Parties expressed concerns about various aspects of the text, in particular the USA which publicly rejected the text'. Machín, N., 'Las armas biológicas. Perspectivas de futuro', UNISCI Discussion Papers 35 (2014) 207. And, Mathews, R., 'Chemical' 13.

108 Article 12 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.

109 Article 6 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.

110 Domínguez Matés, R., *La protección* 179.

111 See Security Council Resolution, 4956th Session, of April 28, 2004, S/RES/1540 (2004).

112 *Ibidem*.

113 In this vein, we can mention the 'Previous agreements and understandings under the Convention relevant to the provision of assistance and coordination in the case of alleged use of biological or toxin weapons', of June 14, 2010, BWC/MSP/2010/MX/INF.1, point 1.

evidence that substantiates it.¹¹⁴ In this regard, we detect two major limiting factors within said mechanism. Firstly, for the sake of international relations, States, on principle, try to avoid making accusations against other States, except in cases of outright enmity. Secondly, as has already been expressed when describing the 1972 Convention, it is considerably complex to be aware of the practices that the States implement. As a consequence, this mechanism will only be used in obvious, well-founded cases of non-compliance. Possibly, this is what the drafter of the instrument was looking for in order to prevent the Security Council from collapsing, or manifest risks from being politicised.

Due to the legal nature of the Security Council, and since this is reflected in the Convention, this complaint procedure constitutes the most drastic form of control. For this reason, in certain review conferences on the instrument, this mechanism has been commented upon with the purpose of clarifying certain 'rules of the game': the Security Council must adopt all the measures that are deemed necessary to investigate the alleged non-compliance; it must inform States of the results; and, if needed, it can ask the Secretary-General to conduct an investigation,¹¹⁵ as well as seek advice from WHO.¹¹⁶ In short, circumstances that are neither new nor obviously different from what is specified in the Charter. In point of fact, given the hypothetical use of biological weapons by the United States in the Korean War¹¹⁷ at the beginning of the 1950s, both the Union of Soviet Socialist Republics and the International Association of Democratic Lawyers addressed the Security Council, reporting the aforesaid possible crime, whilst substantiating the accusations with all the evidence available to them,¹¹⁸ in the same terms as in the post-Convention era.

Everything seems to indicate that the Security Council, without prejudice to its own internal impediments, takes the issue of the threat of biological weapons very seriously. On this matter, through the famous Resolution 687,¹¹⁹ said main body set up a Special Commission¹²⁰ that carried out a thorough

¹¹⁴ Article 6 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.

¹¹⁵ In conformity with Article 98 of the Charter of the United Nations.

¹¹⁶ BWC/MSP/2010/MX/INF.1, point 9.

¹¹⁷ Korean War (1950–1953).

¹¹⁸ 'Letter from the Permanent Representative of the Union of Soviet Socialist Republics, President of the Security Council, Dated 30 June 1952', and 'Appeal to the Security Council adopted unanimously by the Council of the International Association of Democratic Lawyers', at Session held in Vienna from 16 to 18 April 1952. Document S/2684.

¹¹⁹ Security Council, Resolution of April 3, 1991, 687 (1991), 2981th Session. Adopted with 12 votes in favour, 1 against (Cuba) and 2 abstentions (Ecuador and Yemen).

¹²⁰ 'On 18 April 1991, after Iraq had formally accepted the provisions of resolution 687, the Secretary-General submitted to the Security Council his report regarding the

inspection on biological weapons in Irak. Likewise, within the framework of the competences of Chapter VII of the Charter and after the international agenda changed following the well-known terrorist attacks suffered at the beginning of the 21st century, the Security Council¹²¹ not only once again recognised the threat posed by weapons of mass destruction, but it also required States to adopt internal norms with which to preserve the aforementioned objective. Thus, for the verification of said mandate, it created the '1540 Committee'. Said ad hoc body of the Security Council, of a subsidiary nature, was initially established for a two-year period, with the aim of verifying that the entire international community had internally developed norms to prevent the proliferation of weapons of mass destruction. However, such a difficult purpose has caused its mandate to remain in force after being extended 5 times.¹²²

Additionally, the Secretary-General of the United Nations is also authorised to investigate cases of alleged use of biological weapons, and not only upon request of the Security Council. In fact, said competence directly associated with biological weapons was recognised for the first time in 1987,¹²³ making possible 'to carry out investigations in response to reports that may be brought to his attention by any Member State concerning the possible use of (...) biological weapons (...) that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law, in order to ascertain the facts of the matter, and report promptly the results of any such investigation to all Member States'. In 1989, in the same terms, the General Assembly again requested this function from the Secretary General, as well as the preparation of a list of experts and adequate logistics to be able to face the examination

establishment of the United Nations Special Commission (UNSCOM). Following acceptance by the Security Council of the report on 19 April the Secretary-General appointed Ambassador Rolf Ekéus (Sweden) as the Executive Chairman of the Special Commission. On 1 May 1991, the Secretary-General appointed 20 other members of the Commission, from Australia, Austria, Belgium, Canada, China, the Czech Republic, Finland, France, Germany, Indonesia, Italy, Japan, the Netherlands, Nigeria, Norway, Poland, the Russian Federation, the United Kingdom, the United States and Venezuela. Mr. Richard Butler (Australia) replaced Ambassador Rolf Ekéus as the Executive Chairman on 1 July 1997. The current Deputy Executive Chairman is Mr. Charles Duelfer (United States)'. Available at: <https://www.un.org/depts/unscom/unscom.htm>.

121 Resolution by Security Council, at 4956th Session, of April 28, S/RES/1540 (2004). Adopted unanimously.

122 Resolution 1673 (2006), Resolution 1810 (2008), Resolution 1977 (2011), Resolution 2325 (2016) and Resolution 2572 (2021).

123 General Assembly, 'Measures to uphold the authority of the 1925 Geneva Protocol and to support the conclusion of a chemical weapons convention', on 30 November 1987, 42/37C (1987).

tasks, whereby, with the help of said experts, a technical procedure with which to conduct a timely investigation may be perfected whenever required.¹²⁴ In this respect, although it is not specified in the 1972 Convention, the Secretary-General's investigation constitutes the international institutional mechanism to inquire into the alleged use of biological weapons, which, in our view, is significantly more practical and agile than that of the Security Council.

– Adoption of measures to mitigate and control the effects of the attack

Without prejudice to the above, in accordance with the Convention and on a cooperative basis, the States shall provide mutual assistance if they are either attacked with or subject to the effects of biological weapons.¹²⁵ Since the use of this type of weapons constitutes a clear threat to international peace and security, should they be used, it is incumbent upon the United Nations to coordinate the mitigation and control of the corresponding effects of said attack. In this connection, the organisation that institutionalises our international community, firstly through the Security Council, is to analyse the facts, and most certainly issue a resolution declaring the attack as a clear threat to international peace and security.

Therefore, depending on its effects, whether on the population, animals or the environment, the United Nations will need the assistance of other specialised organizations, such as, necessarily, the WHO, but also the World Organisation for Animal Health (OIE), the Food and Agriculture Organisation of the United Nations (FAO), and the International Plant Protection Convention.¹²⁶

In consequence, insofar as it affects human security itself, the United Nations must first address how the effects of the said attack are controlled, since if the weapon is effective, it will most likely give rise to a 'public health emergency of international concern'.¹²⁷

5.2 *Can International Law Condemn the Use of Biological Weapons Individually?*

Notwithstanding that the hypothetical States injured by the illegitimate use of biological weapons hold the wrongdoing States internationally accountable for breaching the right described in the present work, this last section is devoted

¹²⁴ General Assembly. 'Chemical and bacteriological (biological) weapons', October 4, 1989, A/44/561 (1989), points 4–9.

¹²⁵ Article 7 of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.

¹²⁶ BWC/CONF.VI/6, part II, para. 33.

¹²⁷ Article 12, International Health Regulations (2005), Areas of work for implementation, WHO, 2007.

to addressing how International Law can condemn the individuals who have made decisions in violation of the Principles and International Humanitarian Law concerning the prohibition of biological weapons.

As has already been referred to, the study of this type of weapons has historically presented two conditions that prevent us from combating their proliferation more effectively: the effects produced by biological weapons are generally equated with the consequences from natural diseases; and unless the wrongdoing State claims responsibility, it may be intricate to identify the State and hence the individual perpetrators.

Thus, since there are only two cases¹²⁸ in which biological weapons have hypothetically been used in armed conflict, and other one of breach of the Convention for which a State has claimed responsibility,¹²⁹ yet not being taken to Court, there has been no opportunity for international jurisprudence to develop on this matter of concern.

As for the aforementioned use of biological weapons by Japan against China, as we have advanced, said hypothetical war crime was not duly tried by the International Military Tribunal for the Far East¹³⁰ because “a crucial and extremely unfortunate decision¹³¹ was made which may have done much to facilitate the subsequent Korean War BW allegations: The US government granted immunity to General Ishii, all of his subordinates, and members of the other Japanese BW units in exchange for the technical information obtained by the Japanese in the course of their wartime BW R&D programme’.¹³² In addition, it is necessary to remember that despite the irrefutable evidence on

128 Second Sino-Japanese War (1937–1945), and Korean War (1950–1953).

129 In March 1980, in the throes of the Cold War, the United States accused the Soviet Union (bound by the 1925 Protocol and the 1972 Convention) of continuing a programme of offensive biological weapons. The accusation was grounded on the alleged release of anthrax spores into the air, this causing an anthrax outbreak in Svendlovsk, in 1979. Initially, the Soviet Union denied the accusations, yet not the illness. In 1992, Russian authorities admitted to having violated the Convention. Goldblat, J., ‘The Biological’.

130 Judicial ad hoc organ, also known as the Tokyo War Crimes Tribunal. Convened on April 29, 1946, the prosecution opened its case on May 3, 1946. It lasted until November 12, 1948, sentencing 7 persons to death, 16 to life imprisonment and 2 to prison.

131 In fact, ‘Soviet military forces captured some members of Unit 731. After requesting that the U.S. turn over additional senior officials from that organisation and being denied, the USSR tried 12 former members of Unit 731 in a war crimes trial in December 1949 in the city of Khabarovsk. The USSR then requested that the United States release General Ishii, together with Emperor Hirohito, to be put on trial as well, a request that the U.S. government also rejected’. - Leitenberg, M., ‘Resolution of the Korean War Biological Warfare Allegations Milton’, *Critical Reviews in Microbiology*, 24, 3 (2008) 173.

132 *Ibidem*.

indiscriminate use of biological weapons, the first recognition of their use and, therefore, of non-compliance with International Humanitarian Law, did not occur until 2002, on that occasion by the Tokyo District Court.¹³³

How did these previous circumstances influence the Rome Statute?¹³⁴ Unfortunately, the instrument that gives life to the International Criminal Court (ICC) does not directly cover biological weapons (or clearly any of the other weapons of mass destruction). Nevertheless, Article 8 of the aforementioned instrument, which describes war crimes, refers,¹³⁵ as if we went back in time to the early 20th century, to the act of 'employing poison or poisoned weapons'¹³⁶ in the same terms¹³⁷ as Article 23 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, of 1907.

In this sense, we raise several essential questions that will guide us through the last part of the present work. Why was a reference to biological weapons not directly included? Can poison or poisoned weapons be understood as a reference to biological weapons, even though they are not included in the concept of the latter? Can we interpret the use of biological weapons in armed conflicts as a war crime?

As the Preamble of the Rome Statute itself recognises, the purpose of said instrument and the ICC's own Constitution is to classify the most serious crimes of concern to the international community so that they do not remain unpunished and become subject to their effective prosecution.¹³⁸ The success of this system will hence be conditioned by the international support and commitment that it achieves.

Furthermore, the study of said incorporation of biological weapons requires reflecting, even if we do not do so in depth, on the set of existing weapons of

133 The Guardian, 28 August 2002. Available at: <https://www.theguardian.com/world/2002/aug/28/artsandhumanities.japan>.

134 International Treaty whereby the International Criminal Court is constituted, judicial organ with the capacity to judge persons for crimes against humanity, genocide, and war crimes. Rome Statute of the International Criminal Court, 17 July, 1998. Entry into force and registration: July 1, 2002, No. 38544. At present, signatories: 137. Parties: 123. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en.

135 It also alludes to chemical weapons: 'employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices', Article 8.b.(xviii), Rome Statute of the International Criminal Court.

136 Article 8.2.b.(xvii), Rome Statute of the International Criminal Court.

137 Previously, it even incorporated the Project of an International Declaration concerning the Laws and Customs of War, of 1874, Brussels.

138 Preamble, Rome Statute of the International Criminal Court.

mass destruction (WMD), and how the international community has been facing the risks and interests that they pose, as well as their prohibition. After the immense evolution that the treatment of this threat has had in the last half of the 20th century, the reality is that there is a group of States, playing a certain leading role within the institutionalised international community, that do not endorse the prohibition of nuclear weapons and everything that prevents their limits and criminalisation. Thus, in order to gain the broadest support possible, the drafters of the Statute waived its immediate inclusion. With regard to chemical weapons, of which, with respect to the other two, there is greater awareness,¹³⁹ their consequences have been universally verified, especially in World War II, for which reason we find a vague reference to their classification in the Statute as a war crime. Finally, as for biological weapons, these present elements found. On the one hand, they are the first on which the prohibition has been delimited, but, on the other hand, some States are not convinced about the viability of their use. Probably, as humanity has not yet witnessed their full potential and aggressiveness -albeit we can begin to see it-, it is, of the three types of said weapons, 'the meekest', and the 'great sacrifice'.

This being the case, 'during negotiations on the Statute, WMD attracted so much attention (...) that its inclusion was "one of the most controversial issues" in the discussions'.¹⁴⁰ In fact, the problem did not lie in whether biological or chemical weapons were included, but instead revolved around the consideration of nuclear weapons, until their reference was removed from the project.¹⁴¹ This led to the assumption that including only biological and chemical weapons was discriminatory.¹⁴² There being little time left before the discussion conference, no mention of weapons of mass destruction was eventually included in the final draft. 'This proposal was accepted as there was no time left to debate the issues, and parties did not want to risk the failure of the entire enterprise due to disagreement on one issue'.¹⁴³

139 Proof of that is the existence of an organisation for the prohibition of chemical weapons (OPAQ).

140 Allen, k.- Spence, S.- Escauriaza Leal, R., 'Chemical and biological' 6.

141 *Ibidem*.

142 'Delegations which had supported the inclusion of a prohibition on nuclear weapons, shifted their attention to opposing a prohibition on CBW, since they felt that this would lead to an inequitable situation in which 'wealthy' nuclear-equipped states were not prohibited from having these weapons, while states that could not afford this technology were restricted from having the more affordable alternative', *Ibidem*.

143 *Ibidem*, 2.

As Kara Allen, Scott Spence and Rocío Escauriaza explain, ‘the inclusion of CBW use seemed unquestioned’, since, as is verified by observers, the delegates never opposed the classification of the use of chemical and biological weapons as a war crime. More still, ‘the penultimate draft proposal contained a prohibition on the use of CBW’.¹⁴⁴ Something similar happened again with the revision of the Statute in 2010. Thus, Belgium proposed two amendments essential for our research topic: one, to extend the prohibitions on poisons and poisonous gases -Article 8.2. (b) (xvii) and (xviii)- in armed conflicts, including non-international ones, which was accepted; and other one, to adapt the previous provisions to the obligations stipulated in the corresponding treaties.¹⁴⁵ Specifically, with regard to biological weapons, it was suggested updating ‘employing poison or poisoned weapons’ as ‘using the agents, toxins, weapons, equipment and means of delivery as defined by and in violation’ in accordance with the 1972 Convention. This second amendment proposal was not so fortunate as the first one previously mentioned, because, as can be understood, the reference to the specific international treaty¹⁴⁶ was disapproved of, and, whilst they did not reject the idea,¹⁴⁷ ‘progress was halted, however, at the penultimate stage of the amendment process’.¹⁴⁸

Therefore, the reality is that, from the strictly positivist perspective, the acknowledgement of the use of ‘poison or poisoned weapons’ as a war crime is the only connection that we find we can make in order to substantiate that the use of biological weapons would be qualified with the same offence type. However, our research follows another methodology, such that, in our opinion,

¹⁴⁴ *Ibidem*, 6.

¹⁴⁵ The amendment made reference to: ‘xxvii) Using the agents, toxins, weapons, equipment and means of delivery as defined by and in violation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972’ and ‘xxviii) Using or engaging in any military preparations to use chemical weapons as defined by and in violation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993’. Belgium, Draft Amendments to the Rome Statute on War Crimes, Amendment 2. 29 September 2009.

¹⁴⁶ ‘Delegates were concerned that states that had not yet become parties to the Rome Statute would hesitate to join if they had the impression they were also acceding to the BWC and CWC’. Allen, K.- Spence, S.- Escauriaza Leal, R., ‘Chemical and biological’ 8.

¹⁴⁷ On the contrary, the amendment garnered strong support from Argentina, Bolivia, Burundi, Cambodia, Cyprus, Ireland, Latvia, Luxembourg, Mauritius, Mexico, Romania, Samoa, and Slovenia. Resolution RC/ Res.5 Amendments to Article 8 of the Rome Statute. 16 June 2010 for the final Resolution adopting the amendment.

¹⁴⁸ Allen, K.- Spence, S.- Escauriaza Leal, R., ‘Chemical and biological’, 8.

we can interpret the use of biological weapons in armed conflicts as a war crime, for the following reasons:

- In conformity with Article 31.4 of the Vienna Convention on the Law of Treaties,¹⁴⁹ bearing in mind the preparatory work and putting aside a plain, simple interpretation, we can confirm that the drafters of the Rome Statute throughout the Conference, as has been indicated, intended the use of biological weapons to be criminalised. We can thus extensively interpret its articles, and substantiate that, given the use of said weapons, the ICC should be aware of the matter and, if well-founded, condemn those responsible for it. As Professor Kevil Jon Heller strongly defends, ‘if those States did not want the use of chemical and biological weapons to be criminal, they should have made sure the Rome Statute did not include any terms -like “poisonous” or “asphyxiating”- that could be plausibly interpreted to include chemical and biological weapons’.¹⁵⁰
- Although it is not deduced from the Rome Statute, in our view, the criminalisation of the use of biological weapons, additionally, is considered as a universal customary norm. This has been recognised by the International Committee of the Red Cross: ‘there is ample evidence that such prohibitions entail individual responsibility’.¹⁵¹ And, in the same terms, in the Fourth Review Conference on Biological Weapons Convention, it was specified that people are protected by the prohibitions of the Convention.¹⁵² In addition, the *opinio juris* can be confirmed, because more than half of the States bound by the prohibition of biological weapons have directly classified their use as a war crime in their military laws, such as, Australia,¹⁵³ Canada,¹⁵⁴ New Zealand -which also specifies that ‘using bacteriological methods of

149 Vienna Convention on the Law of Treaties, 23 May 1969, Registration: 27 January 1980, No. 18232. Parties: 116.

150 *OpinioJuris*, ‘The Rome Statute Does Not Criminalise Chemical and Biological Weapons’, 2015. Available at: <http://opiniojuris.org/2015/11/05/why-the-rome-statute-does-not-criminalise-chemical-and-biological-weapons/>.

151 International Committee of the Red Cross, The weapons amendment (Article 8.2 letter e) of the ICC Statute). 22 April 2010. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=B62CB33F26A38A83C125861B00492C04&action=openDocument>.

152 ‘States Parties should also consider ways and means to ensure that individuals or sub-national groups are effectively prevented from acquiring, through transfers, biological agents and toxins for other than peaceful purposes’. BWC/CONF.IV/9.

153 Australia, Law of Armed Conflict, Commanders’ Guide, Australia Defence Force Publication, Operations Series, ADFP 37 Supplement 1- Interim Edition, (1994) 1305.

154 Canada, The Law of Armed Conflict at the Operational and Tactical Levels (Office of the Judge Advocate General: 2001) 1609.

warfare' is in a list of 'war crimes recognised by the customary law of armed conflict',¹⁵⁵ Nigeria,¹⁵⁶ Peru,¹⁵⁷ United Kingdom¹⁵⁸ or the United States - albeit in a less precise way-,¹⁵⁹ as well as in their criminal codes, yet in a less forceful fashion.

6 Conclusions

1. Although there is not a generally accepted concept, biological weapons involve the release of a pathogen with a clear destructive intention, in a way that they generate a significant and concrete physiological effect on the population, animals or the environment.
2. Both the Geneva Protocol and the 1972 Biological Weapons Convention include behavioural obligations on biological weapons with which to request the prohibition of their use, manipulation, development and stockpiling. Nonetheless, said instruments present 'cracks' or weaknesses that allow us to conclude that their prohibitions are not absolute.
3. With regard to evolution, changing times and advances in biotechnology, for instance, in the field of nanotechnology, we are not only being faced by 'new wars' that question the current status of International Humanitarian Law, but by improvements in weapons and biological technology that may well put our entire system of international peace and security in check.

¹⁵⁵ New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services (Wellington: 1992) 1704.

¹⁵⁶ Nigeria, The Laws of War, by Lt. Col. L. Ode PSC, Nigerian Army (Lagos: undated) 12.

¹⁵⁷ Peru, Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas, Resolución Ministerial, 049-2010/DE/VPD (Lima: 2010) 32.

¹⁵⁸ United Kingdom, The Law of War on Land being Part III of the Manual of Military Law, (The War Office, HMSO: 1958) 626.

¹⁵⁹ *'Employing poison or similar weapons. a. Text.* "Any person subject to this chapter who intentionally, as a method of warfare, employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct." (...) *d. Maximum punishment.* Death, if the death of any person occurs as a result of the employment of the substance or weapon. Otherwise, confinement for life'. United States, Manual for Military Commissions, published in implementation of Chapter 47^a of Title 10, (United States Code, as amended by the Military Commissions Act: 2009) 948.

4. Be that as it may, it can be considered that the General Principles of International Humanitarian Law, along with their corresponding reinterpretation, will continue to be absolutely valid. In this sense, we can affirm that the use of biological weapons, whatever the conflict or tension, is and will be completely incompatible with them.
5. The United Nations, as the guarantor of international peace and security, has an essential control function within the international community which it institutionalises, being aimed at preventing biological weapons from being used or stockpiled. Although the Security Council may receive complaints from other States for hypothetical non-compliance and subsequently lead the inspection, the Secretary-General also performs an extraordinary role. The guarantee of both our human security and international security depends on both actors.
6. Two reasons explain why biological weapons are not specifically included in the Rome Statute. On the one hand, the States have failed to reach an agreement on the prohibition of nuclear weapons and their criminalisation. On the other hand, said States fear that the specific reference to the other two types of weapons of mass destruction might affect the claim of universality of the aforementioned instrument. In view of the above, and in accordance with custom and the intention of the drafters of the Statute, the use of biological weapons in armed conflicts we believe manifestly constitutes a war crime.

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Autonomous Weapons and International Responsibility

Borja Montes Toscano

A sword never kills anybody; it is a tool in the killer's hand.

Seneca



1 Introduction*

The third decade of the XXI century has begun and complex hybrid scenarios have arisen throughout the last few decades as the result of factors such as climate change, the emergence of new technologies, the refugee crisis and COVID-19 pandemic. Legal loopholes have arisen as a result of these new factors which have evinced a lack of consensus among states in the interpretation of both conventional and customary international norms. Such factors have also created power imbalances and increased questioning of the Rules-Based International Order (RBIO)¹ which has the potential to negatively impact the development of international law. On the other hand, means and methods of warfare are being transformed in accordance with the new requirements and capabilities that will be developed throughout the XXI century.

Autonomous warfare capabilities have begun to be developed by private companies and armed forces and those capabilities may be capable of

* *Disclaimer:* This text was drafted in a personal capacity. The views and opinions of the author expressed herein should, therefore, not be interpreted as stating or reflecting those of the respective employers, universities, associations, or organizations of which he is member of.

¹ For further information see Chatham House, “Ideas for modernizing the Rules-Based International Order” (Chatham House Expert Perspectives: 2019) at <https://www.chathamhouse.org/sites/default/files/publications/research/2019-06-10-Expert-Perspectives.pdf> accessed 30 October 2021.

‘[u]ndertaking tasks and missions on their own’.² Specifically, in the medium term autonomous weapons systems (AWS) will be mainly aimed at the utilization of equipment capable of making quicker life-or-death decisions than human operators, at least in specific operational contexts where AWS will be designed to succeed. The USA and China are the countries that have invested the most in artificial intelligence (AI) capabilities, followed closely by France, Russia, Israel and the UK. Most of current debates have specifically focused on the risk of unintended escalations as the result of anticipated kinetic effects and the lowering of the threshold for armed conflict. The exercise of meaningful human control over the critical functions of AWS has also raised concerns about ensuring context-specific value judgement and the application of International Humanitarian Law (IHL) norms. The question of human control has recently focused on whether human supervision can prevent redefinition of AWS’s mission without human validation and on the performance of the tasks assigned, i.e. to reverse the effects of (possibly unlawful) facts assessed by AI applications.³ Predictability and reliability are the main concerns that autonomy poses for the conflicts of tomorrow. Having a clear picture of present and future battlefields is fundamental towards understanding the consequences of using certain kinds of weapons and will improve compliance with international law.

This chapter will explore the concerns that autonomous weapons pose in the medium term, such as determining a common definition of “Autonomy” and explaining the relationship between human and AI capabilities. Implementing new means and methods of warfare will unavoidably pose ethical questions about how much autonomy can we afford and whether current international law is resilient enough to face the various challenges and uncertainties that will arise as a result of the introduction of new technologies. Different proposals and solutions will be drawn with regards to individual/state responsibility and the conventional (and customary) principles that must be observed when actors utilize AWS.

2 Cummings M.L., “Artificial Intelligence and the Future of Warfare” (Chatham House: 2017) at <https://www.chathamhouse.org/2017/01/artificial-intelligence-and-future-warfare> accessed 30 October 2021.

3 United Nations Office for Disarmament Affairs, *Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, Chairperson’s Summary (19 April 2021) UN Doc CCW/GGE.1/2020/WP.7, 25.

2 How to Determine Autonomy

2.1 *The Implementation of Autonomy on the Battlefield*

The latest advancements that humankind has made in the fields of computer science and AI are further proof of the workability of the design and deployment of fully AWS.⁴ In the medium term, weapons systems might evolve into fully autonomous ones as munitions and platforms, i.e., in the first case, weapons designed to attack a particular target (one-way weapons) meanwhile the second notion of “platform” is related to systems that will be inherently returnable and that launch multiple munitions.⁵ Presently, loitering munitions are the definitive touchstone for deploying AWS in prospective theatres of operations.

Within the field of defence, efforts in AI are mainly geared towards battlefield and course of action analysis, command and control (C2), target recognition and acquisition, intelligence analysis (signal detection), early warning (predictive modelling), swarming manoeuvre techniques and (semi) autonomous decision making.⁶ Development of autonomous technologies will move out of the control loop of the soldiers and leave more and more decisions up to the weapons systems. In addition, using software (originally meant for civilian purposes) can lead to the risk of proliferation of dual-use products.

Some degree of confusion persists regarding the difference between automation and autonomy; Automation requires that within the processes that are done – in whole or in part – by machines, humans intervene as they can solve problems and perform complex tasks that the automated machine cannot. However, humans may also have greater tendency towards confusion and error.⁷ Autonomy does not require that AI initiates its own functioning, i.e., devices can make autonomous choices even if interaction with humans has occurred.⁸ The challenges posed by autonomous warfare will require that the international community reaches consensus on the notions of the “accuracy”

4 A few examples on the current use of weapons that have different levels of autonomy can be mentioned such as the Sensor Fuzed Weapon (SFW), Phalanx CIWS, C-RAM, IAI Harpy, Gaurdium, Taranis, SGR-A1 or Perdix drones.

5 On platforms, “swarm tactics” may be enhanced in which weapon systems will be tasked to perform military missions and humans will just play a “supervisory role”.

6 Osinga F.P.B. – Roorda M.P., “In Control: Harnessing Aerial Destructive Force”, in Bartels R. – Van den Boogaard J.C. – Ducheine P.A.L. – Pouw E. – Voetelink J. (eds.), *Military Operations and the Notion of Control under International Law – Liber Amicorum Terry D. Gill* (The Hague: 2021) 161–193, 186.

7 Gibilisco S., *Concise Encyclopedia of Robotics* (London: 2003) 15.

8 Turner, J., *Robot Rules – Regulating Artificial Intelligence* (Cham: 2019) 17.

and “direction” of weapon systems. A common approach to autonomy is essential and should primarily focus on how weapons are used and controlled rather than the nature of the weapons themselves.

Experts are aware that a unique definition of autonomy is almost impossible to establish as there are varying degrees of autonomy and interpretations of the word. For the specific case of weaponry, autonomy refers to capability, i.e., the system’s ability to perform a designated task, and not to a specific kind of device or behaviour.⁹ Many harbour doubts regarding the relationship between AWS and AI and should recall that AWS do not necessarily incorporate AI and machine learning. Current autonomous arms typically use simple, rule-based control software when deployed on the battlefield for the purpose of engaging targets.¹⁰

2.2 *The Relationship between Humans and Autonomy*

Once AWS are deployed on the battlefield in the medium-term, the systems’ algorithms must comply with IHL at the same level as or better than humans operating under the same circumstances. On the other hand, autonomous cyber weapons will enable the combination of the notions of “cyber” and “autonomy” as these weapons will include algorithms that pinpoint and analyse the nature of particular computer systems (regardless of military or civilian status) and later disable systems without requiring the executive command of an operator.¹¹

Paul Scharre¹² states that autonomous warfare must be understood in a threefold dimension: (i) The relationship of command and control between the human operator and the autonomous system, (ii) The complexity of the system and (iii) The task that will be automatized. For a weapon to perform its tasks independently, it must have the following three features: (i) The need to

9 McFarland T., *Autonomous Weapon Systems and the Law of Armed Conflict* (Cambridge: 2020) 48; Such capability appears when the machine has the ability of retaining the experiences of its interactions with the environment and can adapt its responses on the grounds of some criteria, i.e., it is capable of learning. Chinen M., *Law and Autonomous Machines – The Co-evolution of Legal Responsibility and Technology* (Cheltenham – Northampton: 2019) 3.

10 ICRC, *Autonomy, artificial intelligence and robotics: Technical aspects of human control* (ICRC: 2019) 5 at <https://www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control> accessed 30 October 2021.

11 See further in Ohlin J.D., “Remoteness and reciprocal risk” in Ohlin J.D. (ed.), *Research Handbook on Remote Warfare* (Cheltenham – Northampton: 2017) 15–49, 34.

12 Scharre P., “Between a Roomba and a Terminator: What is Autonomy” (War on the Rocks: 2015) at <https://warontherocks.com/2015/02/between-a-roomba-and-a-terminator-what-is-autonomy/> accessed 30 October 2021.

interact with a human operator to perform tasks. Nevertheless, the fact that a human operator is not directly supervising the machine does not lead to a full consideration of autonomy; (ii) The machine's ability to function despite lack of certainty due to the theatre of operations; (iii) The level of confidence and assertiveness of the autonomous device for each operational decision that is necessary for the machine to complete its mission. Concerns about control over autonomous devices have persisted over time and the US DoD Directive 3000.09 on Autonomy in Weapon Systems establishes a baseline level of "Meaningful Human Control" (appropriate human judgement) necessary for the deployment of the device.

Understanding autonomy requires identification of the different stages¹³ of human control and supervision over a weapon system in order to clarify the interrelation between autonomy and the weapon system: (i) Human deliberation regarding an objective before targeting, (ii) Software recommendation of alternative targets and final human decision on which ones should be attacked, (iii) Software selection of objective and human makes the final decision before the attack, (iv), Software selection of objective, with limited time for human to veto the situation, (v) Software selection of objective and initiation of attack without human involvement. Bearing in mind that stages (i) and (ii) would be legal only if reasonable deliberation happens, stage (iii) would risk of becoming unacceptable in the event that both commanders and operators engage in hostilities on the basis of automated results and without searching for alternative results. However, stages (iv) and (v) would be prohibited as the IHL principles of precaution and distinction would be violated. Risk assessments must analyse the level of reliability and predictability shown by algorithms. Sometimes governments may trust that the machine's actions will be performed within the applicable legal framework. But if not, they should adapt and develop new methods to operate effectively in new and complex environments.¹⁴

3 Ethical Use: Should Autonomous Weapons Be Banned?

Programming a system to decide mechanically what to target, and when and how to do so, inevitably raises ethical questions. When distinguishing between

13 See further in Sharkey N., "Towards a principle for the human supervisory control of robot weapons", *Politica & Società* 2 (2014) 305–324.

14 Deeks A. – Lubell N. – Murray D., "Machine Learning, Artificial Intelligence, and the Use of Force by States", *Journal of National Security Law & Policy* 10 (2019) 1–25, 21.

the notions of “automated” and “autonomous”, the more challenging ethical questions concern the unpredictability of AWS behaviour and their lack of traceability. Furthermore, the introduction of AWS might be dangerous as they risk making meaningless the principles of dignity and humanity (on the grounds of the *Martens* Clause).¹⁵ Regarding that concern, Arkin proposes that emotions may be necessary at a certain stage to enable an autonomous system to be truly ethical. Hence, encoding “compassion” within the behaviour of the system may help foster the ethical use of AI devices.¹⁶

The USA, Russian Federation, People’s Republic of China and other countries are making huge investments in AI as they believe that such technology will give them a competitive advantage. The development of autonomous devices will mainly be justified on the grounds that machines can achieve certain benefits that humans are incapable of. In addition, operational challenges can be better tackled as a result of implementing autonomy which leads to further accuracy, speed and persistence when armed forces must accomplish their tasks. However, there are several reasons why AWS may become a mere fantasy such as: (i) Human mistakes, (ii) Interaction failures between machine and human, (iii) Technical shortcomings, (iv) Lack of appropriate software codification, (v) Cyber interferences / countermeasures, (vi) Possible bias on the manufacturers and providers and unforeseen circumstances in the theatre of operations. In order to support the development of these technologies, Boothby argues that there will always be a human involved in the decision-making process before engaging in a theatre of operations.¹⁷

A pre-emptive ban on autonomous weapons (such as the 1995 Protocol on Blinding Laser Weapons) could be more successful than the conventional norms that regulate the use of weapons. However, such ban could have the effect of hindering the development of AI systems and consequently armed forces would lack the capacity to increase readiness and demonstrate deterrence to adversaries. In this sense, Dunlap warns that weapons’ bans may

15 The *Martens* Clause first appeared codified in The Hague Conventions II and IV respecting the Laws and Customs of War on Land, which were signed on 29 July 1899 and 18 October 1907 respectively. Article 1(2) of the Additional Protocol I to the Geneva Conventions 1949 also enshrines this clause which can serve as a guide for states when implementing new technologies in the absence of norms.

16 Arkin R.C., “Governing Lethal Behaviour: Embedding Ethics in a Hybrid Deliberative/Reactive Robot Architecture” (Technical Report No GIT-GVU-07-11 – Georgia Institute of Technology: 2008) 73–75.

17 Boothby W.H., *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (The Hague: 2014) 224.

incentivize war fighters to employ “legal” but more destructive arms.¹⁸ We can still trust current IHL norms and hence creating new ones might not be necessary because law is considered “technology-neutral”, meaning that it does not bias one kind of technology over another.¹⁹

Considering that AI has not been sufficiently developed in the military context, the most relevant question will be the risk threshold that can be maintained with the aim of keeping a balance: full of employment of the system to achieve strategic objectives with the aim of reduced liability. AI systems may increase the amount of real-time data that is acquired and the human brain’s processing will no longer be capable of facing the challenges faced on the battlefield. On this issue, liability and attribution concerns can be resolved through a system of international certification that determines the safety of the AWS prior to use and deployment.²⁰

In 2015, some experts (including Stephen Hawking, Noel Sharkey, Noam Chomsky) published a letter where they expressed concern about the development of AWS and the danger of an arms race in the field of AI. They called for control of such weapons that surpass the criteria of “Meaningful Human Control”.²¹ In addition, more than fifty non-governmental organizations (e.g. Human Rights Watch, Amnesty International, among others) have strongly advocated for the prohibition of AWS. The special rapporteurs Maina Kiai and Christof Heyns also asserted: ‘[A]utonomous weapons systems that require no meaningful human control should be prohibited, and remotely controlled force should only ever be used with the greatest caution’.²²

18 Dunlap C.J., “A Better Way to Protect Civilians and Combatants than Weapons Bans: Strict Adherence to the Core Principles of the Law of War” (Lawfire: 2015) at <https://sites.duke.edu/lawfire/2015/12/03/a-better-way-to-protect-civilians-and-combatants-than-weapons-bans-strict-adherence-to-the-core-principles-of-the-law-of-war-2/> accessed 30 October 2021.

19 Liivoja R., “Technological change and the evolution of the law of war”, *International Review of the Red Cross* 97 (2015) 1157–1177, 1167.

20 For companies seeking certification for an AI system, the following technical pieces of information should be disclosed, such as: (i) The complete source code, (ii) An accurate description of all hardware/software environments in which the AI systems has been tested and (iii) An accurate description on the AI system performance. Scherer M.U., “Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies and Strategies”, *Harvard Journal of Law & Technology* 29 (2016) 354–400, 397.

21 Russell S., “Autonomous Weapons: An Open Letter from AI & Robotics Researchers” (Future of Life Institute: 2015) at <https://futureoflife.org/open-letter-autonomous-weapons/?cn-reloaded=1> accessed 30 October 2021.

22 UN Human Rights Council, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary*

4 Which Status Autonomous Weapons Should Be Granted?

4.1 *The Notion of Autonomy and Who Should Be Bound by Norms*

Automation is not a new phenomenon as weapons have already been developed that have similar effects to autonomy, such as mines, booby traps, and self-propelled torpedoes. Autonomous weapons or robots must count on “sensors” that keep track of the environment and observe changes to it, “processors” or “artificial intelligence” that choose how to respond, and “effectors” that act upon the environment in a manner that captures the decisions of the processors.²³

Algorithms are starting to perform actions which were once deemed to be exclusively human capabilities. Challenges such as machine/software failures or biased design and use of algorithms require a delineation of tasks and distribution of responsibility among the stakeholders involved. However, it must be noted that the Additional Protocol I to the Geneva Conventions (AP I) does not enshrine a precise definition of “weapon” or “weapon system”. Some scholars have made a distinction between the person who deploys the AWS (Commander) and the AWS itself which is considered the “agent”.²⁴ Customary IHL establishes state responsibility for IHL violations including those committed by its organs (including armed forces) and by those persons or entities it empowered to exercise elements of governmental authority.²⁵ In addition, military manuals²⁶ and scholars²⁷ acknowledge that IHL/IHRL obligations are only applicable to human beings. Addressing this concern, the International

or arbitrary executions on the proper management of assemblies (A/HRC/31/66, 4 February 2016) 15, 67 f).

23 McAllister A., “Stranger than Science Fiction: The Rise of A.I. Interrogation in the Dawn of Autonomous Robots and the Need for an Additional Protocol to the U.N. Convention Against Torture”, *Minnesota Law Review* 101 (2017) 2527–2573, 2533.

24 See further in Arkin R.C. – Ulam P. – Wagner A.R., “Moral Decision-making in Autonomous Systems: Enforcement, Moral Emotions, Dignity, Trust and Deception” (Georgia Institute of Technology: 2011) at <https://www.cc.gatech.edu/~alanwags/pubs/IEEE-ethicsv17.pdf> accessed 30 October 2021.

25 See Henckaerts J.M. – Doswald-Beck L., *Customary International Humanitarian Law – Volume I: Rules* (New York: 2005) 530–531.

26 The U.S. Department of Defense states that: ‘[T]he law of war rules on conducting attacks [...] do not impose obligations on the weapons themselves’. Office of General Counsel – Department of Defense, *Department of Defense Law of War Manual* (Washington D.C.: 2016) 353–354, 6.5.9.3.

27 Sassòli M., “Autonomous Weapons and International Law: Advantages, Open Technical Questions and Legal Issues to be Clarified”, *International Law Studies* 90 (2014) 308–340, 323.

Military Tribunal of Nuremberg asserted in 1947 that '[C]rimes against international law are committed *by men*, not by abstract entities, – and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'²⁸

4.2 *Legal Personality Theories and Delegation of Tasks*

There have been proposals to grant AI legal personality equivalent to that of humans. Currently, only natural persons or entities may act on behalf of a State.²⁹ F. Patrick Hubbard acknowledges that granting personhood to machines is based on a behavioural test and a particular (AI) entity should be able to: (a) interact with its environment and engage in complex thought and communication, (b) show concern for its existence and achieving its plan in life and (c) have the ability to live in a community with other persons based on mutual self-interest.³⁰ Other scholars like John Sullis propose considering robots moral agents (without granting them personhood) if the device has autonomous intentions and responsibilities.³¹ Thus, an (AI) entity, from a property law perspective, may be qualified in the same way as a human but treated differently within the legal system; normative provisions must be sufficiently reliable and precise in order to enable governments to implement the necessary technical features to ensure legal certainty.³² The more responsibilities we delegate to AWS, the higher level of cognitive skills will be required.

Full autonomy of a weapon system will never be achieved as there will always be some form of "human control" through manufacturers and programmers, regardless of the legal status of the AWS. We may draw similarities between granting personhood to AWS to granting such a status to corporations and hence manufacturers. Under such a framework, owners and operators

²⁸ Library of Congress, "Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945 – 1 October 1946" 223 at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf accessed 30 October 2021.

²⁹ Crawford J., *State Responsibility – The General Part* (Cambridge: 2013) 113. On this aspect, Ford acknowledges that the Draft Articles on the Responsibility of States for internationally wrongful acts (DASR), of course, do not consider the potentiality of AWS. Ford C., "Autonomous Weapons and International Law", *South Carolina Law Review* 69 (2017) 413–478, 476.

³⁰ Hubbard F. P., "'Do Androids Dream?': Personhood and Intelligent Artifacts", *Temple Law Review* 83 (2010–2011) 405–474, 419.

³¹ Sullins J.P., "When is a Robot a Moral Agent?", *International Review of Information Ethics* 6 (2006) 23–30, 29.

³² As asserted by Professor Ian Brownlie, the subjects of law in any legal system are not exactly alike in their nature and rights, subject to the needs of the needs of society. Brownlie I., *Principles of public international law* (Oxford: 1990) 58.

would not be held responsible for possible device malfunctions. However, each situation should be analysed on a case-by-case basis to ascertain whether the stakeholders involved could have anticipated the AI system's behaviour.

Risk assessment on delegation of tasks to AI systems requires an analysis of the functions that the system can perform first. Both autonomous and automated robots follow fixed and predetermined algorithms which a computer follows instructions to perform a task. Robots can determine a military target on the basis on pre-programmed characteristics, such as shape and dimensions. Thus, once the system has identified a sufficient number of characteristics that correspond with the pre-programmed list of objects (i.e. the pre-programmed version), the robot would be ready to trigger the attack.³³ Delegating agency to machines may be troublesome as the principle of humanity may be jeopardized. Thus, commanders and operators must consider whether AWS are working according to pre-set constraints or in an unconstrained manner. Risks may be inherent to AI technologies, but the most important concern is determining the risk level that is acceptable in order to reduce liability and maximize the use of these technologies.

5 The Applicable Legal Framework to be Considered When Fielding Autonomous Weapons

Twenty years from now AWS might be developed and deployed in the battlefield³⁴ and any legal framework should regulate the full spectrum of autonomous capabilities across varied and distinct domains, missions and platforms.³⁵ Depending on whether a state is in an armed conflict or a law enforcement situation, it will have to comply with IHL or International Human

33 Wagner M., "Taking Humans Out of the Loop: Implications for International Humanitarian Law", *Journal of Law, Information and Science* 21 (2012) 155–165, 161.

34 In March 2021 the UN Panel Experts on Libya warned about the possible use of lethal autonomous weapons systems such as the STM Kargu-2 and '[w]ere programmed to attack targets without requiring data connectivity between the operator and the munition: in effect, a true "fire, forget and find" capability'. The use of these AWS happened within the conflict between the Tripoli-based Government of National Accord Affiliated Forces (GNA-AF) and the Hafter Affiliated Forces (HAF) in March 2020. United Nations Security Council, *Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*. S/2021/229, 8 March 2021 17, 63.

35 Curley G.F., "Autonomous Weapon Systems: A Pragmatic Approach to an Emerging Capability", *NATO Legal Gazette* 41 (2020) 61–95, 63.

Rights Law (IHL), together with disarmament law to verify the legality of the use of weapons. No IHL norm specifically restricts the use of AWS. In fact, both targeting and weapons law regimes may interact in this field more than ever before: determining how to direct a weapon at a target is tied to the nature of the weapon system itself. Hence, in the event that AWS are fully implemented within the next few decades, the process of directing a weapon (which is exclusively reserved for operators and governed by targeting law) will become part of the built-in behaviour of the weapon system, which is governed by weapons law.³⁶

However, explicit caveats would apply to AWS. In the context of cyber (autonomous) weapons, some acts may be below the threshold of armed attack but still be considered an illegal “intervention”, as it may feature a form of coercion that has devastating effects.³⁷ It is acknowledged that AWS will be proliferated for use in the following law enforcement contexts: crowd-control, hostage situations, areas/building-protections, border controls or check-points, prevention of escapes from prisons and fighting against organized non-state actors (e.g. terrorist groups, drug-lords, organized crime, etc.).³⁸

IHL is applicable to the use of new technologies which are aimed at saving budgetary costs and human lives, i.e., autonomous weapons that are enhanced by machine learning capabilities and artificial intelligence decision-making. This poses the question: to apply a legal regime, is it necessary for the weapon to entail a certain level of intensity? The “first-shot” theory poses an interesting example, which holds that IHL applies starting at the first moment a state uses force against another. Kleffner asserts that certain facts should reach a certain level of intensity and that not all activities would be included (e.g. riots or isolated and sporadic acts of violence, border disputes, intelligence and surveillance ... etc.).³⁹ However, the fact of setting a certain level of intensity may also lead to legal gaps and certain groups of people or objects may not be afforded the protections guaranteed by IHL itself, for example. Rule 92 of the Tallinn Manual 2.0 on the International Law applicable to Cyber Operations acknowledges that the violence threshold must be analysed bearing in mind

³⁶ McFarland (n 9) 93.

³⁷ See further in Wrangé, P., “Intervention in National and Private Cyberspace and International Law”, in Ebbesson J. – Jacobsson M. – Klamberg M.A. – Langlet D. – Wrangé P. (eds.), *International Law and Changing Perceptions of Security – Liber Amicorum Said Mahmoudi* (Leiden: 2014) 307–326, 313.

³⁸ Heyns C., “Human Rights and the use of Autonomous Weapons Systems (AWS) during Domestic Law Enforcement”, *Human Rights Quarterly* 38 (2016) 350–378, 359.

³⁹ Kleffner J.K., “Scope of Application of International Humanitarian Law”, in Fleck D. (ed.), *The Handbook of International Humanitarian Law* (Oxford: 2021) 50–80, 59.

the “violent” consequences and not due to the violent characteristics of the act themselves.⁴⁰

Likewise, peremptory norms cannot be circumvented by states,⁴¹ such as the prohibition of torture, taking hostages, collective punishment, and arbitrary deprivation of liberty.⁴² All international crimes committed by AWS may violate universal norms (*erga omnes*) and imperative norms (*jus cogens*). IHL norms are considered to be peremptory (non-derogable)⁴³ and, of course, customary international law. A common framework on autonomous weapons requires a conventional framework⁴⁴ that encourages the establishment of norms and must bear in mind the following considerations: (i) The process of modification of *jus cogens* norms is not the same as the process of their creation,⁴⁵ (ii) Prof. Dinstein asserts that unilateral acts cannot modify *jus cogens* norms,⁴⁶ (iii) Only states and international organizations are the key sovereign actors (for states through international organizations) in order to create practice and form *opinio juris*.⁴⁷ On the other hand, states must consider that

40 On this Michael Schmitt considers that cyber operations can be considered as “attacks”, even when they are not themselves “violent”, when they have “violent consequences”. Schmitt M.N., “Cyber Operations and the *Jus in Bello*: Key Issues”, *International Law Studies* 87 (2011) 89–110, 93–94.

41 Article 53 of the Vienna Convention on the Law of Treaties (1969) declares a treaty void in case of conflict with a peremptory norm of international law. See also article 26 DASR 2001.

42 UN, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* (Adopted at the Seventy-second Session of the Human Rights Committee on 31 August 2001) 5, 11.

43 ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16, (Judgement, 14 January 2000) 203–204, 520. For IHLR, see Smith M. (ed.), *Operational Law Handbook 2020* (Charlottesville: 2020) 98.

44 Bearing in mind the dichotomy between treaty law and customary international law, Hans Kelsen asserted that the basic norm of international law must be a norm which endorses custom as a norm-creating fact and should be formulated as: ‘[T]he states ought to behave as they have customarily behaved’. Thus, customary international law is the first stage within the international legal order. See Kelsen H., *Principles of International Law* (New York: 1952) 417–418.

45 In this sense, Alexander Orakhelasvili asserts as well that the modification of a *jus cogens* norm must be differentiated from the rise of *jus cogens superveniens*, which are aimed at outlawing certain conventional norms and not to amend existing norms. See Orakhelasvili A., *Peremptory norms in International Law* (Oxford: 2006) 127.

46 Dinstein Y., *War, Aggression and Self-Defence* (Cambridge: 2001) 96–97.

47 Corten O., *Méthodologie du droit international public* (Brussels: 2017) 153.

circumstances precluding wrongfulness (e.g. *force majeure*) cannot be invoked when violating peremptory norms.⁴⁸

6 How Can International Responsibility Be Determined When Autonomous Weapons Are Used?

6.1 *Preliminary Concerns*

International Law does not currently address the consequences of actions undertaken by AWS. One important consensus reached by the UN Group of Governmental experts is that accountability cannot be transferred to machines, i.e., human responsibility for decisions on the use of weapons systems must be retained.⁴⁹ On the other hand, no accountability mechanism is foreseen for wrongs that originate from the various stakeholders involved such as manufacturers, developers, operators and the commander leading a particular operation. Analysing the conduct performed by an AWS will be fundamental: Triggering the responsibility of the commander (and later state liability) or the manufacturer (individual responsibility) may depend on whether the robot's performance took place outside of specified parameters, which would generate manufactures' liability. But if the system's use was illegal, then command responsibility arises as she or he should have exercised greater due diligence in fielding the device.⁵⁰

Different methods can be used to determine the perpetrator of illicit acts made by AWS, such as the duplication of previously issued codes in order to obtain original source code. International Criminal Law does not have to overlap the applicable regime with state responsibility as both can coexist and are recognized by the Geneva Conventions: I (article 51), II (article 52), III (article 131) and IV (article 148).⁵¹

⁴⁸ Melzer N., *Human Rights implications on the usage of robots and unmanned robots in warfare* (Brussels: 2013) 40.

⁴⁹ CCW GGE, *Report of the 2018 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, UN Doc CCW/GGE.1/2018/3 (23 October 2018) 4, 21.b).

⁵⁰ See discussion in Krishnan A., *Killer Robots – Legality and Ethicality of Autonomous Weapons* (Farnham: 2009) 105.

⁵¹ Crooto R., "War Torts: Accountability for Autonomous Weapons", *University of Pennsylvania Law Review* 164 (2016) 1347–1402, 1365.

6.2 *Possible Stakeholders Involved: Individual Responsibility*

Regarding individual responsibility (whether criminal or civil), considering article 30 of the 1998 Rome Statute of the International Criminal Court (Rome Statute) special emphasis will be placed on the elements of intentionality, recklessness or negligence (*mens rea*) to determine, during the manufacturing and programming stages, whether an AWS was programmed to execute an activity that led to the commission of an internationally wrongful act. If the behaviour demonstrated by the machine was unforeseen, then the element of intentionality is not present. Conversely, since civil liability does not necessarily require intentionality, the element of foreseeability can play a key role since the stakeholders involved (the manufacturer, programmer or operator of the device) must assume the risk of the possible damage that the weapons system might commit. This assumption will be key for determining liability. To delve deeper into this, a report published by Human Rights Watch in 2016, asserted that manufacturers would not hold responsibility, if: (i) the AWS' specifications were approved by the government, (ii) the weapons were in accordance with those specifications/requirements and (iii) the manufacturer did not deliberately fail to inform the government of any expected or known danger posed by the AWS.⁵²

However, the individual responsibility regime can lead to accountability gaps since the interrelation between programmers/designers/manufacturers and the resulting device, which sets sufficient grounds for establishing accountability, would be non-existent. Experts who gathered at an International Committee of the Red Cross (ICRC) meeting in 2014 acknowledged that such an accountability gap would render the machines unlawful.⁵³ However, some authors disagree and consider that the existence of unpredictability and lack of direct control over autonomous systems do not suffice alone to create accountability-gaps,⁵⁴ as there should always be an operator (e.g. state, commander or individual) responsible for activating the system.

Thus, acknowledging the hurdles involved in determining each individual's conduct with respect to AWS, perhaps a regime of (strict) state responsibility

⁵² Docherty B., "Making the case: The Dangers of Killer Robots and the Need for a Pre-emptive Ban" (Human Rights Watch: 2016) at https://www.hrw.org/sites/default/files/report_pdf/arms1216_web.pdf accessed 30 October 2021.

⁵³ ICRC, *Autonomous Weapons Systems – Technical, Military, Legal and Humanitarian Aspects* (Expert Meeting – Geneva: 2014) at <https://www.icrc.org/en/document/report-icrc-meeting-autonomous-weapon-systems-26-28-march-2014> accessed 30 October 2021.

⁵⁴ Nyholm S., "Attributing Agency to Automated Systems: Reflections on Human-Robot Collaborations and Responsibility-Loci", *Science and Engineering Ethics* 24 (2018) 1201–1219, 1217.

is more feasible. Under such a regime, even if a state has not violated IHL, accountability would arise due to harmful acts attributable to the state.⁵⁵

6.3 *State Responsibility*

Presently, there is no multilateral international binding norm that regulates state responsibility. On this issue, the International Law Commission (ILC) codified the customary rules on state liability in the Draft Articles on the Responsibility of States for internationally wrongful acts (DASR), in 2001.

Once it can be acknowledged that there has been a breach by a state of an obligation owed under a primary rule of international law, state responsibility arises as it is grounded on the principle of “objective” liability. No further allegations of delinquency, *mens rea* or *culpa* need to be addressed. However, elements such as “intention” or “design” of state action may be decisive factors that can preclude wrongfulness (articles 20–25 DASR).⁵⁶ This may be easily invoked by states as AWS are in the early stages of development which can make the question of attribution more difficult.

As per the commentary to article 2 of the DASR,⁵⁷ the intent element is not required to trigger state responsibility. However, the notions of “attribution”, “breach” (which leads to the qualification of the act as “internationally wrongful”), “circumstances precluding wrongfulness” (and possible means of redress) will be the main grounds for accountability. Bearing in mind the principle of due diligence which states must observe to comply with customary international law (as also enshrined in Rule 6 of the Tallinn Manual), whenever an attack has been launched from infrastructure that is under exclusive governmental control, the state (responsible) for that infrastructure can be considered as mindful of such facts.⁵⁸

55 Sandoz Y. – Swinarski C. – Zimmerman B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: 1987) 1058, 3661.

56 Crawford (n 29) 61. See also Gaeta P., “Autonomous weapons systems and the alleged responsibility gap”, in ICRC, *Autonomous Weapons Systems Implications of Increasing Autonomy in the Critical Functions of Weapons – Versoix, Switzerland 15–16 March 2016* (Geneva: 2016) 45.

57 The commentary says: ‘[I]n the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a state that matters, independently of any intention’.

58 The *Corfu* case is a clear example of this, since the Republic of Albania was declared responsible for the explosions (and consequent material and personal losses) that took place in its territorial waters on 22 October 1946. The Republic of Albania did not notify in time of the presence of mines in their territorial waters and the imminent danger that this posed. ICJ, *Corfu Channel* case (Judgment of April 9th 1949: I.C.J. Reports 1949, P.4) 18–22.

Establishing responsibility necessarily implies taking into account the notion of control in order to assert jurisdiction and then exercise public powers.⁵⁹ Some international tribunals have pronounced judgements that have set parameters regarding standards of control over territory or people: effective control⁶⁰ and overall control.⁶¹ These standards can be interrelated with the possible extraterritorial application of human rights instruments,⁶² as the exercise of competences (i.e. jurisdiction) can be a relevant factor for holding a state accountable. Following the wording of article 8 DASR and the *Nicaragua* case,⁶³ provision of “instructions”, “guidance” or “control” over a particular group of people (e.g. armed group) should give enough grounds for state responsibility. However, in order to avoid accountability gaps, assessing AWS requires more flexible framework that does not fully rely on classical theories of effective control over an area or people. Instead, the effective control test should be considered subsidiary in the event that the relationship of dependence (or agency – “strict control test”) between states and their agents cannot be proven.⁶⁴

7 Weapons’ Control and Review Process

7.1 *The Importance of Weapons’ Review*

The implementation of autonomous systems within armed forces is already taking place and humans will increasingly rely on them to make decisions that are essential for meeting operational requirements. Hence an exhaustive

59 On this concern, the ILC remarked in 1973: ‘[T]here is no a priori implication that all acts of the “organs” of the State should be automatically considered as “acts of the State” under international law’. Yearbook of the International Law Commission, 1973 Vol. 11, Documents of the twenty-fifth session including the report of the Commission to the General Assembly, A/CN.4/SER.A/1973/Add.I, 191, 2.

60 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro* (Judgment, Merits, ICJ GL No 91, ICGJ 70, ICJ 2007, 26th February 2007) 400–410.

61 ICTY Appeals Chamber, *Prosecutor v. Duško Tadić*, Case n° IT-94-I-A, (Judgement 15 July 1999) 145.

62 ECtHR GC, *Banković and others v. Belgium and others* (App no 52207/99, Decision as to the admissibility, 12 December 2001) 80; ECtHR GC, *Al-Skeini and others v. United Kingdom* (App no 55721/07, Judgement 7 July 2011) 134–136.

63 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, 109.

64 Talmon S., “The Responsibility of Outside Powers for Acts of Secessionist Entities”, *International & Comparative Law Quarterly* 58 (2009) 493–517, 502.

legal review processes will be needed in order to assess the compliance of such devices with additional rules like IHL and targeting law.⁶⁵ If states do not comply with their weapons' review obligations or if their process is inadequate, state responsibility will be triggered irrespective of the individual criminal responsibility of person involved in the deployment of an AWS.⁶⁶

Review processes mainly seek to assess the general circumstances in which weapons are intended to be used and whether existing international norms prohibit or restrict such circumstances. The procurement stage is a crucial point for assessing AWS' compliance with IHL. Tactical commanders will have little to say in relation to established benchmarks (at the strategic level) for the use of AWS. Thus, they must rely on a thorough weapon's review process.

The obligation enshrined in article 36 of the AP I is applicable to every state party, regardless of whether it develops, manufactures, or purchases autonomous weapons.⁶⁷ There is no equivalent to article 36 of the AP I for law enforcement situations governed by IHRL. In any event, close analysis must be undertaken to determine whether AWS comply with law enforcement paradigms as well. The legal assessment on a particular AI capability will facilitate the choice of possible (less harmful) alternative weapons able to execute a mission.

7.2 *Steps to be Considered*

There is no official norm that describes the full process. To make matters worse, sometimes states are reluctant to share information on the results of their weapons' tests. The Ministry of Defence should be the competent organ for undertaking this process. However, other nations prefer that this process should be supervised a single governmental official.⁶⁸ Public officials involved in this process perform a multiplicity of tasks: procurement, research (development of the concept), testing (engineers and scientists), manufacturing and development of prototypes, legal compliance of AWS with international norms (lawyers, planners and/or commanders), tactical planning to ensure mission efficiency (technicians, computer programmers, operators, etc.), and transfer and acquisition.

65 Vestner T. – Rossi A., "Legal Reviews of War Algorithms", *International Law Studies* 97 (2021) 509–555, 512–513.

66 ICRC (n 53) 23.

67 Daoust I. – Coupland R. – Ishoey R., "New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare", *International Review of the Red Cross* 84 (2002) 345–363, 348.

68 See further in ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare* (Geneva: 2006) 20–21.

The main steps that states will need to fulfil are related to: a) Technical description of the weapon itself, i.e., intended use of the weapon and reparation means; b) Technical behaviour of the weapon, i.e., accuracy and reliability of the system and whether its effects can be controlled in time and space; and c) Health considerations, i.e., danger to life, harm, risks ... etc. In fact, when developers design the AWS' software and insert instructions and choices, they may play a prominent role as the systems' behaviour will be shaped in accordance with the guidance they provide (e.g. available options in some situations, and recommendations for courses of action).⁶⁹ Such guidance will lead to the "normal or expected use" of the autonomous device but poses the risk of materially altering the method with which the intended effect is achieved. Different variables should not be forgotten such as the nature of the algorithms and the level of reliability, among others.⁷⁰

It is possible that the review process may occur in several stages, i.e., it may not be possible to trust the first outcomes when testing AWS, compared to conventional weapons, as AWS will have the ability to quickly adapt to the battlefield due to its feature of advanced machine learning. On this concern, experts and civil society organizations stress the different nature of the AWS review process compared to conventional weapons: the process foreseen in article 36 would not be sufficient and new regulations or bans should be established to control the development, transfer or use of these new technologies.⁷¹

The analysis must be multidisciplinary. Manufacturers, transferors and legal advisers from Ministries of Defence should participate in order to check the feasibility of the weapons. Governments will also have to face the issue of AWS' supply in the short run. On this, Special Relator Roberto Ago asserted that the mere supply of raw materials, means of transport and even weapons does not itself constitute an internationally wrongful act unless the activity was intended to enable another state to commit or facilitate the commission of an international offence.⁷²

69 McFarland T., "The Concept of Autonomy", in Liivoja R. – Väljataga, A. (eds.), *Autonomous Cyber Capabilities under International Law* (Tallinn: 2021) 12–35, 28–33.

70 Tattersall A. – Copeland D., "Reviewing Autonomous Cyber Capabilities", in Liivoja (n 69) 205–258, 216–217.

71 Boulin V. – Verbruggen M., "Article 36 reviews – Dealing with the challenges posed by emerging technologies" (Stockholm International Peace Research Institute: 2017) at https://www.sipri.org/sites/default/files/2017-12/article_36_report_1712.pdf accessed 30 October 2021.

72 International Law Commission, *Seventh report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (continued)*, Yearbook of the International Law Commission 1978 vol. 1(1), A/CN.4/307 and Add.1 & 2 and Corr.1 & 2 58, 72.

Bearing in mind the challenge of AI warfare in the medium term, not all states may have the expertise and/or financial resources in order to undertake such rigorous review. This poses the question of whether a new concept based on the environmental law principle “Common But Differentiated Responsibilities” should be implemented. Such a principle may enable developing countries to have different speeds of resource planning. A second option might be a multilateral institution with coercive powers (e.g. similar to the UN Security Council or the International Criminal Court) which can supervise and enforce mechanisms that constrain the whole international community.

7.3 *Means and Methods of Warfare: Encoding the Right Behaviour into the System*

For AWS’ review process, it will be more important to focus on software, and the foreseeable effects that algorithms can create, rather than hardware, i.e., the nature of the harming mechanism of the device itself. However, guarding against all the misuses of weapons will be nearly impossible.⁷³ AWS will mainly rely on learning processes that occur when the system can fulfil its tasks faster or with enhanced accuracy in successive attempts. Such a learning process also occurs when the system (robot) understands and subsequently uses unknown information or performs its functions in a dynamic environment.⁷⁴

The review process must entail a full differentiation between *means* and *methods* of warfare. In the particular case of AWS, the *means* refers to the explicit behaviours that humans have encoded into the weapon systems. Meanwhile the *method* refers to the relationship between the machine and the human, i.e., the effects of the decisions taken by the weapon itself.⁷⁵ Therefore, the behaviour of the machine itself does not constitute means of warfare, as for the AWS the distinctive characteristics are those methods and processes by which it selects and authorizes target engagement, not the means themselves that enable the AWS to engage those targets.⁷⁶ Therefore, scientists and eventually governments will have to cope with the challenge of programming

73 Official records of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva (1974–1977) Volume xv (Bern: 1978) 269.

74 Letendre L.A., “Lethal Autonomous Weapon Systems: Translating Geek Speak for Lawyers”, *International Law Studies* 96 (2020) 274–294, 289.

75 An autonomous weapon’s use can lawful itself (*means*). However, even if the weapon is programmed to accurately target objectives, it might be possible its abusive use (*method*) by operators and commanders without complying with IHL principles. Hence, such distinction is key to bear in mind. See further Sandoz (n 55) 398, 1402.

76 Curley (n 35) 75.

AWS in such a way that ensures that the AWS does not violate IHL/IHRL in its deployment and ensures that the devices are adequately equipped to obey orders and reverse actions when necessary.

The regulation of means and methods of warfare throughout the years has been done using general principles and rules applicable to states through conventional instruments (e.g. Antipersonnel Mines or Blinding Lasers Conventions). States will have to comply with the limitations enshrined in article 35(1) of the AP I.⁷⁷ Considering that predictability will not be the norm, Ministries of Defence must enhance planning and methodology that foresees risks that devices will be exposed to, and possible implications for machine learning. Algorithms will need to be analysed within operational environments, regardless of whether they are defensive⁷⁸ or offensive and analysis must also focus on calculations of collateral damage. Different parameters must be observed when states consider fielding (autonomous) cyber weapons, such as the effect that the cyber weapon will have on the data in the target node, network or computer and its impact on the ability of the targeted router to move legitimate data. Possible data alterations (e.g. hacking, spoofing) can affect the performance of the computer targeted and thus have detrimental effects on people and/or objects.⁷⁹

Another important consideration will be whether Intelligence, Surveillance and Reconnaissance (ISR) technologies attached to a weapon may be considered part of the “weapon systems” when the information provided assists the AWS with making final decisions to target a human/object without direct control. In such circumstances, ISR technology might be considered part of the weapon system itself. Review of AWS that are equipped with such ISR technologies will be fundamental as the weapon’s performance can be conditioned as a result of the information provided about targets.

77 Article 35(1) of the AP I: ‘[I]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited’. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion, I.C.J. Reports 1996, p. 226) 256–257, 77–78.

78 As there have been debates on whether developing offensive or just defensive AWS, Scharre acknowledges that the system could be programmed with simple rules, like “shoot back if fired upon”. Scharre P., *Army of None: Autonomous Weapons and the Future of War* (London – New York: 2018) 255.

79 Boothby W., “Dehumanization: Is There a Legal Problem under Article 36?”, in Heintschel von Heinegg W. – Frau R. – Singer T. (eds.), *Dehumanization of Warfare* (Cham: 2018) 21–52, 47.

8 Command Responsibility: Targeting Process

8.1 *Commander's Due Diligence on Supervising the Functioning of Autonomous Weapons*

The use of AWS in the near future will entail accountability for not only those who “execute” attacks at the tactical level, but also commanders at the operational and strategic levels. Command responsibility is not state responsibility, strictly speaking. However, states are obliged to ensure due diligence within the chain of command, and such obligation is expressed in article 7(3) of the Rome Statute and article 86(2) of the AP I. For a long while, scholars have maintained a strong stance on expanding the notion of command responsibility to cover responsibility for AWS.⁸⁰ Normally, a “should have known standard” should be applicable to commanders which obligates them to be aware of all aspects of the use of the weapon, its operational capabilities and its compliance with IHL.

Commanders shall bear responsibility in relation to weapons’ testing⁸¹ and the method in which the device “demonstrates” its autonomy, which should consider the AWS’ operational capabilities and ability to comply with international norms. The commander who supervises the individual programming or deploying an AWS is responsible for the ensuing negative consequences if they knew or should have known that their subordinate was programming or using the device illegally and the commander took no further action to prevent the illegal situation or punish the perpetrators after the fact.⁸²

Operational planning will also rely on appropriate Rules of Engagement (ROE) that regulate the use of force. In order to address legal uncertainty, some scholars have questioned whether the device itself may apply the ROE on its own (in the same way as a human member of the armed forces), instead of

80 White S.E., “Brave New World: Neurowarfare and the Limits of International Humanitarian Law”, *Cornell Journal of International Law* 41 (2008) 177–210, 205; Asaro P., “On banning autonomous weapons systems: human rights, automation, and the dehumanization of lethal decision-making”, *International Review of the Red Cross* 94 (2012) 687–709, 693.

81 Directive 3000.09, Enclosure 4 page: 12 lists obligations that the Commander must comply with in order to deploy systems: Such fielding must be done in accordance with AWS’ design, testing, certification, operator training, doctrine, TTPs, and approval as well as in accordance with the laws of war, applicable treaty, weapons system safety rules and applicable ROEs. Once verified, these weapons should be included in the Operational Planning identifying war fighter priorities and operational needs that may be met by these systems.

82 See further in Chengeta T., “Accountability Gap: Autonomous Weapons Systems and Modes of Responsibility in International Law”, *Denver Journal of International Law & Policy* 45 (2016) 1–50, 33.

assessing the AWS with a weapon-specific ROE. Some experts have asserted that each AWS will have to interpret and apply the ROE in accordance with the technical features of decision-making entities (including quantitative interpretation and possibly other subjective factors).⁸³

At both the strategic and operational level, decision-making processes will be complemented by machine learning and algorithmic technologies for certain specific tasks (Data gathering regarding potential targets, resources and environmental conditions, information analysis regarding a target and the computing process, choice of targets and the implementation of strategy) that rely on sensors that must themselves comply with IHL principles and, when applicable, IHRL. In the event that AWS fails and behaves in defiance of the commander's orders, the criterion of effective control will play a key role in determining an international wrongful act and attribution and, thus, the commander's responsibility.⁸⁴

Targeting rules may be followed in articles 48–67 of the AP I and allows for enemy combatants to be attacked: (a) at any time, (b) anywhere (with the exception of neutral states territory), (c) regardless of whether combatants are uniformed or not, (d) regardless of whether they carry arms or not and (e) regardless of whether they are advancing, stationary, straggling or retreating.⁸⁵ Hence, a high level of trust must be built when collecting information and selecting targets,⁸⁶ even where humans may be involved in some stages. Targeting Law does not address the type of weapon used and there is no restriction on the use of certain advanced weapons like unmanned aircrafts or smart bombs.

8.2 *Distinction*

Compared to machines, humans are better at differentiating targets as a result of their inherent consciousness which enables them to ask sufficient questions about the objective and whether an alternative course of action should

83 Gillespie T. – West R., “Requirements for Autonomous Unmanned Air Systems set by Legal Issues”, *The International C2 Journal* 4 (2010) 1–32, 18.

84 Buchan R. – Tsagourias, N., “Autonomous Cyber Weapons and Command Responsibility”, *International Law Studies* 96 (2020) 645–673, 657–658.

85 Dinstein Y., *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: 2016) 42.

86 Over-reliance in data may lead to “automation bias” and there are certain fields, such as Radiology, where an index of suspicion is required and consider that predictions are not always accurate. See further in Haupt C.E., “Artificial Professional Advice”, *Yale Journal of Law & Technology* 21 (2019) 55–77, 71.

be pursued. AI applications should be sufficiently developed and rely on equivalent or superior self-awareness capabilities.

Indiscriminate attacks and direct attacks against civilian population/property must be differentiated and the element of intent may play an important role.⁸⁷ This principle requires a careful analysis of the military objectives, under the nature/location/use/purpose test. Bearing in mind the accuracy on the development of AWS, these weapons may not fully comply with the principle of distinction for the following reasons: (i) technical shortcomings, particularly when missing accurate vision processing systems or sensors and as a result of cyber interferences; (ii) lack of precise definitions of IHL/IHLR – these norms and its complexities will have to be “encoded” into the systems; and (iii) the nature of current hybrid conflicts. Human involvement is fundamental for AWS to have a 360-degree picture of the operational environment. Basically, robots lack the self-awareness of humans.

Some scholars suggest that AWS should only be deployed in scenarios where there are no civilian populations or objects.⁸⁸ Others suggest equipping robots with non-lethal technologies with the goal of convincing the adversary to surrender.⁸⁹ However, these proposals seem naïve as most battlefield scenarios currently take place within urban or populated areas where AWS will have to rely on advanced sensor packages and recognition software. Hence, governments may start the practice of (and thus form *opinio juris* and customary international law) enacting international norms that compel parties in armed conflict to use precision-guided munitions in urban settings.⁹⁰

Prospective binding norms on autonomy aimed at complying with the principle of distinction (and hence consideration of humanitarian effects in using weapons) could also consider the technical wording enshrined in article 2(2) (c) of the 2008 Convention on Cluster Munitions, which explicitly warns about possible indiscriminate effects and enumerates specific features that should be included such as the ability to detect and engage a single target and self-deactivate equipment.

87 Dinstein (n 85) 147.

88 Titiriga R., “Autonomy of Military Robots: Assessing the technical and legal (“Ius in bello”) thresholds”, *The John Marshall Journal of Information Technology & Privacy Law* 32 (2016) 57–88, 84.

89 Canning J.S., “A Concept of Operations for Armed Autonomous Systems” (Presented at the third annual disruptive technology conference: 2006), at https://ndiastorage.blob.core.usgovcloudapi.net/ndia/2006/disruptive_tech/canning.pdf accessed 30 October 2021.

90 See further in Casey-Maslen S. – Weill S., “The use of weapons in armed conflict”, in Casey-Maslen S. (ed.), *Weapons under International Human Rights Law* (Cambridge: 2014) 240–281, 270.

8.3 *Proportionality*

The International Court of Justice (ICJ) has acknowledged the customary character of proportionality in the Nuclear Weapons Advisory Opinion.⁹¹ According to the ICJ, a weapon that cannot comply with proportionality is illegal. However, the specific provisions of IHL do not regulate the kind and degree of force permissible against legitimate military targets, which falls within the commander's discretion.⁹²

Some scholars admit that AWS will better comply with this principle as AWS might better identify the weapons used by adversaries and more effectively conduct collateral damage assessments. Bearing in mind the existing reluctance to delegate tasks to machines, the UN Special Relator Christof Heyns asserted that certain analyses such as proportionality would at least initially have to be made by commanders, while other aspects can be left to AWS.⁹³

Even beyond an analysis of whether AWS will be more effective than humans, the most important concern will be the establishment of a collateral damage estimation methodology which determines the possible collateral damages that an AWS may cause and how states can bear such a risk through qualitative judgements, as implemented by the USA and other armed forces. Ronald Arkin proposes that algorithms optimize such proportionality through calculations regarding possible unintended collateral damages in the civilian spectrum. Such calculations may enable armed forces to choose the less harmful weapon in situations where collateral damage may result.⁹⁴ These calculations must consider the military advantage that armed forces may achieve and balance it with the humanitarian consequences that the attack may inflict.

8.4 *Feasible Precautions*

States must comply with all necessary precautions enshrined in article 57 of the AP I, i.e. specifically, "feasible precautions" (article 57(2)(ii)) of the AP I) in selecting means and methods of warfare. This principle represents the ensuing step after the principle of proportionality is assessed and balances it with the principle of military necessity. Several organizations have argued for

91 The ICJ asserted: '[T]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law'. Nuclear Weapons (n 77) 245, 41.

92 Melzer N., *Interpretative Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: 2009) 78.

93 United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, Human Rights Council Twenty-third session, 9 April 2013, A/HRC/23/47 14, 74.

94 Arkin R.C., *Governing Lethal Behaviour in Autonomous Robots* (Boca Raton: 2009) 186.

a pre-emptive ban on AWS, and it must be considered that the ICRC's commentary on this rule '[d]oes not imply any specific prohibition of specific weapon'.⁹⁵ Various factors are relevant to the decision on whether to attack an objective or not, such as: clothing, activity, age or gender. All of those factors help determine whether a person has civilian status.⁹⁶ Information must be verified and up-to-date to avoid further delays because the theatre of operations is dynamic and continuously changing. In case further uncertainties are generated, further information needs to be requested;⁹⁷ the AWS must be capable of suspending or terminate an operation and undo the steps taken if the situation calls for it, as is enshrined by Rule 117 of the Tallinn Manual 2.0.

Intelligence gathering through data processors, interconnection of sensors and algorithmic assessments plays a key role in identifying possible targets and consequently the Commander's ability to make decisions will primarily depend on them.⁹⁸ There is always the risk that the AWS' learning process has limitations and thus its pre-set constraints may be reduced. Before undertaking any commitment that may cause prejudice, testing on the AWS' learning outcomes is necessary in order to enable commanders' compliance with targeting law rules. Some officers argue that additional "learned" criteria before engaging the target must be done. However, these situations will require that AI should never disregard pre-set parameters to expand permissible decision space or change the system's initial charter.⁹⁹

9 Conclusions

The introduction of AI applications within armed forces is happening and states must transpose ideas enshrined in AI strategies into practice (e.g. laws, regulations, enforcement mechanisms, etc.) and solve accountability gaps.

Commanders (and later states) need to consider the status that should be conferred on AWS. States are free to grant personhood to AI entities (including AWS) based on past experiences where legal personality has been granted to corporations and other artificial persons but must consider that artificial entities will have fewer rights and obligations than natural persons. However,

⁹⁵ Sandoz (n 55) 682, 2201.

⁹⁶ ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, (Judgement 5 December 2003) 22, 50.

⁹⁷ Sandoz (n 55) 680, 2195.

⁹⁸ Jensen E.T., "Autonomy and Precautions in the Law of Armed Conflict", *International Law Studies* 96 (2020) 577–602, 601.

⁹⁹ Curley (n 35) 82.

the following problems are critical to solve in order to achieve the greatest degree of legal certainty: creating definitions of autonomy, making explicit differences between automated and autonomous weapons and differentiating between autonomous weapons that are governed by AI and those that are not.

Humans (and later states) must retain “sufficient control” over the AWS and rely on capabilities that enable the reversal of acts without requiring human intervention. A possible proposal on this could be: In the event that the machine does not receive further authorization to complete its mission, the next stage is to shut down or self-destruct.¹⁰⁰ However, this situation would leave the idea of autonomous warfare meaningless as the ideal goal should be to completely rely on machines on future battlefields. Alternative approaches regarding control must be considered by future policy makers such as lowering the threshold of control, attributing responsibility for omissions, and recognizing of shared responsibility among the actors involved.¹⁰¹

In the medium term, an ideal international norm should allocate liabilities among the stakeholders involved (e.g. manufacturers, distributors ... etc.). However, at this moment a regime of (strict) civil liability is the most feasible option for addressing possible wrongdoing committed by AWS as it is already applicable for activities that are forbidden under international law, such as the 1972 UN Convention on International Liability for Damage caused by Space Objects. If a machine’s behaviour still carries the risk of being considered unpredictable, it is more sensible to introduce a limited personhood with strict liability,¹⁰² as such a modality would solve the difficulties posed by the blurred tracing of actions within the chain of command.

Special emphasis should be made on situational awareness technologies that collect intelligence regarding possible objectives and assess possible changes to the theatre of operations and take into account lessons learned from past operations. Such analysis will be fundamental for assessing how situations will unravel in the future. States and corporations must implement complex coding that will enable the adaptability of AWS in hostile environments. These new technologies may help reduce asymmetry in armed conflicts and crisis situations, but there is danger that lowering asymmetrical risks may lead to more

100 Crootof R., “The Killer Robots are here: Legal and Policy Implications”, *Cardozo Law Review* 36 (2015) 1837–1915, 1900.

101 Boon K.E., “Are control tests fit for the future? The slippage problem in attribution doctrines”, *Melbourne Journal of International Law* 15 (2014) 330–377, 332.

102 Koops B.J. – Hildebrandt M. – Jacquet-Chiffelle D.O., “Bridging the Accountability Gap: Rights for New Entities in the Information Society?”, *Minnesota Journal of Law, Science & Technology* 11 (2010) 497–561, 555.

jus ad bellum violations and consequently violations of the UN Charter.¹⁰³ States that do not implement these capabilities will be in clear disadvantage compared to their adversaries and the latter will simply use deterrence techniques to achieve strategic objectives. Thus, major armed forces need to implement AI systems to both ensure strategic security and deter adversaries.¹⁰⁴

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¹⁰³ The fact of reducing the risk for armed forces members can result in a special form of anti-social inefficiency and, hence, war may become "too easy". See discussion in Anderson K., "Efficiency in bello and ad bellum: Making the use of force too easy?", in Finkelstein C. – Ohlin J.D. – Altman A. (eds.), *Targeted Killings – Law and Morality in an Asymmetrical World* (Oxford: 2012) 374–399, 389.

¹⁰⁴ Kraska J., "Command Accountability for AI Weapon Systems in the Law of Armed Conflict", *International Law Studies* 97 (2021) 407–447, 426.

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Armed Unmanned Aerial Vehicles in New Armed Conflicts

Pilar Pozo-Serrano

1 Introduction

Armed drones have become a crucial tool in the fight against international terrorism and in counter-insurgency operations in an increasing number of countries. The United States began using drones in the war in Afghanistan after the attacks of 11 September 2001. The novelty of drone technology and its use for targeted lethal strikes outside conflict zones has created widespread controversy. Reports of civilian casualties, programme secrecy, and the lack of oversight, have sparked debate about its legality both inside and outside the United States. The current proliferation of unmanned aerial vehicles (UAVs) for military purposes, the increasing number of countries conducting targeted killings with drones, and the silence or ambiguity of states regarding policies and regulatory frameworks applicable to armed drones, have led to an intensification of the debate and increased the need for answers.

Several characteristics of UAVs make them especially suitable for targeted killings: they do not put pilot lives at risk; they contain sophisticated sensors and increasingly precise image acquisition systems; they can loiter over potential targets and reduce the time lag between identifying the enemy, deciding to attack, and making the attack. From the perspective of the territorial sovereignty of a state, they are less ‘intrusive’ than a ground operation. The assassination of Iranian General Soleimani in Baghdad by an American targeted drone strike on 3 January 2020 is illustrative of the latter feature.¹

These same features raise legal, political, and ethical issues.² The absence of risk to the pilot can reduce the political cost associated with a military

1 *Use of armed drones for targeted killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard*, A/HRC/44/38, 15 August 2020, Annex 23–40.

2 Henriksen A – Ringsmose J., “Drone warfare and morality in riskless war”, *Global Affairs*, 1.3 (2015) 285–291.

operation and lower the threshold for the use of force.³ Moreover, certain features of UAVs, such as their relative smallness, portability, and cheapness, facilitate their proliferation and acquisition by non-state actors. Some of these fears have now materialised. According to data collected by the Special Rapporteur on extrajudicial, summary, or arbitrary executions, as of 2020, some 102 countries had military drones and 40 of them had acquired or were in the process of acquiring armed drones. Several armed non-state actors have conducted drone attacks⁴ and other groups are reported to have acquired UAVs.⁵

There are two key issues in the debate regarding the use of armed drones. Firstly, whether the peculiar characteristics of drone technology make them an inherently unlawful type of weaponry. Secondly, the controversial legality of targeted killings of members of non-state armed groups outside areas of armed conflict, or in situations in which qualification as armed conflict is questionable.

This paper provides an up-to-date overview of the issues surrounding the use of armed drones. It firstly analyses the relevant legal standards to determine whether armed drone technology is unlawful. To this end, it briefly outlines the development of drones for military purposes considering the changes experienced in armed conflicts. Secondly, it focuses on the policies regarding the use of armed drones and on targeted killings as formulated by those states that have made most use of this tactic. Finally, the paper addresses the rules of international law applicable to the conduct of targeted killings with drones depending on the context and circumstances in which an operation takes place. The paper closes with conclusions on the issues discussed throughout the paper and their implications for current armed conflicts.

2 The Development of UAVs: Military Roles, Proliferation, and Technology

2.1 *Origin and Development of UAVs*

The design and manufacture of the first UAVs date back to World War II, although by the end of World War I some countries had already started

3 United Kingdom Ministry of Defence, *Strategic Trends Programme: Future Operating Environment 2035*, quoted in Dorsey J., Amaral N. *Military drones in Europe. Ensuring transparency and accountability*, Chatham House Research Paper (2021) 8.

4 *Saudi oil attacks: Drones and missiles launched from Iran – US*. See: <https://www.bbc.com/news/world-middle-east-49733558> [last accessed 20th September 2021].

5 *Report of the Special Rapporteur Agnes Callamard*, A/HRC/44/38, par. 7, 9.

developing unmanned aircraft projects.⁶ UAVs were initially used for intelligence, surveillance, and reconnaissance. The ability to loiter above a potential target and the absence of a pilot makes UAVs an instrument for reducing the number of casualties in reconnaissance missions.

Drones were operational in the 1950s. The US and Israel began using them in the 1970s for reconnaissance missions during the Vietnam and Yom Kippur wars.⁷ They were used for the same purpose in the 1991 Gulf War, which marked the beginning of the systematic use of drones in American military operations. UAVs were also used in conflicts in the former Yugoslavia in the 1990s.⁸

At the turn of the century, America began to develop the technology to put drones to new uses as transport and launch platforms for long-range controlled missiles. The Predator MQ-1 was the most widely used drone in Afghanistan. Earlier versions of the unarmed model had been operational in June 1994 for surveillance and the decision to transform it into an armed platform was taken in late 2000. At that time, the CIA was already using the Predator for missions over Afghanistan and Uzbekistan to locate Bin Laden. By February 2001, the armed version of the Predator was operational. Then CIA Director George Tenet pointed out that the use of armed drones changed the nature of the activity, raising the question of whether the CIA could use armed drones outside the US Army's chain of command and control.⁹

After the terrorist attacks of 11 September 2001, the US began using drones for combat in Afghanistan. Subsequently, drones were used in the Iraq war. Drones have now become an essential element for any military in armed conflicts, particularly in confrontations with non-state armed groups. The accurate and up-to-date information they provide is crucial when facing such groups, who have no fixed positions and are highly mobile. These same reasons are also a powerful incentive to make armed drone strikes when insurgents are detected in a location that is difficult to access, due to distance or danger. Drones make it possible to reduce the number of ground troops and thus the risk of casualties.

6 Sénat Français, Session ordinaire de 2016–2017. *Rapport d'information fait au nom de la Commission des affaires étrangères, de la défense et des forces armées par le groupe de travail 'Les drones dans les forces armées'* (2017) 12.

7 *Ibidem*.

8 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6, 28 May 2010, par. 27.

9 Williams B.G. "The CIA's Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign", *Studies in Conflict and Terrorism*, 33: 10 (2010) 873.

The first countries to use armed drones were the United States and Israel. British forces, deployed alongside US troops, began using armed drones in Afghanistan and Iraq in 2005.¹⁰ The number of states that have conducted armed drone strikes has increased in recent years. Although the absence of official data makes it difficult to provide a complete picture, the latest Special Rapporteur on extrajudicial, summary or arbitrary executions notes that, since 2015, armed drone strikes appear to have been carried out by Egypt, Iraq, Iran, Nigeria, Pakistan, Saudi Arabia, Turkey, the United Arab Emirates, France, and Russia. There is also evidence of drone attacks by states such as Turkey and Pakistan against insurgent and terrorist groups within their own territory.¹¹

2.2 *The Challenges of a Continuously Developing Technology*

UAVs are aircraft designed to operate without an onboard pilot. The operation of this type of aircraft requires a logistical system for launch and recovery, data transmission, command and control, which involves a significant infrastructure, either in an area close to the theatre of operations or in a distant area, in the territory of the state operating the UAV or in a third state.¹² This description shows that, even if the operation of drones does not endanger the lives of pilots, some of the personnel required to operate drones are usually located near the operational area.

The technological characteristics of UAVs make them a particularly attractive instrument for states and non-state actors – and more susceptible to abuse. The Special Rapporteur on extrajudicial, summary or arbitrary executions noted that features such as efficiency, adaptability, deniability, effectiveness, adaptability, and the political benefit that accompany the use of drones have determined their increasing presence in the military inventories of all types of actors. In terms of efficiency, drones are cheap and easy to operate: a targeted killing using a drone strike is cheaper than a ground-based locate-and-arrest operation.¹³ Image and sound capture systems theoretically ensure the

10 Postma F., *Military Drones and the EU. The role of unmanned systems in the European Union's defence developments*, PAX Report, November 2019.

11 *Report of the Special Rapporteur Agnes Callamard*, A/HCR/44/38, par. 7.

12 United Nations, *Study on Armed Unmanned Aerial Vehicles. Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, United Nations: New York (2015) 13–14. NATO terminology describes it as a 'powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload' *NATO Terminology Database* [Online]. Available at: <https://nso.nato.int/natoterm/Web.mvc> [last accessed 20 September 2021].

13 *Report of the Special Rapporteur Agnes Callamard*, A/HCR/44/38, par. 13.

accuracy of a strike, and the absence of a pilot on board means less risk of own casualties. Drones are also more politically acceptable because they provide a deterrent and, where appropriate, operational capability to use force with less danger to military personnel.¹⁴ The adaptability of drones allows access to difficult or dangerous locations, makes them suitable for a variety of roles, and for incorporating continuing technological advances.¹⁵ Although the vulnerability of small and medium sized drones makes them unsuitable for operations in highly contested environments,¹⁶ the development of concepts such as 'drone swarm' and 'drone mesh' in combination with other armed drones or manned aircraft, could enable them to be used in large-scale military operations to defend deployments or bases in hostile areas.¹⁷

A worrying dimension of drones is their potential impact on the development towards greater autonomy in weapons systems by using artificial intelligence to reduce or eliminate human control. This poses fundamentally different legal dilemmas to those posed by drones, where the attack is always a human decision. Drones may, however, facilitate the introduction of autonomous systems.¹⁸ A worrying development is the recent use of drones equipped with artificial intelligence systems by Turkey in support of the government of National Consensus Government in Libya. According to a UN report, Haftar's forces were attacked by drones equipped with autonomous weapon systems 'programmed to attack targets without requiring data connectivity between the operator and the munition'.¹⁹

UAVs are classified according to characteristics such as maximum take-off weight, payload capacity, autonomy, control systems, and maximum flight altitude. Based on weight, drones are divided into three categories: Class I (less than 150 kilograms); Class II (between 150 and 600 kilograms); and Class III (more than 600 kilograms). Class III includes a widely used subcategory that distinguishes medium-altitude long-endurance (MALE) and high-altitude long-endurance (HALE) UAVs.²⁰ Both have a wide flight range, which varies

14 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns* A/68/382, 13 September 2013, par. 17–18.

15 *Report of the Special Rapporteur Agnes Callamard*, A/HCR/44/38, par. 13.

16 Sénat Français, *Rapport d'information* 20.

17 Hamilton T. – Ochmanek D., *Operating Low Cost, Reusable Unmanned Aerial Vehicles in Contested Environments. Preliminary Evaluation of Operational Concepts*, Santa Monica: RAND Corporation (2020).

18 United Nations, *Study on Armed Unmanned Aerial Vehicles* 9.

19 United Nations Security Council, *Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011)*, S/2021/229, 8 March 2021, Annex, par. 63.

20 UAS. *Unmanned Aircraft Systems. The Global Perspective*, 8th Edition, Blyenburgh & Co (2010) 61–62.

between models, with MALE drones reaching a ceiling of about 13,700 metres and HALE UAVs reaching up to 20,000 metres. The models most often used for reconnaissance and surveillance in military support operations are medium-altitude long-endurance. Initially, only Class III drones could carry weapons, and this limitation facilitated arms export control. However, the ability to adapt increasingly small drones to carry weaponry has reduced the effectiveness of export control systems. This problem is further exacerbated by the development of drones that function as loitering munitions or suicide drones.²¹

These features could lead to the emergence of new forms of low-intensity conflict. The reduced risk to military personnel and the possibility of undertaking military operations with a small theatre presence, or of carrying out small-scale attacks, may reduce governmental restraint in the use of force. Several governments have expressly rejected this possibility, stressing that military intervention is a last resort and always conditional on the existence of an adequate legal basis.²² However, drone technology is easily accessible to non-state armed groups and increases their potential to carry out attacks.²³

2.3 *Are Armed UAVs an Inherently Illicit Technology?*

Opponents of drones claim that it is an unlawful mode of weaponry, arguing that drones do not respect the principle of distinction since strikes can cause indiscriminate damage. This argument faces a first practical obstacle: it is problematic for an outside observer to verify the accuracy of drone strikes. The differences in civilian casualty figures depending on the source of information are well-known, and this makes it difficult to claim that drones produce indiscriminate effects.²⁴ Official casualty figures provided by state agencies are usually much lower than those provided by non-governmental organisations and other unofficial sources. The Special Rapporteur on extrajudicial, summary or arbitrary executions has referred to the myth of the precision strike, and highlighted that drone strikes often cause more casualties than states acknowledge.²⁵

21 United Nations, *Study on Armed Unmanned Aerial Vehicles* 7–15.

22 United Kingdom, House of Commons Defence Committee, *Remote Control: Remotely Piloted Air Systems – Current and Future UK Use: Government Response to the Committee's Tenth Report of Session 2013–14*, Sixth Special Report of Session 2014–15 (2014) 11.

23 United Nations, *Study on Armed Unmanned Aerial Vehicles* ix.

24 Bergen P.– Stermann D. – Salyk-Virk M., *America's Counterterrorism Wars. Tracking the United States's Drone Strikes and Other Operations in Pakistan, Yemen, Somalia, and Libya*, New American Foundation, 17 June 2021, <https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/> [last accessed 21 September 2021].

25 *Report of the Special Rapporteur Agnes Callamard*, A/HRC/44/38, par. 15–21.

Additionally, this argument starts from the premise that a weapon incapable of respecting the principle of distinction is inherently unlawful. A premise rejected by the Advisory Opinion of the International Court of Justice in the case concerning the legality of the use of nuclear weapons. Although the Court affirmed that states should not use weapons incapable of distinguishing between civilian and military targets, when specifically assessing the lawfulness of a particular type of weaponry it emphasised that, in international practice, where states have considered a particular type of weaponry to be contrary to international humanitarian law, they have prohibited it by means of specific international treaties.²⁶ In the absence of a conventional ban on drones, therefore, they cannot be said to be unlawful.²⁷ An interpretation that seems to be reinforced by the Rome Statute of the International Criminal Court, which criminalises as a war crime the use of weapons and methods of warfare which, by their nature, cause superfluous injury or indiscriminate effects – provided that such weapons have been comprehensively prohibited.²⁸

Ultimately, it makes no difference in international humanitarian law whether a missile is launched from a drone or any other platform. The crucial question, as indicated in the reports of the three Special Rapporteurs on extrajudicial, summary or arbitrary executions, is whether their use in the specific case complies with the requirements of international humanitarian law.²⁹ The ethical and legal issues raised by drone technology are not new.³⁰ Concerns about the number of civilian casualties were raised on a larger scale in connection with aerial bombardment. Nor is the distance between the drone operator and the targeted individual a new issue, as it has been discussed with weapons systems such as cruise missiles.³¹ Drone technology may exacerbate some of the problems and accentuate already existing trends, such as the blurring of the line between civilians and combatants. Analysis of practice shows that the main problem with armed drones stems not so much from the technology itself, but from one of the purposes for which they are used: targeted killings. It

²⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, 257.

²⁷ Beard J. M., “Law and War in the Virtual Era” *American Journal of International Law* 103 (2009) 409–445.

²⁸ Rome Statute of the International Criminal Court, Article 8.2.b.(xx).

²⁹ *Report of the Special Rapporteur Philip Alston*, A/HRC/14/24/Add.6, par. 79; *Report of the Special Rapporteur Christof Heyns*, A/68/382, par. 13; *Report of the Special Rapporteur Agnes Callamard*, A/HRC/44/38, par. 30.

³⁰ Pejic, J., “Extraterritorial targeting by means of armed drones: Some legal implications”, 893 *International Review of the Red Cross* (2014) 69.

³¹ Boyle M.J., ‘The legal and ethical implications of drone warfare’ *The International Journal of Human Rights* 19.2 (2015) 105–126.

has been noted that when a tactic is relied upon it becomes a central element of strategy: institutionalising a practice means crossing a threshold that is difficult to return to, and the use of targeted killings by drone outside of conflict areas appears to have become an element of the counter-terrorism policy of some states.³²

3 State Policies on the Use of Armed Drones

One of the main reasons for the controversy over the legality of drones is their increasing use by states as a tool in the fight against global terrorism to conduct targeted killings outside of their national territories, and in areas where there is no armed conflict.³³ Governments have sometimes justified these targeted killings by describing their confrontation with the non-state actor as a non-international armed conflict, although this does not always correspond to reality.

Drones are not the only method for targeted killings; states also use 'conventional' means for this purpose. The legal assessment of the practice is the same regardless of the means used. However, as noted above, drones facilitate targeted killings because they facilitate the use of force over the territory of other states³⁴ and because of the substantial reduction in the time elapse between identifying a potential target and the attack – regardless of location.³⁵

There is a wide consensus that drones are not in themselves illicit weaponry. Their lawfulness depends on the specific use made of them; however, the absence of information about the criteria used by states to make attacks, the authority responsible for the decision, and the specific results of an attack mean it is impossible to make a legal assessment of the practice.³⁶ Only two states have made public their targeted killing policy: Israel and the United States. The UK and France have only outlined the legal basis for justifying specific targeted killings. Several of the ongoing projects under the EU's Common Security and Defence Policy (CSDP), partly financed by the European Union, are aimed at developing European drones. Most projects focus on the intelligence,

32 *The Washington Post*, "Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists", 24 October 2012.

33 Dorsey – Amaral, *Military drones in Europe* 3.

34 UK Parliament Joint Committee on Human Rights (2016), *The Government's policy on use of drones for targeted killing*, Second Report of Session 2015–16, 21.

35 *Report of the Special Rapporteur Christof Heyns*, par. 12.

36 *Report of the Special Rapporteur Agnes Callamard*, A/HCR/44/38, par. 4.

surveillance, and reconnaissance capabilities of drones, but the Eurodrone project focuses on strengthening the EU's strategic autonomy regarding its main suppliers and requires the ability to carry arms. The various documents on the subject pay little attention to this possible armed dimension of drones. Given the ethical and legal issues raised by the use of armed drones, the lack of discussion on the subject at EU level has been criticised.³⁷ The European Parliament has adopted several resolutions on the use of armed drones, urging member states and competent organisations to prohibit the practice of extrajudicial targeted killings and to adopt a common position.³⁸ Institutional responses have recalled that national defence is a competence of the member states and that the EU position is that drone strikes must comply with the existing international legal regime on the use of force and international humanitarian law.³⁹

3.1 *The Use of Armed Drones for Targeted Killings: US and Israeli Policies*

Israel was the first nation to formally announce a targeted assassination policy in its confrontation with Palestinian militants. After the attacks of 11 September 2001, other countries such as the United States, Pakistan, and Russia began to adopt this tactic in their fight against terrorist or insurgent groups, although without publicly acknowledging it as official policy.⁴⁰

Israel formally acknowledged its policy on targeted attacks in November 2000 at the beginning of the second Intifada. The official position until then had been to deny government involvement in such actions.⁴¹ Israeli government policy established a procedure for the approval of each operation. Firstly, the existence of sufficient evidence of the involvement in acts of terrorism of the individual identified as the potential target of the attack is required. Secondly, a detailed plan is developed of where, when, and by what means the attack is made. Thirdly, possible collateral damage and the weighing of possible political repercussions is assessed. Finally, the approval of the entire plan must be given by a senior political leader.⁴² The Israeli Supreme Court,

37 Postma, *Military Drones and the EU* 10–22.

38 European Parliament, Directorate-General for External Policies, *Towards an EU common position on the use of armed drones* (2017) 13, 16.

39 Cvijic S – Klingenberg L – Goxho D. – Knight E., *Armed Drones in Europe*, Open Society, European Policy Institute (2019) 64.

40 Melzer N., *Targeted Killing in International Law* (Oxford: 2009) xi.

41 Jacobson D – Kaplan E.H., "Suicide Bombings and Targeted Killings in (Counter-) Terror Games", *Journal of Conflict Resolution* 51. 5 (2007) 772–792.

42 Gross E., "Self-Defense Against Terrorism – What Does it Mean? The Israeli Perspective", *Journal of Military Ethics*, 1.3 (2002) 91–108.

in its judgement of 13 December 2006⁴³ endorsed the government's practice but with some corrections. The judgement qualified the intifada that began in 2000 as an international armed conflict between Israel and Palestinian armed groups that legitimised Israel's use of force, thus excluding the possibility of addressing the issue as a problem of internal terrorism.⁴⁴ Given the particularities of the conflict, the judgement imposed on Israel various limits and restrictions on the use of force in addition to those strictly required by international humanitarian law in an international armed conflict.⁴⁵

Following the attacks of 11 September 2001, the US Congress authorised President Bush 'to use all necessary and appropriate force' against those responsible for the attacks.⁴⁶ Furthermore, the Bush administration took the position that the ban on political assassinations passed by President Ford in 1976 did not apply to actions against enemy combatants during an armed conflict or to the exercise of self-defence, in peacetime, against specific individuals who posed a direct threat to American citizens or national security.⁴⁷ The United States began a systematic campaign of targeted attacks in 2004 that was mostly directed against senior and mid-level Taliban and Al Qaeda leaders sheltering in the Pakistani border region, without explicit approval from the Pakistani government, but with its secret consent.⁴⁸

After President Obama came to power, the number of attacks against Taliban and al-Qaeda leaders increased considerably, prompting growing calls for transparency and for the targeted lethal strike programme to be subject to oversight.⁴⁹ Beginning in 2010, the US government provided arguments about the permissibility of targeted lethal strikes from the perspective of domestic and international law in a series of speeches by senior administration officials

43 Case HCJ 769/02, *The Public Committee against Torture in Israel, Palestinian Society for the Protection of Human Rights and the Environment v. the Government of Israel, the Prime Minister of Israel, the Minister of Defense, the Israel Defense Forces, the Chief of the General Staff of the Israel Defense Forces, Shurat HaDin – Israel Law Center and 24 others*.

44 Ben-Naftali O.– Michaeli K, "Public Committee Against Torture in Israel v. Government of Israel. Case No. HCJ 769/02", *American Journal of International Law* 101. 2 (2007) 463–464.

45 Stahl, A., "The Evolution of Israeli Targeted Operations: Consequences of the Thabet Operation", *Studies in Conflict and Terrorism* 33.2 (2010) 111–133.

46 United States Congress, *Senate Joint Resolution 23: Authorisation for Use of United States Armed Forces*, 107th Cong., 1st sess., 14 September 2001. The resolution was passed as law on 20 September 2001 (P.L. 107-40).

47 Paust J., 'Self-defense targeting of non-state actors and permissibility of U.S. use of drones in Pakistan', *Journal of Transnational Law and Policy*, 19.2 (2010) 262.

48 Enemark C., "On the responsible use of armed drones: the prospective moral responsibilities of states", *International Journal of Human Rights* 24.6 (2020) 872.

49 Zenko, M., "The Long Third War", *Foreign Policy, Situation Report*, 30 October 2012.

and President Obama himself. These documents provided a reasoning based on three key concepts.

Firstly, the notion of global armed conflict against Al Qaeda and its associates. The Obama administration abandoned the reviled term 'global war on terror' used by the previous administration and replaced it with the term 'armed conflict with Al Qaeda, the Taliban and allied groups in Afghanistan and elsewhere'.⁵⁰ This change in terminology did not affect the substance, as it reflected unequivocally that America continued to see a global battlefield without boundaries. In this conception, the global nature of the conflict legitimised actions outside the 'hot' battlefield of Afghanistan. The use of force on the territory of a third state, the documents stressed, should respect international norms and would only be legitimate when made with the consent of the nation concerned, or after establishing that this nation was unwilling or unable to fight effectively against individuals or groups that threatened the United States from its territory.⁵¹ The global nature of the conflict, according to the US administration, meant that the fight against any 'local franchise' of Al Qaeda, such as Al Qaeda in the Arabian Peninsula, or Al Qaeda in the Islamic Maghreb, was part of the same conflict with Al Qaeda and shared the same legal basis.⁵² Armed conflicts between a state and other non-state actors are non-international armed conflicts and do not necessarily change their nature when they extend into the territory of one or more neighbouring states.⁵³ They had the effect of extending the theatre of war into the designated areas of Pakistan,⁵⁴ but without triggering an armed conflict between the two countries because of Pakistan's attitude.⁵⁵ Despite Pakistan's protests against US drone strikes on its territory, there is evidence that such actions had its implicit consent.⁵⁶ This reasoning, however, does not extend away from the Afghan conflict in other regions where Al Qaeda franchises and other associated groups operate. The mere displacement of a terrorist or insurgent does not have the effect

⁵⁰ Koh H.H., *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010.

⁵¹ Johnson, J.C., *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, Oxford Union, Oxford University, November 30, 2012.

⁵² *Ibidem*.

⁵³ Sassòli M., "The role of human rights and international humanitarian law in new types of armed conflicts", in Ben-Natali O. (ed.) *International humanitarian law and international human rights law: pas de deux* (Oxford: 2011) 53, 55.

⁵⁴ Paust, "Self-defense targeting" 254.

⁵⁵ Murphy, "The International Legality" 118–120.

⁵⁶ O'Connell, M.E., "Drones under International Law", *International Debate Series. Washington University Law* (2010) 7.

of extending the battlefield to where they have relocated. Lethal drone strikes in other areas, such as Yemen or Somalia, require a specific legal basis and cannot be justified as part of diffuse global conflict against al-Qaida.⁵⁷

Secondly, the speeches emphasised in one way or another that the behaviour of the American government during the conflict must respect both domestic and international law. From the perspective of international law, the US invoked a dual rationale: the rules of international humanitarian law applicable in an armed conflict and the right to self-defence recognised in Article 51 of the UN Charter. On 23 May 2013, President Obama outlined the main lines of his counterterrorism strategy at the National Defense University. The speech called for 'targeted action against terrorists' and announced the adoption of a policy document on the use of force in counter-terrorism operations outside the United States and areas of active hostilities.⁵⁸ According to the paper, targeted lethal strikes outside conflict zones would be conditional: firstly, on the existence of a legal basis; and secondly, that the target of the attack had to be a continuing and imminent threat against US citizens. It also required a near certainty of the terrorist's presence, that death or harm would not be caused to non-combatants, that it must be concluded that capture was not possible and that there were no other alternatives for eliminating the threat. Thirdly, the use of force in the territory of third states must be in accordance with the principles of international law, in particular the sovereignty of third states and international humanitarian law.⁵⁹ The assurances provided by the document are few. The mere reiteration of statements of principle, such as that each operation must have a legal basis for each use of force, or that the United States respects national sovereignty and international law, are not enough to guarantee compliance with international law. Added to this is the indeterminacy of key concepts such as 'imminent threat', and 'a level of near certainty'.

Finally, a third line of argument asserts that the UN Charter permits in peacetime the use of force to capture or kill individuals whose activities constitute a direct threat to American citizens or national security. The use of lethal force would be conditional on the impossibility of capture and would have to respect the rules of war.⁶⁰ Because of the argument used by the US, part of the

57 Lubell N. *Extra-Territorial Use of Force Against Non-State Actors* (Oxford: 2010) 118–120, 255.

58 The White House, President Obama, *Remarks by the President at the National Defense University*, May 23, 2013.

59 *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, The White House, Office of the Press Secretary, May 23, 2013.

60 Koh, *The Obama Administration*.

legal debate over the lawfulness of targeted strikes has focused on whether such strikes can be considered an exercise of the right to self-defence under Article 51.⁶¹ This aspect of US policy has been in response to a desire to provide an acceptable approach for other countries. The US was aware that some of its allies, for example the UK,⁶² did not share its view of the conflict against al-Qaeda as a global conflict. Hence the recourse to the notion of self-defence to justify the use of force against specific individuals who pose an imminent threat outside areas of conflict.

President Trump began his term with the legacy described above. The drone campaign in Pakistan had come to a virtual standstill in the final years of the Obama administration, and under Trump the number of strikes fell considerably. The campaign in Yemen continued under similar conditions, and Somalia saw a significant increase in strikes. In March 2019, Trump designated certain areas of Yemen and Somalia as 'areas of active hostilities' and lifted some restrictions passed by Obama during his last year in office.⁶³

3.2 *The Practice of Other States: Silence and Ambiguity*

An analysis of Israeli and American policies shows a tendency to initially deny targeted killings. Guiding criteria for action were formulated when the notoriety of the practice made it impossible to continue as covert actions. The claimed existence of a global armed conflict between the US and al-Qaida and its associated groups, which reaches wherever there is a nominally al-Qaida-linked operative, has not gained international support. But neither have American actions in Yemen, Somalia, and Pakistan met with widespread rejection from the international community. Rather, the response has been one of silence and, where appropriate, an attempt to disassociate one's own position from American activities.⁶⁴

The UK set out the criteria governing its use of armed drones in July 2014 in response to questions from the Parliamentary Defence Committee. The Defence Committee emphasised the importance of differentiating between the British use of UAVs in Afghanistan, and the operation of these systems by other states 'elsewhere', and concluded that the evidence demonstrated that

61 O'Connell M. E., "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009", *Notre Dame Legal Studies Paper* (2010) 9–43.

62 Gray C., "Targeted Killings: Recent US Attempts to Create a Legal Framework", *Current Legal Problems*, 66 (2013) 75–106.

63 Felter, C., The Controversy Over U.S. Strikes in Somalia, *Council on Foreign Relations in brief* (2019); Bergen – Sterman – Salyk-Virk, *America's Counterterrorism Wars*.

64 *Report of the Special Rapporteur Agnes Callamard*, A/HCR/44/38, par 65–70.

the British use of drones was in accordance with international law.⁶⁵ In its response, the government pointed out that the use of drones complied with the same rules of engagement as manned aerial systems and respected international humanitarian law.⁶⁶ According to the official position, the UK government only resorts to the use of armed drones to conduct lethal strikes in areas where it is clearly involved in armed conflict, such as Iraq and Afghanistan at the time, or, subsequently, against the Islamic State in Iraq. Parliament authorised the use of force in 2014 against the Islamic State in Iraq, but expressly excluded the possibility of strikes against ISIL targets in Syria without a further decision by Parliament. On 21 August 2015, a British UAV launched a strike against an Islamic State (ISIL) operative on Syrian territory, killing him and two escorts. In setting out the legal basis for the action before Parliament on 7 September, the prime minister invoked self-defence and noted that it was the first instance of military use of force in a country with which the UK was not at war. The attack was part of the counter-terrorism strategy aimed at preventing and deterring an attack on the UK in response to the heightened threat from Islamist extremists.⁶⁷ In December, Parliament extended authorisation for the use of force against the Islamic State in Syria, so that the legal right to use force from a national law perspective was settled. The prime minister's statements created uncertainty about a change in the official position on targeted killings. An investigation by the Joint Committee on Human Rights into government policy on the use of drones for targeted killings concluded that the apparent contradictions between the legal bases invoked in different statements by the prime minister were more about the need to justify the use of force in Syria in the absence of parliamentary authorisation, than a real change in official position. Therefore, the targeted killing on 21 August was seen as a military operation within the armed conflict against the Islamic State.⁶⁸ The report however highlighted several worrying elements of the government's response. Although the government denies that it has a policy of targeted killings, the joint committee found that the government does have a policy. This is clear from its unequivocal claim to a right to use lethal force against suspected terrorists outside areas of armed conflict when there is a direct and immediate

65 UK House of Commons Defence Committee, *Remote Control: Remotely Piloted Air Systems – current and future UK use: Government Response to the Committee's Tenth Report of Session 2013–14*, Sixth Special Report of Session 2014–15 (2014).

66 *Ibidem* 14.

67 UK Parliament Joint Committee on Human Rights (2016), *The Government's policy on use of drones for targeted killing*, Second Report of Session 2015–16, 14.

68 *Ibidem* 29–37.

threat to the UK and no alternative means of preventing that threat.⁶⁹ A position that resembles the American position for all practical purposes.

France has used armed drones in the fight against insurgent and terrorist groups operating in the Sahel, as part of partnership agreements with five countries in the area. The government announced it had carried out the first armed drone strike on 21 December 2019 in Mali in an action supporting French ground forces in which manned combat aircraft were also involved.⁷⁰ From that moment onwards, France began using armed drones for surveillance and reconnaissance in the Sahel, which made it feasible to target terrorists or armed insurgents if eventually detected.⁷¹ According to the criteria set out by the Armed Forces Ministry, armed drone attacks would respect the same rules of engagement as combat aircraft, and the same international humanitarian law.⁷² The decision to use armed force would be a purely human decision, and the personnel flying the drones would operate from close to the theatre of operations.⁷³ France distances itself from the US position, presenting the use of armed drones as an addition to other military capabilities and used when active hostilities are occurring.

4 International Legal Regime Applicable to Targeted Killings by Drones

An analysis of the legality of armed drone strikes requires answering two essential questions. Firstly, whether the operation constitute a lawful use of force under international law. Secondly, whether the use of lethal force against each specific individual has also complied with the rules applicable in that context. Where an operation takes place in an armed conflict, the rules of international humanitarian law apply; while international human rights law applies outside areas of armed conflict.

After almost two decades of debate, the answers to these two questions remain controversial. It should be remembered that there is no legal definition

⁶⁹ *Ibidem* 36.

⁷⁰ Ministère des Armées, *BARKHANE: Poursuite de l'action dans la région de Mopti*, Communiqué 23 December 2019.

⁷¹ Ministère des Armées, *Florence Parly, ministre des Armées, salue le succès des tirs d'expérimentation des drones armés*, Communiqué 19 December 2019.

⁷² Ministère des Armées, *Les drones armés désormais opérationnels au sein de nos forces*, Communiqué 7 January 2020.

⁷³ *Ibidem*.

of core concepts such as ‘armed attack’ or ‘armed conflict’ and this leads to discrepancies in the categorisation of complex situations.

4.1 *International Legal Framework for the Use of Force*

To be lawful, any use of force in international relations, must be based on one of the exceptions to the prohibition of the use of force provided for in international law. On the one hand, the two exceptions to the prohibition of the use of force provided for in the United Nations Charter: the right of individual and collective self-defence ‘if an armed attack occurs’ and the authorisation of the Security Council under Chapter VII of the Charter. On the other hand, the consent of the state on whose territory the attack takes place, one of the circumstances that preclude the wrongfulness of an act under the rules of the international responsibility of states.

Previous analysis of state policy and practice on targeted killings has shown that self-defence is the main legal basis on which governments rely – either in support of isolated actions, as in the case of the British attack in Syria in 2015, or as a basis for launching a military campaign, as in the case of American forces in Afghanistan. The exercise of self-defence, however, is subject to several requirements that do not always appear to be met in practice. The arguments used by states reveal the difficulties experienced in accommodating these requirements in practice.

The exercise of self-defence is conditional on the existence of an armed attack. The vagueness of the notion of armed attack has given rise to various interpretations by doctrine and states. The jurisprudence of the International Court of Justice requires that an armed attack must be of some scale.⁷⁴ While the possibility of invoking self-defence in response to a threat of imminent attack is widely, but not unanimously, supported, self-defence against a latent threat has been generally rejected as having no basis in international law.⁷⁵ A worrying aspect of state practice is the interpretation of imminent attack which does not reflect the accepted notion of imminent material threat, but is closer to the concept of latent threat, lacking support in international

74 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, Judgment of 27 June 1986, para. 195; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, Judgment of 19 December 2005, par. 146–7.

75 United Nations General Assembly, *A more secure world: our shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004, par. 191–193.

law.⁷⁶ Another questionable element is the apparent equating of any terrorist action with an armed attack that generates a right to legitimate self-defence under Article 51 of the Charter. The classification of the terrorist attacks of 11 September 2001 as an armed attack within the meaning of Article 51 of the Charter, and therefore generating the right to legitimate self-defence, entailed a profound alteration of the traditional definitions of legitimate self-defence. International practice, both unilaterally and through various international organisations, in particular the UN Security Council, seemed to endorse this possibility.⁷⁷ But this practice does not seem to support a state's right to legitimate self-defence against individuals considered to be an imminent threat.

4.2 *A Legal Assessment of Targeted Killing from the Perspective of International Humanitarian Law and International Human Rights Law*

The targeting of key leaders of terrorist or insurgent groups suspected of attacks or acts of terrorism, has led to the practice being termed as extrajudicial execution, because the targeted individuals are denied the fundamental right to a judicial process.⁷⁸ The rules of international human rights law do not entirely exclude the use of lethal force against individuals who pose a threat to state security, albeit only exceptionally and as a last resort when there is no alternative – and subject to strict conditions.⁷⁹

In the context of armed conflict, the requirements for using lethal force against an individual are determined by *ius in bello* or international humanitarian law (IHL). IHL is based on two cardinal principles: the principle of proportionality between the specific military advantage expected and the foreseeable incidental harm to civilians; and the principle of distinction between civilian and military targets. Under the principle of proportionality,⁸⁰

76 Haas, R.N., *The President Has Too Much Latitude to Order Drone Strikes*, Council on Foreign Relations, 18 February 2013.

77 Delbrück J., "The Fight Against Global Terrorism: Self-Defense or Collective Security as international Police Action? Some Comments on the international Legal implications of the 'War on Terrorism'", *German Yearbook of International Law* (2001) p. 15; Lubell, *Extra-Territorial Use of Force* 56.

78 Kretzmer D., "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", *European Journal of International Law* 16.2 (2005) 174, 176–186; Melzer *Targeted Killing* 44–70; Tams C.J., "The Use of Force against Terrorists", *European Journal of International Law* 20.2 (2009) 384–390.

79 Roth K., "The Law of War and the War on Terror", *Foreign Affairs* 83.1 (2004) 2–7.

80 *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Program on Humanitarian Policy and Conflict Research, Harvard University (2010) 63.

a military objective must not be attacked when it is likely to cause civilian deaths or damage disproportionate to the military advantage gained. This is an assessment to be made case-by-case, with no consensus on the criteria for weighing military necessity against an acceptable level of harm. It has already been noted that IHL does not provide a legal basis for asserting the inherent unlawfulness of drones, derived from their alleged indiscriminate effects.

The principle of distinction means it is only permissible to direct attacks against military objectives. According to IHL, members of state armed forces, dissident armed forces, and organised armed groups capable of 'sustained and concerted military operations' may be targeted.⁸¹ Attacks on civilians are prohibited except if they are participating in hostilities and then they may only be targeted during such participation.⁸² In practice, both the determination of who is a member of an armed group and the interpretation of the temporal aspect of the direct participation of civilians (who can only be targeted 'for the duration of the participation') is complicated and subject to divergent assessments.⁸³

At the formal level, states are committed to respecting the rules of international humanitarian law in all their military operations. In practice, it is difficult to verify effective compliance for targeted killings by drones.

5 Conclusions

From a legal perspective, targeted killings by drones may be in accordance with international humanitarian law provided they respect the principles of distinction and proportionality and take place within an armed conflict, even when the conflict has crossed state borders. The problem is that in non-international armed conflicts, especially if they are asymmetrical, there are deep divergences in the interpretation of the rules applicable to basic questions: such as the threshold of violence required for a situation to be considered an armed conflict and who can be lawfully attacked.

The analysis throughout this paper shows that the main legal and ethical problem is not so much associated with the drone technology itself, but the

81 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), adopted on 8 June 1977, art. 1.1.

82 *Ibidem*, art. 13.3.

83 Schmitt, M.N., "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", *Harvard National Security Journal* 1 (2010) 5–44.

use of drones for targeted killings as a tactic in the fight against international terrorism and outside of armed conflict. The undeniable short-term results of this tactic may make it difficult to assess its potential long-term costs. Under certain conditions, a targeted killing campaign can diminish a group's operational capacity to organise attacks, but the decapitation of a group can also prompt new members to join and lead to the emergence of more charismatic and capable leaders. Targeted killings by armed drones can also contribute to an escalation of violence, especially when carried out in a third state. The evolution of the situation in Afghanistan after the withdrawal of American troops in August 2021 is worth considering. If the effectiveness of the tactic is controversial, the legal basis is questionable. The arguments used by the United States and the United Kingdom are based on a state's right to legitimate self-defence in the face of a threat that is not always material or immediate, and this is hardly comparable to the armed attack required by international law as a condition for the right to legitimate self-defence.

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(p. 475) 16 Protection of Cultural Property

Introductory Remarks

- 1.** The protection of cultural property in armed conflict, by which is meant its protection from damage and destruction and from all forms of misappropriation, has been a matter of legal concern since the rise of modern international law in the sixteenth and seventeenth centuries.¹ When the laws of war were codified over the second half of the nineteenth and at the beginning of the twentieth centuries, cultural property was treated for certain purposes as a species of enemy property generally, so that it was protected by the classical rule as to military necessity which governed destruction and seizure of such property (Article 23, lit. g, HagueReg) and by the prohibition on pillage (Articles 28 and 47 HagueReg; Article 7 HC IX). For other purposes, it was treated specifically as cultural property, with special rules requiring its sparing as far as possible in the course of bombardment by land and air (Article 27 HagueReg)² and by sea (Article 5 HC IX) and prohibiting its destruction, wilful damage, and seizure during belligerent occupation (Article 56 HagueReg).
- 2.** After the First World War, various efforts were made to establish a further, specialized treaty regime for the wartime protection of cultural property, starting with a 1919 proposal by the Netherlands Archaeological Society,³ which was partly reflected in Article 26 of the 1923 draft Hague Rules on Aerial Warfare (HRAW). A draft text dedicated to the question, instigated by Nikolai Roerich, was picked up and adopted by a number of states of the Pan-American Union as the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, known as the Roerich Pact.⁴ In 1938, the International Museums Office of the League of Nations finalized a Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War, with annexed Regulations for its execution,⁵ but the Second World War broke out before a diplomatic conference for its adoption could be held. In the immediate aftermath of the War, the relevant Hague Regulations, which were treated as declaratory of customary international law, provided the basis on which several defendants before the International Military Tribunal at Nuremberg, chief among them Alfred Rosenberg, were convicted of war crimes for their roles in organizing the seizure and destruction of (p. 476) cultural property in occupied territory.⁶ The same acts were also held to constitute crimes against humanity.
- 3.** The Second World War spurred the eventual conclusion of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for its execution,⁷ along with a separate optional Protocol, now known as the First Protocol.⁸ The preamble to the former declares that ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’. CultPropConv applies during international armed conflict whether or not a legal state of war exists between the belligerents (Article 18, para. 1, CultPropConv), as well as to all cases of partial or total occupation of the territory of a party (Article 18, para. 2, CultPropConv). The provisions relating to respect for cultural property, by which is meant the various paragraphs of Article 4 (headed ‘Respect for cultural property’), also apply to non-international armed conflict occurring within the territory of one of the parties (Article 19, para. 1, CultPropConv). CultPropConv offers two levels of protection for cultural property. So-called ‘general protection’⁹ (Chapter I CultPropConv) extends to all immovables and movables satisfying the definition of cultural property. ‘Special protection’ (Chapter II CultPropConv; Chapter II RegExCultPropConv) imposes a supplementary and nominally stricter standard of respect in relation to a narrower range of property. CultPropConv also lays down rules on the transport of cultural property during armed conflict (Chapter III CultPropConv; Chapter III

RegExCultPropConv), the treatment of personnel engaged in its protection (Chapter IV CultPropConv), the creation and use of a 'distinctive emblem' for cultural property (Chapter V CultPropConv; Chapter IV RegExCultPropConv), the establishment and functioning of an elaborate international regime of control (RegExCultPropConv, Chapter I), the imposition of penal or disciplinary sanctions for breach (Article 28 CultPropConv), and the submission by the parties of periodic implementation reports (Article 26, para. 2, CultPropConv). UNESCO is granted a right of initiative in both international (Article 23, para. 2, CultPropConv) and non-international (Article 19, para. 3, CultPropConv) armed conflict. A Meeting of the High Contracting Parties convenes, in practice now biennially, to consider the application of the Convention and of the Regulations for its execution and to formulate recommendations in this respect (Article 27 CultPropConv). For its part, Prot1CultPropConv deals with questions regarding the exportation and importation of cultural property from occupied territory and with the return of cultural property deposited abroad for the duration of hostilities. By 1 January 2020, CultPropConv had 133 states parties and Prot1CultPropConv 110. CultPropConv remains the centrepiece of the international legal protection of cultural property in armed conflict, although some of its provisions (p. 477) now need to be read in the light of subsequent customary international law and, for parties to it, the Second Protocol to CultPropConv.

4. Although not itself an international humanitarian law treaty, the UNESCO-sponsored Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,¹⁰ adopted in 1970, contains provisions for the protection of movable cultural property in occupied territory.

5. The 1977 Additional Protocols to the Geneva Conventions both embody brief provisions specifically relating to respect for cultural property. The motivation behind Article 53 AP I and Article 16 AP II was to affirm in a single article in each instrument the essential obligations of respect for cultural property embodied more exhaustively in CultPropConv.¹¹ The derivative or secondary nature of these provisions is highlighted by the 'without prejudice' clause in the chapeau to each, which makes it clear that the provisions are not intended to modify the existing legal obligations of those parties to AP I and AP II which are also parties to CultPropConv,¹² a point underscored in Resolution 20(IV) of the Diplomatic Conference of Geneva.¹³ The desire was to avoid the 'parallel application of two divergent systems for the protection of cultural property, which could only be a source of confusion',¹⁴ with several delegates placing the primary emphasis on CultPropConv.¹⁵ In certain cases, an attack against cultural property can constitute a grave breach (Article 85, para. 4, lit. d, AP I). In addition, the improper use of the emblem of cultural property is prohibited (Article 38, para. 1, AP I). Outside the scope of the *lex specialis* represented by Article 53 AP I and Article 16 AP II, cultural property is considered a civilian object, so that in international armed conflict it benefits from the prohibition on indiscriminate attacks (Article 51, paras 4 and 5, lit. b, AP I) and from mandatory precautions to be taken in attack (Article 57 AP I).

6. For their part, 1980 Protocol II and 1996 Amended Protocol II to the 1980 Conventional Weapons Convention each contain two provisions relevant to cultural property.¹⁶

7. A process of review undertaken in the 1990s with a view to updating and improving aspects of CultPropConv's regime, spurred in part by the deliberate destruction of cultural property in the wars in the former Yugoslavia,¹⁷ culminated in 1999 with the adoption of the Second Protocol to CultPropConv.¹⁸ Prot2CultPropConv applies to international (p. 478) and non-international armed conflict without distinction. As made clear in the preamble, the instrument is designed to supplement, not supplant, the provisions of CultPropConv. It leaves intact the basic architecture of CultPropConv and operates, on a technical level, by reference back to it, elaborating on, refining and in places adding to CultPropConv's various obligations as between parties to Prot2CultPropConv, which, as a precondition to participation, must be parties to CultPropConv (Articles 40–2 Prot2CultPropConv). Prot2CultPropConv maintains the distinction between general and special protection of

cultural property, albeit effectively replacing CultPropConv's scheme of the latter with a regime of 'enhanced' protection (Chapter 3 Prot2CultPropConv). General protection is updated and added to (Chapter 2 Prot2CultPropConv). A comprehensive regime of penal sanctions is provided for (Chapter 4 Prot2CultPropConv), as is a formalized institutional framework to facilitate and supervise the protection of cultural property in the event of armed conflict, comprising a Meeting of the Parties, which in practice convenes biennially, an intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict, assisted by a Secretariat, and a centralized Fund for the Protection of Cultural Property in the Event of Armed Conflict (Chapter 6 Prot2CultPropConv). The instrument also incorporates obligations relating to the dissemination of information and to international assistance, and UNESCO is granted a right of initiative (Chapter 7 Prot2CultPropConv). Prot2CultPropConv is accompanied by the Guidelines for the Implementation of the Second Protocol, as developed and regularly revised by the Committee and endorsed by the Meeting of the Parties, which incorporate guidelines concerning the use of the Fund (Articles 23, para. 3, lits. b and c, 27, para. 1 lit. a, and 29, para. 3, Prot2CultPropConv).¹⁹ As of 1 January 2020, Prot2CultPropConv had eighty-two states parties.

8. In parallel with these treaty regimes, a body of customary international law has developed over the years to protect cultural property in armed conflict. Many of the provisions cited above, where not declaratory of custom when adopted, have come to reflect it in the period since.²⁰

9. The relationships among these various bodies of law are considered in the following sections, which give a synthetic account of the basic rules governing the protection of cultural property in armed conflict.²¹

I. Definition of 'Cultural Property'

16.01

The term 'cultural property' means movable or immovable property of great importance to the cultural heritage of peoples (e.g. buildings and other monuments of historic, artistic, or architectural significance; archaeological sites; artworks, antiquities, manuscripts, (p. 479) books, and collections thereof; archives; etc.), whether of a secular or religious nature and irrespective of origin or ownership (Article 53, lit. a, AP I; Article 16 AP II; Article 1, lit. a, CultPropConv). The term extends to buildings for preserving or exhibiting, and refuges intended to shelter, movable cultural property (Article 1, lit. b, CultPropConv) and to centres containing a large amount of movable or immovable cultural property, known as 'centres containing monuments' (Article 1, lit. c, CultPropConv).

1. CultPropConv and its two Protocols are the only conventions in the field of international humanitarian law actually to use the term 'cultural property', the formal legal definition of which for the purposes of all three instruments is found in Article 1 CultPropConv. This provision forms the basis of the definition given here. The term 'cultural property' refers in essence to 'movable or immovable property of great importance to the cultural heritage of every people' (Article 1, lit. a, CultPropConv). While the property protected by Articles 27 and 56 HagueReg and Article 5 HC IX, by RoerichPact and by Article 53 AP I and Article 16 AP II can be referred to generically and in a strictly informal sense as cultural property, the provisions themselves use different terminology.

2. Whereas the relevant provisions of HagueReg and HC IX apply *mutatis mutandis* to all buildings dedicated to religion, charitable purposes, and the arts and sciences and to every historic monument and work of art, the drafters of CultPropConv opted for a more selective approach.²² CultPropConv seeks to protect only those immovable and movable objects ‘of great importance to the cultural heritage of every people’ (Article 1, lit. a, CultPropConv). On its face, the phrase ‘of every people’ is capable of two meanings, viz ‘of all peoples jointly’ or ‘of each respective people’. Recourse to the French and Spanish texts, which are also authoritative, fails to establish which of these meanings is to be preferred, since both refer instead to the cultural heritage ‘of peoples’ (‘le patrimoine culturel des peuples’ and ‘el patrimonio cultural de los pueblos’).²³ But the second alternative is the correct one: the term ‘cultural property’ in Article 1 CultPropConv refers to movable or immovable property of great importance to the cultural heritage of each respective people—in other words, of great importance to the national cultural heritage of each respective party.²⁴ This follows from the preambular recital which declares ‘that damage to (p. 480) cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’, especially the words ‘any people’ and ‘each people’ and their use in contradistinction to ‘all mankind’ (as opposed to ‘every people’). It is also borne out in the practice of many parties, as evidenced in their implementation reports.²⁵ The definition of cultural property thus reflects the conviction, in the words of a former president of the International Court of Justice, that ‘cultural objects and properties which make up a national heritage [are], consequently, the world’s heritage’.²⁶

3. It is left to each party to determine the property in its territory to which CultPropConv applies, in accordance with its own criteria of ‘great importance’ to its cultural heritage,²⁷ a discretion circumscribed only by the ordinary meaning of the words and the requirement of good faith. In practice, the overwhelming majority of parties which have submitted implementation reports appear, in the case of immovable cultural property, to consider CultPropConv to apply either to the full complement of their national cultural heritage, as defined and formally identified by domestic law and procedure, or to a substantial proportion of the same. While few parties have cited figures, those given are of an order of magnitude of tens of thousands.²⁸ As for movable cultural property, only (p. 481) two states have cited figures, and they refer to the contents of between 100 and 250 museums, art galleries, libraries, and archives.²⁹ In the final analysis, however, numbers are less important than the principle reiterated by the twenty-seventh General Conference of UNESCO—comprising representatives of every member state of the organization, most of them parties to CultPropConv—that CultPropConv ‘offers protection to cultural property that is of national and local importance as well as to sites of outstanding universal importance’.³⁰

4. Since the object and purpose of Article 53 AP I and Article 16 AP II was to restate the fundamental obligations of respect laid down in CultPropConv, it stands to reason that the property protected by the provision, viz ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’,³¹ should equate, as far as the ordinary meaning of the words permit, to cultural property within the meaning of its predecessor. In short, the wording of Article 53 AP I and Article 16 AP II was intended as an abbreviation or simplification of the formula used in Article 1 CultPropConv, the relevant working group speaking of ‘the cultural heritage of peoples, in the words of the Hague Convention of 1954’.³² Indeed, in the equally authentic French and Spanish texts of both instruments, the language is identical (except for the insertion of the words ‘or spiritual’): the French and Spanish texts of Article 1 CultPropConv make no use of the word ‘every’ found in the English version, referring simply to ‘le patrimoine culturel des peuples’ and ‘el patrimonio cultural de los pueblos’ respectively, while the French and Spanish texts of Article 53 AP I and Article 16 AP II speak of ‘le patrimoine culturel ou spirituel des peuples’

and ‘el patrimonio cultural o espiritual de los pueblos’.³³ The *ICRC Commentary* on the Additional Protocols, referring to the superficial divergence between the relative clause ‘which constitute the cultural and spiritual heritage of peoples’ in Article 53 AP I and Article 16 AP II and the clause ‘which are of great importance to the cultural heritage of every people’ in Article 1 CultPropConv, states that it ‘does not seem that these expressions have a different meaning’,³⁴ and makes it clear that ‘there was no question of creating a new category of cultural objects’.³⁵ This view was endorsed by the Appeals Chamber of the ICTY in *Kordić*, where, drawing attention to (p. 482) the variation in wording between Article 53 AP I and Article 1 CultPropConv, it cited the *ICRC Commentary on the Additional Protocols* to hold that, ‘despite this difference in terminology, the basic idea is the same’.³⁶

5. In this light, the terms ‘historic monuments’ and ‘works of art’ in Article 53 AP I and Article 16 AP II should be seen as shorthand for the full range of immovable and movable cultural property referred to Article 1 CultPropConv.³⁷ Additionally, the former’s reference to the cultural or spiritual heritage ‘of peoples’ is to be construed as meaning the cultural or spiritual heritage of each respective people—that is, of each party, as determined by it according to its own criteria. In fact, the initial draft of Article 53 AP I spoke of ‘the cultural heritage of a country’,³⁸ and the earliest draft of the Article 16 AP II used the expression ‘the national heritage of a country’.³⁹ Moreover, in its discussion of the differences of opinion which arose in relation to an intermediate draft over the application to places of worship of the clause ‘which constitute the cultural heritage of peoples’, Committee III of the Diplomatic Conference (in a statement applicable *mutatis mutandis* to historic monuments and works of art) suggested that ‘cultural heterogeneity may be the key, for among some peoples any place of worship may be part of the cultural heritage, while among others only some places of worship may be so described’.⁴⁰ Similarly, the *ICRC Commentary*’s gloss on the notion of the spiritual heritage of peoples (applicable *mutatis mutandis* to the idea of the cultural heritage of peoples) is instructive: acknowledging that ‘the expression remains rather subjective’, it suggests that, in case of doubt, ‘reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is’.⁴¹

6. The obvious textual divergence between Article 1 CultPropConv, on the one hand, and Article 53 AP I and Article 16 AP II, on the other, is the insertion in the latter of places of worship and of the concept of the spiritual heritage of peoples. The *ICRC Commentary* elaborates that in general ‘the adjective “cultural” applies to historic monuments and works of art, while the adjective “spiritual” applies to places of worship’, yet emphasizes that a religious building may qualify for protection on account of its cultural value, just as under CultPropConv.⁴² Putting it more simply, the majority of delegates, who adopted (p. 483) Article 53 AP I and Article 16 AP II by consensus, took the unequivocal view that not all places of worship are protected by these provisions but only those which constitute the cultural or spiritual heritage of peoples.⁴³ In practice, the addition of places of worship which constitute part of the cultural or spiritual heritage of peoples does not make a real difference to the relative scope of application of Article 53 AP I and Article 16 AP II vis-à-vis Article 1 CultPropConv. Those places of worship important enough to constitute part of the spiritual heritage of a people will, in practice, also be historic monuments forming part of the cultural heritage of that people for the purposes of both Article 53 AP I and Article 16 AP II, on the one hand, and Article 1 CultPropConv, on the other.⁴⁴ Indeed, the drafting records make it clear that the insertion of places of worship and of the concept of the spiritual heritage of peoples had a purely rhetorical significance.⁴⁵

7. The conclusion that Article 53 AP I and Article 16 AP II serve to protect the national cultural and spiritual heritage of each party as determined by that party is not undermined by the *ICRC Commentary*’s additional assertion that ‘the Conference intended to protect in particular the most important objects, a category akin to property granted special protection as provided in Article 8 of the Hague Convention’.⁴⁶ The apparent attribution to

the drafters of explicit reference to Article 8 CultPropConv is editorial licence.⁴⁷ The *travaux* reveal no such reference or, indeed, specificity. Committee III spoke only of ‘objects of considerable historical, cultural, and artistic importance’.⁴⁸ Furthermore, the suggestion that Article 53 AP I and Article 16 AP II apply to a category of cultural property akin to that covered by Article 8 CultPropConv fails to account for the fact that the latter encompasses only immovable cultural property, with movables enjoying only *de facto* protection insofar as they are placed in specially protected refuges or situated in specially protected centres containing monuments. Article 53 AP I and Article 16 AP II, on the contrary, expressly apply to ‘works of art’ in their own right. It is also hard to imagine that the Geneva diplomatic conference would have troubled itself to debate and adopt Article 53 AP I and Article 16 AP II for the benefit of what were at the time eight examples of immovable cultural property, as inscribed in the International Register of Cultural Property under Special Protection.

8. Nonetheless, the ICRC Study on Customary International Humanitarian Law draws a distinction between cultural property ‘which forms part of the cultural or spiritual heritage of “peoples” (i.e., mankind)’, as protected by Article 53 AP I and Article 16 (p. 484) AP II, and the ‘broader’ scope of CultPropConv, ‘which covers property which forms part of the cultural heritage of “every people”’,⁴⁹ concluding that the property covered by the Additional Protocols ‘must be of such importance that it will be recognised by everyone’.⁵⁰ But this statement reflects only the English-language texts. As seen above, leaving aside Article 53 AP I and Article 16 AP II’s reference to the spiritual heritage, the equally authentic French and Spanish texts of the respective wordings are identical: both translate as ‘the cultural heritage ... of peoples’. Additionally, even restricting one’s attention to the English text, the ICRC’s construction of the word ‘mankind’ overlooks the key statement in the preamble to CultPropConv that ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’. The ICRC Study claims support for its view in the interpretative declarations entered by several states at the time of Article 53 AP I’s adoption.⁵¹ But, as reproduced in the Study itself, the distinction drawn by these states is between the scope of application of Article 53 of AP I and the scope of application of Article 27 HagueRegs, not of Article 1 CultPropConv.⁵²

9. In principle it is up to each party in whose territory the relevant property is situated to determine whether or not that property is of great importance to its cultural heritage and is therefore protected as cultural property. In practice, however, things are not so straightforward. Unless a party has taken measures to notify other parties of the identity and location of all such property by means of inventories or maps, or has marked all such property with CultPropConv’s distinctive emblem, there will be no definitive way for an opposing party to know what movables and immovables are protected. In such a situation, which is likely to be the rule rather than the exception, it will ultimately fall by default to the opposing party to determine, for the purposes of compliance with its own obligations of respect, which movables and immovables situated in the territory of the first party satisfy the definition of ‘cultural property’ by being of great importance to the cultural heritage of that first party.⁵³ In such an event, the safest course is to err on the side of caution.

II. Protection of Cultural Property during Hostilities

1. General Rules

16.02

It is prohibited to attack cultural property unless it becomes a military objective and there is no feasible alternative for obtaining a similar military advantage (Articles 53, lit. a, and 52 AP I; Article 16 AP II; Article 4, paras 1 and 2, CultPropConv and Article 6, lit. a, Prot2CultPropConv). The parties to the conflict shall do everything feasible to verify that objectives to be

attacked are not cultural property (Article 57, para. 2, lit. a(i), AP I; Article 7, lit. a, Prot2CultPropConv). They shall cancel or suspend an attack if it becomes apparent that the objective is cultural property (Article 57, para. 2, lit. b, AP I; Article 7, lit. d(i), Prot2CultPropConv).

(p. 485) **1.** The rules stated here apply during both international and non-international armed conflict and to all attacks, whether by land, sea, or air. In the context of international armed conflict, all three accord with customary international law. In the context of non-international armed conflict, the first is customary, but evidence in support of the second and third is not yet conclusive.

2. The second limb of Article 4, para. 1, CultPropConv obliges parties to respect cultural property by refraining from any act of hostility against such property, an obligation encompassing *inter alia* attacks against such property. This must be read subject to Article 4, para. 2, CultPropConv, which provides that the obligations laid down in the preceding paragraph may be waived where military necessity imperatively requires such a waiver. On the face of it, the phrase ‘where military necessity imperatively requires’ is an open-textured one. But the waiver in Article 4, para. 2, CultPropConv must today be read through the lens of the customary rules on targeting, applicable to both international and non-international armed conflict, which emerged after the adoption of CultPropConv, specifically the subsequent definition of a military objective, as per Article 52, para. 2, AP I.⁵⁴ This is in line with the approach taken to the phrase ‘not justified by military necessity’ by the ICTY.⁵⁵ As a consequence, a party may invoke the waiver in Article 4, para. 2, CultPropConv to justify attacking cultural property only in cases where the cultural property in question, by its nature, location, purpose, or use, makes an effective contribution to military action and where its total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁶

3. In accordance with Article 53, lit. a, AP I and Article 16 AP II, it is prohibited to direct acts of hostility against cultural property. But whereas Article 4, para. 1, CultPropConv is subject to Article 4, para. 2, CultPropConv, Article 53, lit. a, AP I and Article 16 AP II contain no exception in respect of military necessity. Military necessity as such provides no justification under these articles for attacking cultural property. Nor is the prohibition on acts of hostility against cultural property reciprocal with the prohibition on the use of such property in support of the military effort.⁵⁷ That said, if and for as long as an object covered by Article 53, lit. a, AP I is used in support of the military effort contrary to Article 53, lit. b, the legality of any attack against that object (and only that object) falls to be determined by reference to Article 52, para. 2, AP I,⁵⁸ and will be lawful provided such use makes an effective contribution to military action and the object’s total or partial (p. 486) destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The practical effect, therefore, of the additional protection afforded by Article 53 AP I is that whereas other civilian objects may be targeted pursuant to Article 52, para. 2, AP I on account of their nature, location, purpose, or use, cultural property may be attacked only on account of its use.⁵⁹ For its part, AP II contains no provision equivalent to the definition of a military objective in Article 52, para. 2, AP I, since nowhere does AP II embody a prohibition on attacking civilian objects as such or the concomitant obligation to limit attacks strictly to military objectives. The use of cultural property contrary to Article 16 AP II results, therefore, in the lawfulness of any attack against it falling to be determined by reference to the customary international law of targeting in non-international armed conflict. In the end, however, there is no practical difference between the situation under AP I and that under AP II, since it is now sufficiently clear that customary international law prohibits attacks against cultural property in the course of non-international armed conflict unless such property becomes a military objective within the meaning of the definition

encapsulated in Article 52, para. 2, AP I. In short, under both AP I and AP II, cultural property may be attacked only on account of its use.

4. But Article 53, lit. a, AP I and Article 16 AP II are stated to be without prejudice to CultPropConv. As a consequence, where the parties to an armed conflict are parties both to AP I and AP II, on the one hand, and to CultPropConv, on the other, conduct covered by both regimes is governed by the provisions of CultPropConv.⁶⁰ The result is that parties to both regimes are entitled to invoke the waiver as to military necessity embodied in Article 4, para. 2, CultPropConv, as elaborated on by customary international law, to justify attacking cultural property.⁶¹ But the difference is slight: whereas parties to AP I and AP II alone may attack cultural property only on account of its use, parties to AP I and AP II which are also parties to CultPropConv may additionally invoke its nature, location, and purpose—which, in the context of cultural property, is scarcely a difference at all (*see below*).

5. Article 6, lit. a, Prot2CultPropConv refines the application of Article 4, para. 2, CultPropConv among parties to Prot2CultPropConv. It states that a waiver on the basis of imperative military necessity pursuant to Article 4, para. 2, CultPropConv may be invoked to direct an act of hostility against cultural property only when, and for as long as, two cumulative conditions are met: first, when and for as long as the cultural property in question has, by its function, been made into a military objective (Article 6, lit. a(i), Prot2CultPropConv); and, second, when and for as long as there is no feasible alternative available for obtaining a similar military advantage to that offered by directing an act of hostility against that objective (Article 6, lit. a(ii)). ‘Military objective’ is defined in Article 1, lit. f, Prot2CultPropConv in accordance with the now-customary definition found in Article 52, para. 2, AP I. But a terminological disjuncture is immediately apparent: Article 6, lit. a(i), Prot2CultPropConv refers to cultural property being made into (p. 487) a military objective by its ‘function’, whereas Article 1, lit. f, speaks of its ‘nature, location, purpose, or use’. The daily précis of the 1999 Hague diplomatic conference⁶² reveals the explanation. Opinion was sharply divided between those states which supported reference to cultural property which ‘has, by its use, become a military objective’,⁶³ ‘feeling that “nature”, “purpose” and/or “location” were not on their own sufficient to define a military objective’, and those which sought a full restatement of the definition of a military objective found in Article 1, lit. f, Prot2CultPropConv.⁶⁴ In other words, some delegates favoured the higher standard of protection afforded cultural property by Article 53, lit. a, AP I and Article 16 AP II, whereas others wished simply to put on an explicit treaty footing the customary gloss on Article 4, para. 2, CultPropConv. Faced with this impasse, the chair of the conference invited the informal working group on Chapter 2 of the draft Prot2CultPropConv to reconvene ‘in order to try to find a balance between the need to protect cultural property, and the actions that have to be taken in certain military situations’.⁶⁵ The upshot was the compromise word ‘function’, a term open-textured enough to accommodate both positions—indeed, deliberately designed to permit a degree of discretion in its interpretation and application. Those states favouring the lower standard are free to hold that cultural property can become a military objective under Article 6, lit. a(i), by virtue of its nature, location or purpose, in addition to its use.⁶⁶ At the same time, states supporting the higher standard are not precluded from maintaining that only its use can make cultural property a military objective. Room is also left for the possibility that the higher standard may emerge in future as customary international law, in which case Article 6, lit. a(i), will have to be read consistently with it. It should be emphasized, however, that the practical difference between the two levels of protection is unlikely to be great.⁶⁷

6. The requirement in Article 6, lit. a(ii), Prot2CultPropConv that there be no feasible alternative available for obtaining a similar military advantage to that offered by attacking the cultural property, while helpful to have spelled out, is really no more than an explicit

elaboration of the limits imposed by imperative military necessity, as embodied in Article 4, para. 2, CultPropConv and reflected in Article 57, para. 3, AP I.⁶⁸

(p. 488) **7.** The reference in Article 53 AP I's 'without prejudice' clause to 'other relevant international instruments' would appear to be to RoerichPact, in force when the provision was adopted, but the ordinary meaning of the phrase would also encompass any similar specialist international agreement for the protection of cultural property in the event of armed conflict as may be concluded in the future. In this light, where parties to AP I are also parties to Prot2CultPropConv, conduct covered by both instruments is governed by the provisions of Prot2CultPropConv. Article 16 AP II's 'without prejudice' clause makes no mention of 'other relevant international instruments', seemingly reflecting the fact that, insofar as it applies during wartime, RoerichPact applies only to wars between states and not to civil wars. Given the relationship between Article 53 AP I and Prot2CultPropConv, however, and in the light of the drafters' intention that Article 16 AP II should not affect the application of the specialist regime represented at the time by CultPropConv, it is reasonable to treat Prot2CultPropConv as a *de facto* integral part of CultPropConv for the specific purposes of Article 16 AP II, with the result that Article 16 AP II is without prejudice to the provisions of Prot2CultPropConv. As such, where a state is party to both AP II and Prot2CultPropConv, conduct by that state which is covered by both instruments is governed by the provisions of Prot2CultPropConv. At present, however, in neither international nor non-international armed conflict does any of this make a practical difference.

8. When it comes to applying the rule on attacks against cultural property, such property may be considered a military objective in certain circumstances, although these circumstances will be rare. It is not absurd to suggest that very specific cultural property—historic fortresses, barracks, arsenals, and the like—can, by its nature, make an effective contribution to military action. That said, if it is decommissioned, an eighteenth-century fortress, to take an example, is better characterized by its nature as a historic monument, rather than a fortress; and if it is still in service, any effective contribution it may make to military action will be through its use, rather than its nature. Similarly, while the vast majority of cultural property cannot make an effective contribution to military action through its purpose (defined as 'the future intended use of an object'⁶⁹), a historic bridge, railway station, or dock could conceivably, by its purpose, make such a contribution, although whether this contribution is genuinely effective will depend on the circumstances. Generally speaking, one would not expect infrastructure built in and for another age to play a significant military role today. As for location, it is not unimaginable that the position of cultural property during a battle could serve to block a party's line of fire. At the same time, any contribution this may make to the military action of the opposing party is arguably better seen as a function of the property's passive or *de facto* use.⁷⁰ In the final analysis, then, it is principally through its use, if it all, that cultural property could be expected to make an effective contribution to military action.⁷¹ In other words, use (p. 489) in support of military action is the principal reason which a party to the conflict could be expected to invoke to justify attacking cultural property.⁷² Indeed, it is inconceivable today that a party would cite the nature of cultural property to this end, scarcely imaginable that it would cite its purpose, and highly unlikely that it would cite its location.⁷³

9. It is crucial to stress that, whatever contribution cultural property may make to military action, it will constitute a military objective only if its total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

10. It is also critical to emphasize that, even where cultural property constitutes a military objective, its attack will be lawful only if there exists no feasible alternative for obtaining a similar military advantage.⁷⁴ Where cultural property is rendered a military objective by its use, there may be other practicable ways of dealing with the situation without attacking the property. For example, if enemy snipers have installed themselves in cultural property, it may be possible simply to bypass it.⁷⁵ Equally, it may be possible to surround it and wait, while pursuing a peaceful resolution through negotiation and reliance on diplomatic good offices, as the Israel Defence Forces did for over a month in 2002 at the Church of the Nativity in Bethlehem, in which a large number of armed Palestinian militants had taken up position.⁷⁶

11. In the rare event that cultural property constitutes a military objective and there is no feasible alternative for obtaining a similar military advantage to that offered by attacking it, two further obligations apply, as a matter strictly of treaty law, where a party to the conflict is bound by 2ProtCultPropConv. Article 6, lit. c, 2ProtCultPropConv requires that any decision to attack the property be taken, unless circumstances do not permit, by an officer commanding a force equivalent in size to at least a battalion, while Article 6, lit. d, 2ProtCultPropConv requires that any such attack be preceded, whenever circumstances permit, by an effective warning.

12. The prohibition on attacks against cultural property is backed up by two mandatory precautions in attack deriving from Article 57, para. 2, AP I, Article 7 Prot2CultPropConv, and customary international law.⁷⁷ AP II makes no mention of such precautions.

16.03

The parties to the conflict shall take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental damage to cultural property (Article 57, para. 2, lit. a(ii), AP I; Article 7, lit. (p. 490) b, Prot2CultPropConv). They shall refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2 lit. a(iii), AP I; Article 7, lit. c, Prot2CultPropConv). They shall cancel or suspend an attack if it becomes apparent that it may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2, lit. b, AP I; Article 7, lit. d(ii), Prot2CultPropConv).

1. The rules stated here apply during both international and non-international armed conflict and to all attacks, whether by land, sea, or air. In the context of international armed conflict, all three accord with customary international law. In the context of non-international armed conflict, the first is probably consonant with custom, but evidence for the second and third is not yet conclusive.

2. Incidental damage inflicted in the course of attacks against otherwise lawful targets has historically posed the single greatest threat to cultural property in armed conflict, at least since the rise of modern forms of bombardment. One of the most significant advances in the protection of cultural property in armed conflict came, therefore, with the adoption in Article 51, para. 5, lit. b, AP I, cross-referable to Article 51, para. 4, AP I, of a prohibition on attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects (including cultural property), or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. The standard is one of proportionality. It is supported by the three obligatory precautions in attack found in Article 57, para. 2, lit. a(ii), Article 57, para. 2, lit. a(iii) and Article 57, para.

2, lit. b, AP I, reproduced in the specific context of cultural property in Article 7, lit. b, Article 7, lit. c, and Article 7, lit. d(ii), Prot2CultPropConv.⁷⁸

3. As applied to cultural property, proportionality in the context of incidental damage implicates qualitative as much as quantitative factors.⁷⁹ The extent of incidental loss occasioned by damage to or destruction of cultural property is a question not just of square or cubic metres but also of the cultural value represented thereby. In this light, it is significant that cultural property is by definition of great importance to the cultural heritage of a people and that the preamble to CultPropConv, as echoed in Resolution 20(IV) of the Diplomatic Conference of Geneva, declares that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.⁸⁰ Since elements of this heritage are often irreplaceable, only the anticipation of very considerable concrete and direct military advantage, in many cases overwhelming, will in practice suffice to justify an attack likely to cause incidental damage to cultural property. A textbook example of the application of the rule of proportionality came during the Gulf War in 1991, when Iraq positioned two fighter aircraft next to the ancient ziggurat of Ur. Coalition commanders decided not to attack the aircraft 'on the basis of (p. 491) respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple'.⁸¹

16.04

All other acts of hostility against cultural property are prohibited unless imperatively required by military necessity (Article 23, lit. g, HagueReg; Article 4, paras 1 and 2, CultPropConv).

1. The rule stated here applies during both international and non-international armed conflict. It accords with customary international law in both contexts.

2. Article 23, lit. g, HagueReg prohibits the destruction of enemy property unless it is imperatively demanded by the necessities of war. The rule is reiterated in the specific context of cultural property in Article 4, para. 1, CultPropConv, as qualified by Article 4, para. 2, CultPropConv, in accordance with which parties are obliged to respect cultural property by refraining from any act of hostility against it, unless military necessity imperatively requires otherwise. The term 'any act of hostility' is significant in forbidding not just attacks against cultural property but also *inter alia* its demolition,⁸² whether by way of explosives or bulldozers or other wrecking equipment, and whether to impede the progress of enemy columns, to clear a line of fire, to deny cover to enemy fighters, or *a fortiori* for motives other than military. Since acts of hostility other than attacks are not amenable to an analysis based on the concept of a military objective, the latter being relevant only to attacks,⁸³ the rule stated here reflects the plain language of Article 4, paras 1 and 2, CultPropConv and Article 23, lit. g, HagueReg.

3. Article 53 AP I and Article 16 AP II similarly apply to any acts of hostility directed against cultural property, and thus encompass demolitions as much as attacks. It will be recalled that neither provision embodies a waiver in respect of military necessity. Nor, in the context of acts of hostility other than attacks, does Article 53 AP I interact with the concept of a military objective in Article 52, para. 2, AP I, since the latter applies only to attacks. The same goes *mutatis mutandis* for Article 16 AP II and the customary analogue of Article 52, para. 2, AP I applicable to non-international armed conflict. The result is that acts of hostility against cultural property other than attacks are absolutely prohibited by Article 53 AP I and Article 16 AP II. But Article 53 AP I and Article 16 AP II are without prejudice to CultPropConv, with the consequence that parties to both regimes are entitled

to invoke the waiver in respect of imperative military necessity embodied in Article 4, para. 2, CultPropConv.

4. Imperative military necessity implies no feasible alternative for dealing with the situation. As emphasized by Eisenhower, military necessity is not the same as military convenience,⁸⁴ a view reiterated in 1997 by the third meeting of the parties to CultPropConv⁸⁵ (p. 492) and the following year by a meeting of governmental experts drawn from fifty-seven parties.⁸⁶ 'It is not sufficient that the objective could be more easily attained by endangering the protected object'; rather, 'an imperative necessity presupposes that the military objective cannot be reached in any other manner'.⁸⁷ Military necessity also serves to calibrate the extent of any damage or destruction compelled by military considerations: harm to cultural property occasioned by the invocation of the concept must be only to a degree that is imperatively necessary.

16.05

It is prohibited to make cultural property the object of reprisals (Articles 52, para. 1, and 53, lit. c, AP I; Article 4, para. 4 CultPropConv; see above, Section 7.43).

1. The rule stated here applies during both international and non-international armed conflict. In the context of international armed conflict, it accords with customary international law. The position is uncertain as regards non-international armed conflict.

2. Article 4, para. 4, CultPropConv obliges parties to refrain from any act directed by way of reprisals against cultural property, a prohibition to which the waiver in respect of imperative military necessity in Article 4, para. 2, CultPropConv is not applicable. This absolute prohibition is reiterated in Article 53, lit. c, AP I and, as regards civilian objects generally, in Article 52, para. 1, AP I. Article 16 AP II, on the other hand, makes no mention of reprisals.

16.06

It is prohibited to make any use of cultural property or its immediate surroundings for purposes likely to expose it to destruction or damage in the event of armed conflict unless no choice is possible between such use and another feasible method for obtaining a similar military advantage (Article 4, paras 1 and 2 CultPropConv and Article 6, lit. b, Prot2CultPropConv).

1. The rule stated here applies during both international and non-international armed conflict. It accords with customary international law in both contexts.

2. The first limb of Article 4, para. 1, CultPropConv obliges parties to respect cultural property by refraining from any use of the property and its immediate surroundings for purposes which are likely to expose it to destruction or damage in the event of armed conflict. The wording makes this provision more than a prohibition on the use of cultural property for hostile purposes. The reference to 'its immediate surroundings' and to any use 'for purposes which are likely to expose it to destruction or damage' means that the prohibition extends to its *de facto* or passive use in any manner likely to draw fire on it.⁸⁸ Article 4, para. 1, CultPropConv therefore prohibits the deliberate interposition of cultural property in the line of fire, for example by retreating to a position obscured by a monument from the opposing party's view.⁸⁹ The provision also serves to forbid the effective incorporation of a monument into a defensive line, as with the German 'Gustav (p. 493) line' around the abbey at Monte Cassino in the Second World War. Nor is it only use in combat that the rule prohibits. If it is foreseeable that the use of a protected building as a field headquarters or barracks, for example, will expose it to attack, such use is forbidden.⁹⁰ The

first limb of Article 4, para. 1, CultPropConv would also prohibit parking military aircraft in the immediate surroundings of cultural property,⁹¹ as Iraq did in the Gulf War of 1991. Nor, indeed, need such use expose the property in question to attack for it to fall foul of the rule: the provision forbids any use likely to expose cultural property to damage during armed conflict (which, as per Article 18, para. 2, CultPropConv, includes belligerent occupation), with the result that the likelihood of more than *de minimis* deterioration in the fabric of a monument, and *a fortiori* the risk of vandalism, through its use as a headquarters, barracks, or the like is enough to render such use impermissible.⁹² It is important to note too that the first limb of Article 4, para. 1, CultPropConv prohibits the use of cultural property and its surroundings in any manner likely to expose it to damage or destruction 'in the event of armed conflict'. In other words, if such use in peacetime is likely to expose cultural property to attack on the outbreak of hostilities, it is not permitted.⁹³

3. But Article 4, para. 1, CultPropConv is qualified by the waiver as to military necessity in Article 4, para. 2, CultPropConv. As such, if military necessity imperatively requires the use of cultural property and its surroundings for purposes likely to expose it to attack, such use is not prohibited. An example of one of the 'rare cases where it is essential to use cultural property for military purposes' is a historic bridge which constitutes the only available river crossing.⁹⁴ A further example is the positioning of an artillery piece in the immediate vicinity of cultural property if that is the only point from which an enemy stronghold dominating the battlefield can be attacked.⁹⁵

4. It should be emphasized that a party's use of cultural property and its surroundings in any manner likely to expose it to destruction or damage does not as such make it lawful for an opposing party to attack the property. That is, a party's breach of the first limb of Article 4, para. 1, CultPropConv does not *ipso facto* relieve an opposing party from its obligation under the second limb of the provision, as stressed by the Legal Committee during the drafting of the Convention.⁹⁶ Cultural property put to such use may be attacked only if it thereby makes an effective contribution to military action, if its total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, (p. 494) offers a definite military advantage, and if there exists no feasible alternative for obtaining a similar military advantage.⁹⁷

5. Article 53, lit. b, AP I and Article 16 AP II prohibit parties from using cultural property in support of the military effort. The concept of 'the military effort' is arguably wider than the notion of 'military action' referred to in the definition of a military objective in Article 52, para. 2, AP I. According to the *ICRC Commentary*, the military effort is 'a very broad concept, encompassing all military activities connected with the conduct of a war'.⁹⁸ For example, the use of the cellars of a historic castle a long way behind the front line to store rations may be considered supportive of the military effort but may not be thought to make an effective contribution to military action. The same may go for the billeting of non-front-line troops there. Such use may be held to violate Article 53, lit. b, AP I or Article 16 AP II but would arguably not go towards rendering the castle a military objective. Since neither Article 53, lit. b, AP I nor Article 16 AP II contains an exception in respect of military necessity, their respective prohibitions on the use of cultural property in support of the military effort are absolute. But as these provisions are without prejudice to CultPropConv, parties to both regimes may invoke the waiver as to military necessity in Article 4, para. 2, CultPropConv.

6. Article 6, lit. b, Prot2CultPropConv provides that a waiver on the basis of imperative military necessity pursuant to Article 4, para. 2, CultPropConv may be invoked to use cultural property for purposes which are likely to expose it to destruction or damage only when, and for as long as, no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage. The provision,

although helpful in its explicitness, is no more than a codified statement of the proper application of Article 4, para. 2, CultPropConv as it applies to the use of cultural property.

7. The posting on or near cultural property of armed custodians specially empowered to guard it does not constitute use of the property or its immediate surroundings for purposes likely to expose the property to destruction or damage. The same goes *a fortiori* for the presence of police. Although Article 8, para. 4, CultPropConv makes the point only in relation to cultural property under special protection, the principle is a general one.⁹⁹

8. In the rare event that imperative military necessity justifies using cultural property or its immediate surroundings for purposes likely to expose the property to destruction or damage, Article 6, lit. c, 2ProtCultPropConv requires that any decision to this effect by a party to the conflict bound by 2ProtCultPropConv be taken, unless circumstances do not permit, by an officer commanding a force equivalent in size to at least a battalion.

16.07

All forms of theft, pillage, misappropriation, confiscation, and vandalism of cultural property are prohibited (Article 28 HagueReg; Article 7 HC IX; Article 4, para. 3, CultPropConv). The parties to the conflict shall prohibit, prevent, and, if necessary, put a stop to all such acts (Article 4, para. 3, CultPropConv). They shall refrain from requisitioning movable cultural property situated in the territory of an opposing party (Article 4, para. 3, CultPropConv).

(p. 495) 1. The first two rules stated here apply during international and non-international armed conflict alike. The third applies by definition only during international armed conflict. In the context of international armed conflict, all three accord with customary international law. The first two are also more likely than not to be consonant with custom in non-international armed conflict.

2. All pillage during hostilities, including of cultural property, is prohibited by Article 28 HagueReg and Article 7 HC IX.

3. As for the obligations incumbent on a party to the conflict by virtue of Article 4, para. 3, CultPropConv, these are not, for the avoidance of doubt, restricted to belligerent occupation. They apply, in the context of international armed conflict, also where a party to the conflict's control over territory of the opposing party is unconsolidated, and they apply during non-international armed conflict, including with respect to territory under the control of a non-state armed group.

4. Article 4, para. 3, CultPropConv is not subject to Article 4, para. 2's waiver in respect of military necessity.

5. The undertaking in Article 4, para. 3, CultPropConv to prohibit, prevent, and, if necessary, put a stop to all forms of theft, pillage, misappropriation, confiscation, and vandalism of cultural property is not limited to the commission of such acts by a party's own armed forces but extends to commission by others, be they the local populace, organized criminal groups, or remnants of the opposing armed forces.¹⁰⁰ This explains why the first limb of the provision is formulated as an obligation to prohibit, prevent, and, if necessary, put a stop to the relevant conduct, instead of merely an obligation to refrain from it, as is the case with the second limb of the provision and with Article 4, paras 1 and 4, CultPropConv. Indeed, somewhat curiously, Article 4, para. 3, does not in terms oblige a party to refrain from theft, pillage, misappropriation, confiscation, and vandalism of cultural property. But a prohibition to this effect must be implied, reasoning *a fortiori*.¹⁰¹ Any other outcome would fly in the face of the Article's rationale. The implication is strengthened by the adoption of Article 15, para. 1, lit e, Prot2CultPropConv, which recognizes as a war crime, when committed intentionally and in violation of CultPropConv, theft, pillage, or

misappropriation of, or acts of vandalism directed against, cultural property protected under CultPropConv.

6. The obligations to prevent and, if necessary, to put a stop to all forms of theft, pillage, misappropriation, confiscation, and vandalism of cultural property are obligations of due diligence, by which is meant that a party to the conflict is required to take such necessary measures to these ends as are reasonably within its power under the circumstances. The obligation to prohibit the same acts is strict.

(p. 496) **7.** The prohibition on requisitioning movable cultural property situated in the territory of an opposing party is not limited to the public property of the opposing party and the private property of its nationals but extends to any property of a third state or its nationals present in the territory of the opposing party. So, for example, a party to an international armed conflict may not requisition movable cultural property of a third state or its nationals temporarily present for the purpose of exhibition in the territory of the opposing party.¹⁰²

16.08

The parties to the conflict shall, to the maximum extent feasible, take the necessary precautions to protect cultural property under their control against the dangers resulting from military operations (Article 58, lit. c, AP I). To the maximum extent feasible, they shall remove cultural property from the vicinity of military objectives (Article 58, lit. a, AP I; Article 8, lit. a, Prot2CultPropConv) or provide for adequate *in situ* protection (Article 8, lit. a, Prot2CultPropConv) and shall avoid locating military objectives near cultural property (Article 8, lit. b, Prot2CultPropConv).

1. The rules stated here apply during both international and non-international armed conflict. In the context of international armed conflict, they likely accord with customary international law. In the context of non-international armed conflict, their customary status is unclear.

2. In contrast to the functionally-similar peacetime obligation of safeguarding of cultural property provided for in Article 3 CultPropConv and elaborated on in Article 5 2ProtCultPropConv,¹⁰³ the general and specific obligations incumbent during hostilities on a party to the conflict to take measures to protect cultural property under its control against the dangers resulting from its own or the adversary's military operations are confined in principle neither, in the case of international armed conflict, to cultural property within a state's own territory nor, in the case of non-international conflict, to the government side.

3. As indicated by the recurrent qualification 'to the maximum extent feasible', what is required in a given situation of a party to the conflict by its general and specific obligations to take measures to protect cultural property under its control against the dangers resulting from military operations will depend on the circumstances, including the military situation and the party's logistical capacity.¹⁰⁴

4. The removal of cultural property from the vicinity of military objectives may involve its transport to a refuge with the state concerned, as implicitly foreshadowed in Articles 1, lit. b, and 8 CultPropConv and Article 11 RegExCultPropConv.¹⁰⁵ Equally, the transport of cultural property abroad for safekeeping in the event of armed conflict is envisaged in Articles 12 and 13 CultPropConv, Article 18 RegExCultPropConv, and para. 5 Prot1CultPropConv.¹⁰⁶

(p. 497) **5.** Whether a military objective is ‘near’ cultural property for the purposes of the obligation to avoid locating military objectives near cultural property is a question of reasonable appreciation. The answer will depend in part on the weaponry that an opposing party may be expected to deploy against the objective.

2. Special Protection

16.09

Contracting parties may request that a limited number of refuges for movable cultural property and of centres containing monuments and a limited amount of immovable cultural property of very great importance be placed under special protection (Article 8, para. 1, CultPropConv).

1. Chapter II CultPropConv (Articles 8–11) and Chapter II RegExCultPropConv (Articles 11–16) establish a regime of ‘special protection’ applicable over and above the general protection provided for in Chapter I CultPropConv. This supplementary regime is designed to provide a higher standard of protection in respect of a narrower range of property, a higher standard which relates specifically to the obligation to refrain from using cultural property and its surroundings for military purposes and the obligation to refrain from directing acts of hostility against it. These twin obligations aside, all the obligations otherwise applicable to movables and immovables which satisfy the definition of cultural property under Article 1 CultPropConv are equally applicable to property which additionally qualifies for special protection under Article 8 CultPropConv. Special protection is available only in respect of refuges intended to shelter movable cultural property, centres containing monuments, and other immovable cultural property. It is not available for movable cultural property as such. Moreover, refuges, centres containing monuments, and other immovable cultural property are entitled to special protection only if they satisfy strict criteria.

2. The difference between the standards imposed during armed conflict by the regime of special protection and the respect owed to cultural property under general protection is extraordinarily minor.¹⁰⁷ Although labelled ‘immunity’, the additional restraints mandated in relation to specially protected property amount to no more than a slight tightening of the conditions under which the waiver as to military necessity may be invoked. Any greater substantive protection that such property may stand to enjoy effectively derives from the regime’s criteria for eligibility, which prescribe a *cordon sanitaire* around the property.¹⁰⁸

3. The success of the arrangements for special protection ‘has proved very limited’.¹⁰⁹ Only ten centres containing monuments, comprising the Vatican City and recently nine centres in Mexico, along with eight refuges for movable cultural property, six of them in the Netherlands, have ever been entered in the International Register of Cultural Property under Special Protection provided for in Chapter II CultPropConv and Chapter (p. 498) II RegExCultPropConv, and the Vatican City’s entry was possible only thanks to a special undertaking by Italy ostensibly under Article 8, para. 5, CultPropConv. Four of the refuges have since been removed at the request of the respective parties, leaving the Register to comprise now ten centres containing monuments (nine of them in Mexico) and four refuges (three in the Netherlands and one in Germany).¹¹⁰ The reasons for this underwhelming uptake are obvious: the criteria of eligibility for special protection are cripplingly difficult to satisfy, while the procedure by which such protection is granted is potentially tortuous, time-consuming, and, with precious little reward for success, hardly worth the effort.

4. The regime of special protection is now effectively defunct, since it has, for all intents and purposes, been replaced by the regime of ‘enhanced protection’ under Chapter 3

Prot2CultPropConv. But it has not been formally abolished, making a bare outline of its rules a necessity.¹¹¹

5. The rules stated in Sections 16.10-16.15 apply only during international armed conflict and do not reflect customary international law.

16.10

The grant of special protection is subject to the following criteria:

- **The cultural property must be situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point (e.g. an aerodrome, broadcasting station, major port, railway station, or main line of communication) (Article 8, para. 1, lit. a, CultPropConv). Cultural property not so situated may, nonetheless, be placed under special protection if the contracting party requesting such protection undertakes, in the event of armed conflict, to make no use of the military objective in question and, in the case of a port, railway station, or aerodrome, to divert all traffic therefrom (Article 8, para. 5, CultPropConv). A refuge for movable cultural property not so situated may, nonetheless, be placed under special protection if it is designed in such a way that it will not, in all probability, be damaged in the event of attack (Article 8, para. 2, CultPropConv).**
- **The cultural property must not be used for military purposes (Article 8, para. 1, lit. b, CultPropConv). A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military forces or material, even by way of transit, or whenever activities directly connected with military operations, the stationing of military forces or the production of military material take place within the centre (Article 8, para. 3, CultPropConv). The guarding of cultural property by specially authorized armed custodians or the presence in the vicinity of police forces responsible for the maintenance of public order shall not be deemed to be use for military purposes (Article 8, para. 4, CultPropConv).**

Special protection is granted to cultural property by its entry in the International Register of Cultural Property under Special Protection (Article 8, para. 6, CultPropConv).

16.11

If during an armed conflict a contracting party is induced by unforeseen circumstances to set up an improvised refuge for movable cultural property, and if in the view of the Commissioner General for Cultural Property accredited to that party (Articles 2, 4, (p. 499) 6, 8-10 RegExCultPropConv) the refuge fulfils the criteria for special protection, the refuge may, subject to the consent of the delegates of the protecting powers accredited to the opposing parties (Articles 2, 3, 5, 8-10 RegExCultPropConv), be granted special protection by its entry in the International Register of Cultural Property under Special Protection (Article 11 RegExCultPropConv).

16.12

Contracting parties shall ensure the immunity of cultural property under special protection by refraining from any act of hostility against such property, except in exceptional cases of unavoidable military necessity (Articles 9 and 11, para. 2, CultPropConv).

16.13

Contracting parties shall ensure the immunity of cultural property under special protection by refraining from any use of such property or its surroundings for military purposes, except in exceptional cases of unavoidable military necessity (Articles 9 and 11, para. 2, CultPropConv).

16.14

Unavoidable military necessity can be established only by the commander of a division or higher-ranking officer. When circumstances permit, the opposing party shall be notified a reasonable time in advance of the decision (Article 11, para. 2, CultPropConv). The contracting party taking the decision shall, as soon as possible, and in writing, inform the Commissioner General for Cultural Property accredited to it of the decision, giving reasons (Article 11, para. 3, CultPropConv).

16.15

If a contracting party violates one of its obligations towards cultural property under special protection, the opposing party shall, for as long as the violation persists, be released from its obligation to ensure the immunity of the property concerned, although whenever possible the latter party shall first request the cessation of the violation within a reasonable time (Article 11, para. 1, CultPropConv). The contracting party taking the decision shall, as soon as possible, and in writing, inform the Commissioner General for Cultural Property accredited to it of the decision, giving reasons (Article 11, para. 3, CultPropConv). The cultural property in question shall remain protected by the general rules on respect for cultural property.

3. Enhanced Protection

16.16

Contracting parties may request that cultural property be placed under enhanced protection (Article 10 Prot2CultPropConv).

1. The predominant view during the review of CultPropConv was that the regime of special protection had been a failure. At the same time, even if doubts were expressed in this regard, it was generally agreed that the basic idea of two levels of protection should be retained. In the event, the effective replacement of special protection by the new regime of enhanced protection emerged as one of the core rationales of Prot2CultPropConv, as underscored in the first preambular recital.

2. Enhanced protection, unlike special protection, is available for immovable and movable cultural property alike. Its conditions of eligibility are intended to be more realizable than those for special protection, with the absence of any requirement that the property in question be situated at an adequate distance from military objectives. The procedure by which enhanced protection is granted is designed to be more objective and transparent, with the final decision being taken by the Committee for the Protection of Cultural Property in the

Event of Armed Conflict established under Article 24 Prot2CultPropConv. (p. 500) The immunity afforded is more substantial than is the case under special protection: cultural property under enhanced protection and its immediate surroundings may never be used in support of military action, it may never be subject to acts of hostility other than attacks, such as demolitions, and it may be attacked only if its use renders it a military objective.

3. The relationship between enhanced and special protection is outlined in Article 4, lit. b, Prot2CultPropConv: as between parties to Prot2CultPropConv, where cultural property has been granted both special and enhanced protection, the rules on enhanced protection alone apply.

4. Article 4, lit. a, Prot2CultPropConv states that Chapter 3 Prot2CultPropConv is without prejudice to Chapter I CultPropConv and Chapter 2 Prot2CultPropConv. What this means is that cultural property under enhanced protection enjoys the benefit of the general provisions regarding protection laid down in CultPropConv and Prot2CultPropConv, except to the extent that the rules on enhanced protection constitute *lex specialis*. The upshot is that cultural property under enhanced protection is protected not only by Article 12 Prot2CultPropConv, as refined by Article 13, but also by Article 3, Article 4, paras 3–5 and Article 5 CultPropConv and by Articles 5, 7, 8, and 9 Prot2CultPropConv. It also has the consequence that cultural property under enhanced protection is protected by Article 4, para. 1, CultPropConv to the extent that the expression ‘act of hostility’ used in that provision is more compendious than the term ‘attack’ used in Articles 12 and 13 Prot2CultPropConv.

16.17

The grant of enhanced protection is subject to the following criteria:

- **The cultural property must be cultural heritage of the greatest importance for humanity (Article 10, lit. a, Prot2CultPropConv).**
- **The cultural property must be protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection (Article 10, lit. b, Prot2CultPropConv).**
- **The cultural property must not be used for military purposes or to shield military sites, and the party having control over the cultural property must make a declaration that it will not be so used (Article 10, lit. c, Prot2CultPropConv).**

Enhanced protection is granted to cultural property by its entry in the International List of Cultural Property under Enhanced Protection (Article 11, para. 10, Prot2CultPropConv) maintained by the Committee for the Protection of Cultural Property in the Event of Armed Conflict (Articles 11, 24, and 27, para. 1 lit. b, Prot2CultPropConv).

1. The conditions of eligibility for enhanced protection are laid down in Article 10 Prot2CultPropConv, which provides that cultural property may be placed under enhanced protection if it meets the three cumulative criteria stated here. Such property enjoys enhanced protection, however, only if entered in the International List of Cultural Property under Enhanced Protection (Article 11, para. 10, Prot2CultPropConv) maintained by the Committee for the Protection of Cultural Property in the Event of Armed Conflict (Articles 11, 24, and 27, para. 1, lit. b, Prot2CultPropConv), which decides upon any request for inclusion in the List (Article 11, para. 5, Prot2CultPropConv). The criteria for eligibility for

enhanced protection and the procedure for its grant are elaborated on in Chapter III, Section A GuidelinesProt2CultPropConv.

(p. 501) **2.** The requirement in Article 10, lit. a, Prot2CultPropConv that the cultural property in question constitute ‘cultural heritage of the greatest importance to humanity’ is stricter than the corresponding requirement in Article 8 CultPropConv, which speaks of ‘very great importance’. This more stringent threshold criterion was the *quid pro quo* for the freeing up of what might be called the objective criteria for enhanced protection. It does not, however, represent a quantifiable standard. The open-textured formulation, reached by consensus, is a means of accommodating both inclusivist and exclusivist schools of thought, deferring the debate to the case-by-case deliberations of the Committee. The term ‘heritage’, as distinct from ‘property’, and the word ‘humanity’, as compared with the draft text ‘all peoples’, were settled on for rhetorical reasons, the former to connote intergenerational ethical responsibilities of a fiduciary character, the latter to emphasize ‘the common interest in safeguarding important cultural heritage’.¹¹²

3. The reference in Article 10, lit. b, Prot2CultPropConv to ‘cultural and historic’ value, where ‘cultural’ alone would have sufficed, wrongly implies that the adjectives are mutually exclusive, is inconsistent with Article 10, lit. a, Prot2CultPropConv, which uses ‘cultural’ only, and sits uncomfortably with Article 1 CultPropConv, which employs ‘cultural’ as a catch-all term for ‘historical’, ‘artistic’, ‘archaeological’, ‘scientific’, and even bibliographical and archival.

4. As of 1 January 2020, there were seventeen entries in the International List of Cultural Property under Enhanced Protection, spread over nine states parties.¹¹³

16.18

The parties to the conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack (Article 12 Prot2CultPropConv). Cultural property under enhanced protection may, however, be made the object of attack if:

- **it becomes, by its use, a military objective (Article 13, para. 1 lit. b, Prot2 CultPropConv);**
- **the attack is the only feasible means of terminating such use (Article 13, para. 2 lit. a, Prot2CultPropConv);**
- **all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimizing, damage to the cultural property (Article 13, para. 2, lit. b, Prot2CultPropConv);**
- **unless circumstances do not permit owing to requirements of immediate self-defence, the attack is ordered at the highest operational level of command, effective advance warning is issued to the opposing forces requiring the termination of the use, and reasonable time is given to the opposing forces to redress the situation (Article 13, para. 2 lit. c, Prot2CultPropConv).**

1. The rules stated here apply during both international and non-international armed conflict. They do not reflect customary international law.

2. For no obvious reason, Article 12 Prot2CultPropConv uses the phrase ‘by refraining from making such property the object of attack’ in preference to the more compendious (p. 502) ‘by refraining ... from any act of hostility directed against such property’, the latter being employed in Article 9 CultPropConv (special protection), as well as *mutatis mutandis* in Article 4, para. 1, CultPropConv and Article 6 Prot2CultPropConv (general protection) and

in Article 53, lit. a, AP I and Article 16 AP II. As a result of this more restrictive formulation, Article 12 Prot2CultPropConv does not encompass acts of hostility other than attacks, such as demolitions. But where the rules on enhanced protection do not constitute *lex specialis*, cultural property under enhanced protection benefits from the general provisions regarding protection in CultPropConv and Prot2CultPropConv. In this light, the prohibition on demolitions inherent in the obligation in Article 4, para. 1, CultPropConv to refrain from acts of hostility against cultural property applies to cultural property under enhanced protection.

3. Article 13, para. 1, Prot2CultPropConv specifies two circumstances in which cultural property under enhanced protection can 'lose such protection', in the words of the chapeau. The wording is unfortunate, since what the cultural property is better characterized as losing in the second of the two circumstances is its immunity, rather than its enhanced protection as such. It is, however, a distinction without a difference, given the precise formulation of Article 13, para. 1, lit. b.

4. The first situation in which enhanced protection can be lost, as spelled out in Article 13, para. 1, lit. a, Prot2CultPropConv, is if such protection is suspended or cancelled in accordance with Article 14 Prot2CultPropConv. This eventuality is not included in the rule stated here, for the simple reason that, where enhanced protection is suspended or cancelled, the property in question is not cultural property under enhanced protection.

5. The other circumstance in which cultural property can lose its enhanced protection, or more accurately in this case its immunity, is if and for as long as it has, by its use, become a military objective (Article 13, para. 1, lit. b, Prot2CultPropConv). Two crucial implications are to be drawn from this provision. First, provided it is not suspended or cancelled, enhanced protection can be lost only in relation to attacks, since it is only attacks which depend on whether an object is a military objective. In other words, in contrast to the immunity of specially protected cultural property under CultPropConv, but no different from the protection afforded cultural property more generally by Article 53 AP I and Article 16 AP II, the immunity of cultural property under enhanced protection is absolute when it comes to acts of hostility other than attacks, such as demolitions. Military necessity can never justify such acts. Second, whereas cultural property under general protection can in principle become a military objective through any one of its nature, location, purpose, or use, cultural property under enhanced protection, like cultural property under Article 53 AP I and Article 16 AP II, can become a military objective only through its use. It was this that a majority of delegates to the 1999 Hague diplomatic conference saw as the main difference in the protection afforded by general and enhanced protection respectively.¹¹⁴

16.19

The parties to the conflict shall ensure the immunity of cultural property under enhanced protection by refraining from any use of such property or its immediate surroundings in support of military action (Article 12 Prot2CultPropConv).

(p. 503) 1. The rule stated here applies during both international and non-international armed conflict. It does not reflect customary international law.

2. Article 12 Prot2CultPropConv uses the expression 'in support of military action', as found in Article 52, para. 2, AP I, rather than 'in support of the military effort', as contained in Article 53, lit. b, AP I and Article 16 AP II. The concept of 'military action', referring to military operations, is arguably more restrictive than the notion of 'the military effort', which is 'a very broad concept, encompassing all military activities connected with the conduct of a war',¹¹⁵ with the result that the protection granted by Article 12 Prot2CultPropConv against military use, generically speaking, is possibly narrower than

that provided by Article 53, lit. b, AP I and Article 16 AP II. The term 'military action' is also possibly narrower than 'military purposes', as used in Article 11, para. 2, CultPropConv.

3. The only¹¹⁶ situation in which enhanced protection, or more accurately immunity, can be lost is if the cultural property has, by its use, become a military objective (Article 13, para. 1, lit. b, Prot2CultPropConv), and this is applicable only to attacks against such property. The result is that the immunity of cultural property under enhanced protection is absolute when it comes to its use in support of military action. Military necessity can never justify such use.

16.20

Where cultural property under enhanced protection no longer meets any of the criteria for such protection, the Committee for the Protection of Cultural Property in the Event of Armed Conflict may suspend this protection or may cancel this protection by removing the cultural property from the International List of Cultural Property under Enhanced Protection (Article 14, para. 1, Prot2CultPropConv). The Committee may also suspend the enhanced protection granted to cultural property in the case of a serious violation of the immunity of that property through its use in support of military action. Where such violation is continuous, the Committee may exceptionally cancel the enhanced protection granted to the property by removing the property from the List (Article 14, para. 2, Prot2CultPropConv). The Committee shall afford an opportunity to the contracting parties to make their views known before taking a decision to suspend or cancel enhanced protection (Article 14, para. 3, Prot2CultPropConv).

Suspension and cancellation of enhanced protection and the procedures for each are elaborated on in Chapter III, Sections C and D GuidelinesProt2CultPropConv.

4. Transport of Cultural Property

16.21

Means of transport engaged exclusively in the transport of cultural property may, at the request of the contracting party concerned, be placed under special protection (Article 12, para. 1, CultPropConv and Article 17, paras 1 and 2, RegExCultPropConv). Such transport shall take place under international supervision (Article 12, para. 2, CultPropConv and Article 17, para. 3, RegExCultPropConv). All acts of hostility directed against such means of transport are prohibited (Article 12, para. 3, CultPropConv).

(p. 504) 1. The rules stated here apply only during international armed conflict. They do not reflect customary international law.

2. The mass relocation of movable cultural property for protective purposes during the Spanish Civil War and Second World War inspired the drafters of CultPropConv to make special provision for the transport of cultural property during armed conflict. The rules eventually adopted in Chapter III CultPropConv and Chapter III RegExCultPropConv apply only during international armed conflict but without distinction to transport by land, sea, or air. The gist of these rules is the absolute immunity of duly authorized transports of cultural property, as provided for in Article 12, para. 3, CultPropConv. Article 13 CultPropConv makes provision for the transport of cultural property in cases where urgency does not

permit recourse to the elaborate procedure specified in Article 12 CultPropConv and Articles 17 and 18 RegExCultPropConv.

3. CultPropConv's regime for the transport of cultural property has never formally been put to use, although during the international armed conflict in Cambodia in 1972, to which CultPropConv did not actually apply, many treasures were transported from Angkor to Phnom Penh on trucks displaying the distinctive emblem of cultural property and driven by personnel wearing the armlet provided for in Article 21 RegExCultPropConv.¹¹⁷ Nor is it likely that it will ever formally be put to use. It not only depends on the functioning as intended of CultPropConv's regime of control, which has never functioned as intended and is unlikely ever to do so. It also adds nothing by way of protection to transports of cultural property, insofar as movable cultural property being transported can never make an effective contribution to military action, with the consequence that both it and, by extension, any vehicle transporting it may never be considered a military objective and hence may never be the object of attack.¹¹⁸

16.22

Contracting parties shall grant immunity from seizure, placing in prize, and capture to cultural property transported under special protection or transported in urgent cases, as well as to the means of such transport (Article 14, para. 1, CultPropConv).

1. The rule stated here applies only during international armed conflict. It does not reflect customary international law.

2. The rule stated here does not limit the right of visit and search (Article 14, para. 2, CultPropConv).

3. Just as with the immunity of means of transport of cultural property from attack, it is unnecessary for cultural property under transport to be granted protection in accordance with Article 12 or Article 13 CultPropConv before a party to the conflict is prohibited from seizing, placing in prize, or capturing it. Cultural property may never be seized or captured during hostilities,¹¹⁹ and customary international law similarly forbids its taking in prize.¹²⁰

(p. 505) III. Protection of Cultural Property during Occupation

16.23

All acts of hostility against cultural property are prohibited during belligerent occupation unless imperatively demanded by military necessity (Articles 56 and 23, lit. g, HagueReg; Article 53 GC IV; Article 4, paras 1 and 2, CultPropConv).

1. The rule stated here applies by definition only during international armed conflict. It accords with customary international law.

2. Article 23, lit. g, HagueReg prohibits the destruction of enemy property unless it is imperatively demanded by the necessities of war. In the specific context of belligerent occupation, and as specifically regards cultural property, Article 56 HagueReg lays down an absolute prohibition on the destruction and wilful damage of the latter. It is important to appreciate, however, that what Article 56 HagueReg forbids is destruction and wilful damage to cultural property unconnected with military operations. Insofar as any destruction or damage is for the purpose of furthering military operations, it is governed under HagueReg not by Article 56 but by Article 23, lit. g, regulating the destruction of enemy property in the context of hostilities. This accords with Article 53 GC IV, which provides that any destruction by the occupying power of real or personal property is

prohibited, except where such destruction is rendered absolutely necessary by military operations.

3. Article 4, paras 1 and 2, CultPropConv apply as much during belligerent occupation as during active hostilities. As a consequence, all acts of hostility against cultural property are prohibited during belligerent occupation unless imperatively demanded by military necessity.¹²¹

4. Reasoning along the lines of the rule stated here was relied on by the Supreme Court of Israel (sitting as the High Court of Justice) in *Hess v Commander of the IDF in the West Bank*,¹²² where the Court, referring to HagueReg, GC IV, and CultPropConv without citing provisions, upheld an order of the commander of Israeli occupation forces in the West Bank to demolish, *inter alia*, a structure forming part of the historic streetscape of the Old City of Hebron in order to prevent armed attacks by Palestinian militants. The commander had revised his original order, which would have involved the destruction of twenty-two Ottoman and Mameluke buildings, some dating from the fifteenth century, in response to an earlier interim decision of the Court.¹²³ Although eventually upholding the order to demolish one building comprising cultural property, the Court ruled that the demolition had to be supervised by an expert in the preservation of historic buildings and an archaeologist, so as to protect as much heritage value as possible.

16.24

It is prohibited during belligerent occupation to make any use of cultural property or its immediate surroundings for purposes likely to expose it to destruction or damage unless no choice is possible between such use and another feasible method for obtaining a similar military advantage (Article 4, paras 1 and 2 CultPropConv and Article 6, lit. b, Prot2CultPropConv).

1. The rule stated here applies by definition only during international armed conflict. It accords with customary international law.

(p. 506) 2. Article 4, paras 1 and 2, CultPropConv and Article 6, lit. b, Prot2CultPropConv apply as much during belligerent occupation as during active hostilities. As a consequence, it is prohibited during belligerent occupation to make any use of cultural property or its immediate surroundings for purposes likely to expose it to destruction or damage unless no choice is possible between such use and another feasible method for obtaining a similar military advantage.¹²⁴ This qualified prohibition takes on a particular practical significance during belligerent occupation, 'when military forces are more likely to look to accommodate headquarters or troops in available buildings or to construct camps, with the attendant earthworks, use of heavy machinery, movement of motor vehicles and helicopters, and other activities posing a risk to the preservation of cultural property'.¹²⁵

16.25

All forms of theft, pillage, misappropriation, confiscation, and vandalism of cultural property are prohibited during belligerent occupation (Articles 47 and 56 HagueReg; Article 4, para. 3, CultPropConv). The occupying power shall prohibit, prevent and, if necessary, put a stop to all such acts (Article 43 HagueReg; Article 4, para. 3, CultPropConv). It shall refrain from seizing or requisitioning cultural property situated in the occupied territory (Article 56 HagueReg; Article 4, para. 3, CultPropConv).

1. The rules stated here apply by definition only during international armed conflict. They accord with customary international law.

2. All pillage by an occupying power, including of cultural property, is prohibited by Article 47 Hague Reg. In addition, Article 56 HagueReg lays down an absolute prohibition on all seizure or requisition of cultural property by an occupying power. For its part, the first limb of Article 43 HagueReg obliges an occupying power to take all measures within its power to restore and to ensure, as far as possible, public order and civil life, which implies an obligation to see to it that any existing laws for the protection of cultural property from any form of misappropriation or vandalism are adequately enforced, whether by the competent authorities and local police and courts or, failing this, by the occupying power itself.¹²⁶

3. As for the obligations incumbent on a party to the conflict by virtue of Article 4, para. 3, CultPropConv, these are applicable as much to belligerent occupation as to active hostilities and are not subject to Article 4, para. 2's waiver in respect of military necessity.¹²⁷

16.26

The occupying power shall as far as possible support the competent authorities of the occupied country in safeguarding and preserving cultural property (Article 5, para. 1, CultPropConv). Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent authorities be unable to take such measures, the occupying power (p. 507) shall, as far as possible, and in close co-operation with these authorities, take the most necessary measures of preservation (Article 5, para. 2, CultPropConv).

1. The rules stated here apply by definition only during international armed conflict. They accord with customary international law.

2. Article 5 CultPropConv is to be read against the backdrop of the pre-existing customary law of belligerent occupation, especially the rule reflected in Article 43 HagueReg, the second limb of which obliges the occupying power (unless absolutely prevented from doing so, and within the parameters set by the powers vested in and obligations imposed on it by specific rules¹²⁸) to leave existing administrative authority intact and free to operate. In this light, the task of preserving cultural property under belligerent occupation continues to fall to the competent national authorities.

3. The obligation in Article 5, para. 1, CultPropConv goes beyond the obligation to refrain from hampering the competent national authorities to include, as far as possible, assistance.¹²⁹ At the same time, the drafters made it clear that Article 5, para. 1, does not require the occupying power to take measures *proprio motu* to preserve (as distinct from to respect) cultural property in the territory, since such measures remain the responsibility of the competent national authorities.¹³⁰

4. The words 'safeguarding' and 'preserving' in Article 5, para. 1, CultPropConv denote two distinct things. The former refers to the measures of safeguard mandated by Article 3 CultPropConv. The concept of 'preserving' refers to measures taken after the cessation of active hostilities to conserve and protect cultural property in the occupied territory—measures which, but for the state of belligerent occupation, would be considered peacetime measures. This second element of Article 5, para. 1, obliges the occupying power to support the competent national authorities, as far as possible, in implementing the legislative and administrative regime in force in the occupied territory for the preservation of cultural property, such as local planning laws requiring permits for construction on sensitive sites and laws regulating the upkeep of historic buildings.

16.27

The occupying power shall prohibit and prevent in relation to the territory any illicit export, other removal, or transfer of ownership of cultural property (Article 5 CultPropConv; Section 1 Prot1CultPropConv; Article 9, para. 1, lit. a, Prot2CultPropConv; Article 2, para. 2, and Article 11 IllicitImpExpTransConv).

1. The rule stated here applies by definition only during international armed conflict. It accords with customary international law.
2. Paragraph 1 Prot1CultPropConv, inspired by the systematic removal by Germany and the Soviet Union of artworks and antiquities from some of the countries occupied by them during the Second World War, requires each party to prevent the export of cultural property from territory occupied by it during armed conflict. The obligation imposed on an occupying power goes beyond ensuring that its own occupation authorities or military forces do not export cultural property from the territory: para. 1 encompasses a duty to (p. 508) prevent private parties from doing so. Nor is the obligation limited to export contrary to local law: para. 1 obliges a belligerent occupant to prevent all export of cultural property.
3. In Article 2, para. 2, IllicitImpExpTransConv, parties undertake to oppose with the means at their disposal the illicit export and transfer of ownership of movable cultural property covered by IllicitImpExpTransConv, and Article 11 IllicitImpExpTransConv provides that the export and transfer of ownership of any such cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.
4. Article 9, para. 1, lit. a, Prot2CultPropConv requires an occupying power, in respect of the occupied territory, to prohibit and prevent any illicit export, other removal, or transfer of ownership of cultural property.¹³¹ The provision's generic reference to 'cultural property' comprehends not only movables (and in practice the acts of export and removal can relate only to these) but also immovables, so that an occupying power is obliged to prohibit and prevent the illicit transfer of ownership not only of antiquities, works of art, and the like but also of buildings, monuments, in the narrow sense, and archaeological sites in the territory. Like Article 4, para. 3, CultPropConv, Article 9 Prot2CultPropConv obliges parties to prohibit and prevent the impugned acts not only when committed by their own forces and occupation authorities but also, and this is the thrust of both provisions, when committed by private persons. Indeed, like Article 4, para. 3, CultPropConv, Article 9 Prot2CultPropConv does not, on its face, prohibit a party from engaging in such activities itself; but just as with Article 4, para. 3, CultPropConv, a prohibition to this effect must be read into Article 9 Prot2CultPropConv, reasoning *a fortiori*. The term 'illicit' for the purposes of Article 9 Prot2CultPropConv is defined in Article 1, lit. g, Prot2CultPropConv to mean under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law.
5. The obligation to prevent any illicit export, other removal, or transfer of ownership of cultural property is an obligation of due diligence, by which is meant that a party to the conflict is required to take such necessary measures to this end as are reasonably within its power under the circumstances. The obligation to prohibit the same acts is strict.

16.28

A contracting party in occupation of the whole or part of the territory of another contracting party shall prohibit and prevent any archaeological excavation in the occupied territory, save where this is strictly required to safeguard, record, or preserve cultural property (Article 9, para. 1, lit. b, Prot2CultPropConv). The same shall apply in respect of any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical, or scientific evidence (Article 9, para. 1, lit. c,

Prot2CultPropConv). Any archaeological excavation of, alteration to, or change of use of, cultural property in the occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent authorities of that territory (Article 9, para. 2, Prot2CultPropConv).

1. The rules stated here apply by definition only during international armed conflict. They do not reflect customary international law.
2. No provision in CultPropConv deals with archaeological excavations in occupied territory. The suggested insertion in RegExCultPropConv of an article on the question was (p. 509) rejected at the Hague intergovernmental conference in 1954, although only just and partly on procedural grounds.¹³² It had subsequently been hoped by its drafters that Article 32 of UNESCO's Recommendation on International Principles Applicable to Archaeological Excavations,¹³³ a hortatory provision on point adopted by the Organization's General Conference in 1956, would be incorporated, along with implementing regulations, in an addendum to CultPropConv, but this was never to be the case. The absence of binding rules on digs in occupied territory, and on the alteration of cultural property in this context, was exposed as a serious lacuna after 1967 by Israel's controversial activities in the occupied West Bank, particularly East Jerusalem. In the event, the 1999 Hague diplomatic conference reached consensus on three interrelated provisions, namely Article 9, para. 1, lits. a and b, and Article 9, para. 2.
3. The obligation imposed on an occupying power by Article 9, para. 1, lit. b, Prot2CultPropConv to prohibit and prevent any archaeological excavation in the occupied territory, save where this is strictly required to safeguard, record, or preserve cultural property, extends on its face to digs authorized by the competent national authorities, including digs in progress. At first blush this seems odd, and it is unclear if this is what was intended. On the one hand, with the exception of those matters falling expressly or necessarily within the rights ceded to and duties imposed on the occupying power by specific rules, the regulation of cultural property in occupied territory remains the province of these competent national authorities, and there seems no reason why they should not be free to authorize whatever archaeological excavations they see fit. On the other hand, it is possible that the provision is a precautionary one, premised on the calculation that the only way to prevent illicit excavations in occupied territory is to ban all excavations for the duration of the occupation. Either way, it may be that the exception in respect of excavations strictly required to safeguard, record, or preserve cultural property would permit the continuation of digs in progress insofar as this were necessary to enable the recording of finds already unearthed and to prepare the site for suspension of the work.
4. The obligation to prevent any archaeological excavations and any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical, or scientific evidence is an obligation of due diligence, by which is meant that a party to the conflict is required to take such necessary measures to this end as are reasonably within its power under the circumstances. The obligation to prohibit the same acts is strict.

IV. Preparatory Measures during Peacetime

16.29

Contracting parties shall prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate (Article 3 CultPropConv). Such measures shall include, as appropriate, the preparation of inventories, the planning of emergency

measures for protection against fire or structural (p. 510) collapse, the preparation for the removal of movable cultural property or the provision of adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property (Article 5 Prot2CultPropConv).

1. The rule stated here does not reflect customary international law.
2. For the purposes of CultPropConv, the protection of cultural property is defined to comprise both the safeguarding of and respect for cultural property (Article 2 CultPropConv), the latter referring to restraints on methods of warfare, the former referring to so-called 'material' protection, by which is meant practical measures, prepared in advance in peacetime, against the foreseeable effects of armed conflict. The obligation to safeguard cultural property is laid down in Article 3 CultPropConv, which obliges parties to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict by taking such measures as they consider appropriate. What the drafters had in mind were '[s]pecial measures of an architectonic nature' designed to protect immovable cultural property, 'particularly against the dangers of fire and collapse'; special measures designed to protect movable cultural property 'in the building where it is generally to be found or in the immediate neighbourhood of the latter (organization, stocking of packing material, etc.)'; the establishment of refuges for movables and the organization of transport to them in the event of armed conflict; and the institution of a civilian service to execute such measures.¹³⁴ But the text of Article 3 leaves the choice of measures to be adopted to the discretion of the party in whose territory the cultural property is situated, and the ordinary meaning of the key phrase 'such measures as they consider appropriate' is capable of encompassing all sorts of measures.
3. Since the obligation is to take such measures as they consider appropriate, the parties are not compelled to undertake equally rigorous preparations in relation to each item of cultural property in their territory. The wording of Article 3 CultPropConv implicitly takes into account financial and technical constraints, leaving it to the parties to prioritize their resources as they see fit.¹³⁵ In the case of immovables, the drafters themselves foresaw that measures of safeguard would be taken only in relation to 'a certain number of buildings of great value and of buildings containing collections of cultural property (museums, archives, libraries, etc.)',¹³⁶ and this likelihood is acknowledged in Article 4, para. 5, CultPropConv, which provides that no party to an armed conflict may evade the obligations of respect for cultural property incumbent upon it by reason of the fact that the opposing party to the conflict has not applied the measures of safeguard referred to in Article 3. This selectivity has been borne out in the practice of the parties. As regards movables, many parties make provision for the evacuation in the event of armed conflict of only the most important artworks and antiquities, as effected in Croatia in 1991.¹³⁷
4. Given that Article 1 CultPropConv leaves it to each party to determine the applicability of CultPropConv to specific cultural property in its territory, the measure *sine qua non* that a party can and should take in pursuance of the obligation laid down in Article 3 CultPropConv is the identification of the property in question. Linked to this, (p. 511) a useful practical measure of peacetime preparation undertaken in the past by at least one party is the submission to UNESCO, as CultPropConv's depositary, of an inventory of immovable cultural property and of collections of movable cultural property in its territory, for dissemination among the parties.¹³⁸ The drafters of CultPropConv themselves recognized that the encouragement of a standard practice of notification had, 'to a very large extent, become the essential factor in identifying property and facilitating its protection'.¹³⁹ Even better still, in the spirit of the drafters' view that cultural property would not be safe from bombardment unless its location was known,¹⁴⁰ Switzerland

previously sent to the Director-General of UNESCO a map showing the location of cultural property in its territory and in Liechtenstein.¹⁴¹ In turn, the Director-General transmitted copies of the map to all the parties.¹⁴² An updated topographic map showing 1,500 high-priority objects in Swiss territory and an inventory of the complete 8,000 'cultural items that Switzerland wished to protect and have protected' were subsequently circulated.¹⁴³ For their part, after an artillery attack in July 1991 on the town of Erdut damaged its medieval fortress, the Croatian authorities sent lists of cultural monuments marked with CultPropConv's distinctive sign to the Yugoslav Federal Defence Secretariat and to all headquarters of the Yugoslav National Army.¹⁴⁴

5. There was general agreement during the review of CultPropConv that Article 3 CultPropConv was unhelpfully impressionistic. A more programmatic provision was needed, 'listing steps to be taken in peacetime to ensure overall risk-prevention'.¹⁴⁵ As a result, Article 5 Prot2CultPropConv puts flesh on the bare bones of Article 3 CultPropConv by providing that preparatory measures taken pursuant to Article 3 shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of cultural property or the provision for its adequate *in situ* protection, and the designation of competent authorities responsible for the safeguarding of cultural property. The measures listed are merely indicative.¹⁴⁶

16.30

Contracting parties shall plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it (Article 7, para. 2, CultPropConv).

1. The rule stated here does not reflect customary international law.
2. Article 7, para. 2, CultPropConv, inspired by the German *Kunstschutz* (art protection) corps in both World Wars and by the Monuments, Fine Arts, and Archives officers in the US and UK armies in the Second, leaves it to the parties to organize the requisite services (p. 512) or personnel as they see fit.¹⁴⁷ Such services and personnel are a standing feature of the armed forces of a growing number of states.¹⁴⁸

V. Personnel Engaged in the Protection of Cultural Property

16.31

Personnel engaged in the protection of cultural property shall, as far as is consistent with the interests of security, be respected. Should such personnel fall into the hands of the opposing party, they shall be allowed to continue to carry out their duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing party (Article 15 CultPropConv).

1. The rules stated here apply only during international armed conflict. They do not reflect customary international law.
2. It may be that, pursuant to Article 3 CultPropConv, a party designates competent authorities responsible for the safeguarding of cultural property against the foreseeable effects of armed conflict, a possibility expressly mentioned in Article 5 Prot2CultPropConv. A party to an armed conflict may also, as implied by Article 8, para. 4, CultPropConv, specially empower 'armed custodians' to guard cultural property. Moreover, Article 7, para. 2, CultPropConv obliges parties to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.¹⁴⁹

All three categories of personnel engaged in the protection of cultural property are covered by the rule in Article 15 CultPropConv.¹⁵⁰ Their status is analogous to that of medical and religious personnel in the armed forces.¹⁵¹

3. Should the specialist military personnel envisaged in Article 7, para. 2, CultPropConv fall into the hands of the opposing party, they are entitled to the protection of GC III.

4. RegExCultPropConv further provides for the involvement of a range of individuals in CultPropConv's regime of control, namely representatives for cultural property (Article 2, lit. a, RegExCultPropConv), delegates of Protecting Powers (Articles 2, 3, 5, and 8 RegExCultPropConv), Commissioners-General for Cultural Property (Articles 2, 4, 6 and 8 RegExCultPropConv), inspectors of cultural property (Articles 7, para. 1, and 8 RegExCultPropConv), and experts (Articles 7, para. 2, and 8 RegExCultPropConv). These five categories of persons are not 'personnel engaged in the protection of cultural property' within the meaning of Article 15 CultPropConv. They are 'the persons responsible for the duties of control', as per Article 17, para. 2, lit. c, CultPropConv.

5. On the only occasion when Commissioners-General for Cultural Property have been appointed, in the wake of the Six-Day War in 1967, the Executive Board of UNESCO invited the Director-General of the organization to make the necessary arrangements (p. 513) to enable them to enjoy the privileges and immunities granted to senior officials of UN specialized agencies under the Convention on the Privileges and Immunities of the Specialized Agencies.¹⁵²

16.32

Personnel engaged in the protection of cultural property may wear an armlet bearing the distinctive emblem of cultural property, issued and stamped by the competent authorities of the contracting party concerned (Article 17, para. 2, lit. c, CultPropConv and Article 21, para. 1, RegExCultPropConv). They shall carry a special identity card bearing the distinctive emblem (Article 21, para. 2, RegExCultPropConv). Such personnel may not, without legitimate reason, be deprived of their identity card or of the right to wear the armlet (Article 21, para. 4, RegExCultPropConv).

1. The rules stated here apply only during international armed conflict. They do not reflect customary international law.

2. In contrast to Article 15 CultPropConv, the rules stated here apply also to the persons responsible for the duties of control (Article 17, para. 2, lit. b, CultPropConv and Article 21 RegExCultPropConv).

VI. Distinctive Marking of Cultural Property

16.33

The distinctive emblem of cultural property takes the form of a shield, pointed below, per saltire blue and white (Article 16, para. 1, CultPropConv; see below, Annex 'Distinctive Emblems' No. 8).

1. The emblem described here is the so-called 'distinctive emblem' of CultPropConv. What the technical heraldic language means is explained parenthetically in Article 16, para. 1, CultPropConv, namely a shield consisting of a royal-blue square, one of the angles of which

forms the point of a shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.

2. While in practice it cannot be said to matter, it is not ideal that CultPropConv's distinctive emblem differs from the 'visible signs' stipulated by Article 5 HC IX ('large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white') and from the 'distinctive flag' prescribed by Article 3 RoerichPact ('red circle with a triple red sphere in the circle on a white background'). As between parties to both CultPropConv and HC IX, however, the distinctive emblem of the former replaces the signs prescribed by the latter (Article 36 CultPropConv). The same goes *mutatis mutandis* for CultPropConv and RoerichPact (Article 36 CultPropConv).

16.34

Contracting parties may, so as to facilitate its recognition, mark cultural property with the distinctive emblem used once (Articles 6 and 17, para. 2, CultPropConv).

1. As the wording of Article 6 CultPropConv makes clear, the marking of protected cultural property with the distinctive emblem is not obligatory.

2. In principle, the emblem, used once, may be displayed on both immovable and movable cultural property, although practicality militates against the latter. The placing of the (p. 514) distinctive emblem and its degree of visibility is left to the discretion of the competent authorities of each party, and it may be displayed on flags, painted on an object, or represented in any other appropriate form (Article 20, para. 1, RegExCultPropConv).

3. In practice, the peacetime distinctive marking of cultural property under general protection is rare among parties to CultPropConv. It may be, however, that the relevant authorities have in place plans for distinctive marking if and when hostilities are imminent, as was the case with the Croatian authorities in 1991.¹⁵³

4. If a party does opt to mark cultural property in its territory, reason suggests that it should be all or nothing. While the absence of the distinctive emblem does not, as a matter of law, denote the absence of protection under CultPropConv, the assumption made in practice by an opposing party may well be *expressio unius exclusio alterius*. In this way, the selective use of the emblem, which seems not uncommon,¹⁵⁴ poses a threat to the protection of the property it is meant to facilitate.

16.35

During international armed conflict, contracting parties shall mark cultural property under special protection with the distinctive emblem repeated three times in triangular formation with one shield below (Articles 10, 16, para. 2, and 17, para. 1, lit. a, CultPropConv; see below, Annex 'Distinctive Emblems' No. 9). The same shall apply in respect of means of transport engaged exclusively in the transport of cultural property (Articles 12, para. 2, 13, para. 1, 16, para. 2 and 17, para. 1, lit. b, CultPropConv) and improvised refuges for cultural property (Articles 16, para. 2, and 17, para. 1, lit. c, CultPropConv and Article 11, para. 2, RegExCultPropConv).

The rules stated here apply expressly only during international armed conflict. They do not reflect customary international law.

16.36

During armed conflict, contracting parties may mark cultural property under enhanced protection with the distinctive emblem for cultural property under enhanced protection, which takes the form of the distinctive emblem outlined by a detached external red band (Chapter III, Section E and Annex IV Guidelines2ProtCultPropConv; see below, Annex ‘Distinctive Emblems’ No. 10).

1. The rule stated here applies during both international and non-international armed conflict. It does not reflect customary international law.
2. 2ProtCultPropConv makes no provision for the distinctive marking of cultural property under enhanced protection. But in 2015 the Sixth Meeting of the Parties to 2ProtCultPropConv endorsed amendments to Guidelines2ProtCultPropConv¹⁵⁵ creating such an emblem, specifying modalities for its optional use, and encouraging such use during armed conflict (Chapter III, Section E and Annex IV Guidelines2ProtCultPropConv).

16.37

During international armed conflict, the deliberate misuse of the distinctive emblem is prohibited (Article 38, para. 1, AP I; Article 17, para. 3, CultPropConv), as is the use for any purpose whatsoever of a sign resembling the distinctive emblem (Article 17, para. 3, CultPropConv).

(p. 515) 1. The rule stated here applies expressly only during international armed conflict. It is unclear whether the first limb reflects customary international law. The second does not.

2. The abuse of the distinctive emblem in peacetime and the peacetime use of a sign resembling the emblem are both unregulated.

Footnotes:

¹ For a fuller account of the evolution of the protection of cultural property under international humanitarian law, see R. O’Keefe, *The Protection of Cultural Property in Armed Conflict* (CUP, 2006).

² The rule on aerial bombardment was subsequently reiterated in Article 25 HRAW 1923.

³ (1919) 26 *RGDIP* 329, at 331.

⁴ 167 *LNTS* 290. The Pact, still in force among eleven states of the Americas, applies during both war, as such, and peace. It has never been invoked, and will not be considered in detail.

⁵ *LNOJ*, 19th Year, No. 11 (November 1938), 937.

⁶ See Misc. No. 12 (1946), Cmd 6964, 56, 64–5, 95–6, 129. See also *US v von Weizsaecker et al. (Ministries Case)*, 14 *TWC* 308 (1949), at 690–4, 712–15, 723–4, 725–7 (*USMT*, Nuremberg) and *US v von Leeb et al. (High Command Case)*, 11 *LRTWC* 1 (1948), at 47–8, 95 (*USMT*, Nuremberg) (convictions and exonerations in relation to seizure of artistic treasures in occupied territory). At the other end of the scale of gravity, see *Trial of Karl Lingenfelder*, 9 *LRTWC* 67 (1947) (French Permanent Military Tribunal, Metz).

⁷ CultPropConv and RegExCultPropConv, 249 *UNTS* 240.

⁸ Prot1CultPropConv, 249 *UNTS* 358.

- ⁹ The label is not in fact used in CultPropConv. Rather, Ch. I CultPropConv lays down what it calls ‘general provisions regarding protection’.
- ¹⁰ IllicitImpExpTransConv, 823 *UNTS* 231.
- ¹¹ *ICRC Commentary*, paras 2039–40, 4826–7.
- ¹² *ICRC Commentary*, paras 2046, 4832.
- ¹³ Records 1974–7, I, Part I, 213.
- ¹⁴ CDDH/SR.53, para. 4, Records 1974–7, VII, 142 (FRG).
- ¹⁵ As regards AP I, see CDDH/SR.42, para. 12, Records 1974–7, VI, 207 (Belgium); CDDH/SR.42, Annex, Records 1974–7, VI, 224 (Canada), 234 (Poland); CDDH/III/SR.15, para. 22, Records 1974–7, XIV, 121 (USSR); CDDH/III/SR.16, para. 15, Records 1974–7, XIV, 129 (Poland); CDDH/III/SR.24, paras 28–30, Records 1974–7, XIV, 221–2 (Netherlands). As regards AP II, see CDDH/SR.52, paras 2, 7, Records 1974–7, VII, 125, 126 (Belgium).
- ¹⁶ See Article 6, para. 1, lit. b(ix), Prot2WeaponsConv and Article 7, para. 1, lit. i, AmendedProt2WeaponsConv, prohibiting the use of booby traps which are in any way attached to or associated with cultural property, as well as Article 6, para. 1, lit. b(i), Prot2WeaponsConv and Article 7, para. 1, lit. a, AmendedProt2WeaponsConv, prohibiting the same as regards internationally protected signs and signals, which include the emblem of cultural property.
- ¹⁷ For a list of international and national criminal trials in respect of these acts, see R. O’Keefe *et al.*, *Protection of Cultural Property: Military Manual* (UNESCO/IIHL, 2016), App. IV. The process of review of CultPropConv was initially inspired by the Iran–Iraq War of 1980–88.
- ¹⁸ Prot2CultPropConv, 2253 *UNTS* 212.
- ¹⁹ See Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (16 December 2019) (Guidelines2ProtCultPropConv). Guidelines2ProtCultPropConv do not seek to provide guidance on the implementation of any rules of 2ProtCultPropConv governing the conduct of hostilities and occupation.
- ²⁰ A fuller account justifying this chapter’s conclusions on points of customary international law can be found in O’Keefe, above (n. 1). See also *CIHL*, Chapter 12.
- ²¹ Purely procedural rules, institutional arrangements, and criminal sanctions are not examined. Reference throughout to numbered or lettered documents is to UNESCO documents unless otherwise specified or obvious.
- ²² Cultural objects not qualifying for CultPropConv’s protection remain protected by the 1907 rules themselves and as civilian objects.
- ²³ The Russian text, which is also authoritative, is equally unhelpful, since the key phrase can mean either ‘every people’ or ‘each people’.
- ²⁴ See also M. Frigo, *La protezione dei beni culturali nel diritto internazionale* (Giuffrè, 1986), 98, 100, 272; J. H. Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80 *AJIL* 831 at 837 n 2; A. Przyborska-Klimczak, ‘Les notions des “biens culturels” et du “patrimoine culturel mondial” dans le droit international’ (1989–90) 18 *Polish Yearbook of International Law* 47 at 53; J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection* (UNESCO/Dartmouth, 1996), 50; D. Sabelli, ‘La Convenzione sul patrimonio mondiale: limiti giuridico-politici’, in M. C. Ciciriello (ed.), *La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla Convenzione dell’UNESCO* (Editoriale Scientifica, 1997), 143 at 149;

K. Chamberlain, *War and Cultural Heritage: An Analysis of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two Protocols* (Institute of Art and Law, 2004), 29; IIHL, *The Manual on the Law of Non-International Armed Conflict With Commentary* (IIHL, 2006), 57; R. Wolfrum, 'Cultural Property, Protection in Armed Conflict', in *MPEPIL*, at para. 8; S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, 2012), 376; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (CUP, 2016), para. 555; A. Annoni and F. Salerno, *La tutela internazionale della persona umana nei conflitti armati* (Cacucci, 2019), 207–8, by implication. See, too, *Prosecutor v Prlić et al.*, IT-04-74-A, Appeals Chamber, Judgment, 29 November 2017, diss. op. Pocar, para. 14 ('cultural property belonging to any people'). But cf. A. P. V. Rogers, *Law on the Battlefield*, 3rd edn (Manchester University Press, 2012), 204–5 (undecided, although nonetheless referring to 'tens of thousands of items of movable property and thousands of items of immovable property in each state'); L. C. Green, *The Contemporary Law of Armed Conflict*, 3rd edn (Manchester University Press, 2008), 179 n. 208.

²⁵ See, most explicitly, CLT-95/WS/13, 19 (Bulgaria), 31, 34 (Iran), 35 (Liechtenstein), 36 (Madagascar), 42 (Slovenia), 43–4 (Switzerland), 48 (Ukraine); CC/MD/11, 16 (India), 27 (Netherlands), 38 (USSR); CLT/MD/3, 21 (Austria), 24 (Byelorussian SSR); CC/MD/41, 19 (Hungary), 20 (Jordan), 25 (Niger); SHC/MD/6, 16 (Luxembourg); SHC/MD/1, 32–3 (San Marino); CLT-13/8.COM/CONF.203/9, para. 198 (Finland). See also Article 2, lit. b and c, and Article 3, para. 3, Federal Act on the Protection of Cultural Property in the Event of Armed Conflict, Disaster or Emergency Situations of 20 June 2014 (Switzerland).

²⁶ CLT/MD/3, 15 (Nagendra Singh). See also CLT/MD/3, 13 (Manfred Lachs). This idea was expressed during the drafting of CultPropConv: see Records 1954, paras 136 (USSR), 146 (FRG). It is also echoed in some parties' implementation reports: see CC/MD/41, 15 (Byelorussian SSR), 20 (Jordan), 27 (USSR); CLT-95/WS/13, 31, 34 (Iran), 48 (Ukraine). Indeed, Guidelines2ProtCultPropConv, para. 33, makes clear that '[c]ultural property of national ... value' may satisfy even the stricter standard of 'the greatest importance for humanity' on which Article 10, lit. a, 2ProtCultPropConv conditions the grant to cultural property of enhanced protection. See below, Section 16.17.

²⁷ See, e.g., 7 C/PRG/7, Annex I, 7; CBC/4, 7 (Israel); Records 1954, paras 163 (Israel), 164 (France), 869 (Denmark), 1201 (Italy). See also H. Niecówna, 'Sovereign Rights to Cultural Property' (1971) 4 *Polish Yearbook of International Law* 239 at 250; S. Nahlik, 'Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 1954: General and Special Protection', in IIHL (ed.), *The International Protection of Cultural Property: Acts of the Symposium organized on the Occasion of the 30th Anniversary of the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts* (Fondazione Europea Dragan, 1986), 87 at 89, 95; A. Przyborowska-Klimczak, above (n. 24), at 53; M. Cornu, *Le droit culturel des biens. L'intérêt culturel juridiquement protégé* (Bruylant, 1996), 159; Toman, above (n. 24), 50; M. Seršić, 'Protection of Cultural Property in Time of Armed Conflict' (1996) 27 *NethYIL* 3 at 9; C. Johannot-Gradis, 'Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?' (2015) 97 *IRRC* 1253 at 1268 n. 67; M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar, 2019), para. 10.175.

²⁸ See CLT/MD/3, 21 (Austria, 76,890); CC/MD/11, 27 (Netherlands, 43,000); CLT-95/WS/13, 19 (Bulgaria, 39,412), 24 (Germany, 10,000 in former FRG alone, plus 2,000 museums, archives, libraries, and archaeological sites); CC/MD/11, 20 (Iraq, 10,000 archaeological sites alone); CC/MD/11, 35 and CLT-95/WS/13, 43 (Switzerland, 8,000); CC/MD/41, 15 (Byelorussian SSR, more than 6,000); CLT-95/WS/13, 66 (Slovenia, 5,550), although see also CLT-13/8.COM/CONF.203/9, para. 42 (Slovenia, 30,000); CLT-13/8.COM/CONF.203/9, paras 8–11 (Belgium, 21,111 in total over the different regions and communities), para. 32

(Jordan, 10,000). See also UK Department for Digital, Culture, Media, and Sport (DDCMS), *Protection of cultural property in the event of armed conflict. Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, its Protocols and the Cultural Property (Armed Conflicts) Act 2017* (November 2017), paras 1.7–1.8, with an ‘indicative and non-exhaustive’ list of cultural property that the UK government considers as meeting the definition in Article 1 CultPropConv ‘and is therefore protected by the Convention and Protocols’ (amounting to over 14,000 buildings and sites).

²⁹ See CLT-95/WS/13, 20 (Bulgaria, 222 museums and art galleries); UK DDCMS, above (n. 28), paras 1.7–1.8 (UK, around 230 museums, galleries, libraries, and archives).

³⁰ 27 C/Resolution 3.5, para. 3. See also 142 EX/Decision 5.5.2, para. 7 lit. c; 142 EX/15, para. 8.

³¹ The relevant provisions of Prot2WeaponsConv and AmendedProt2WeaponsConv also use this terminology.

³² CDDH/III/224, Records 1974–7, XV, 333. See also CDDH/215/Rev.1, para. 69, Records 1974–7, XV, 278.

³³ In Russian, Article 53 AP I and Article 16 AP II also refer to the cultural or spiritual heritage of ‘peoples’, while Article 1, lit. a, CultProtConv refers to the cultural heritage of, alternatively, ‘every people’ or ‘each people’. Note that, while the Arabic and Chinese texts of AP I and AP II are also authentic, the authentic texts of CultPropConv are limited to English, French, Russian, and Spanish.

³⁴ *ICRC Commentary on the Additional Protocols*, para. 4844. See also J. Toman, ‘La protection des biens culturels en cas de conflit armé non international’, in W. Haller et al. (eds), *Im Dienst an der Gemeinschaft. Festschrift für Dietrich Schindler zum 65. Geburtstag* (Helbing & Lichtenhahn, 1989), 311 at 333–4; Sivakumaran, above (n. 24), 376.

³⁵ *ICRC Commentary on the Additional Protocols*, para. 2064 n. 23.

³⁶ *Prosecutor v Kordić and Čerkez*, IT-95–14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 91, citing *ICRC Commentary on the Additional Protocols*, para. 2064. This was followed in *Prosecutor v Strugar*, IT-01–42-T, Trial Chamber, Judgment, 31 January 2005, para. 307, which left open ‘[w]hether there may be precise differences’. See also para. 3 of the Russian Federation’s declaration of 2 March 2005, 2308 UNTS 134, on becoming party to AmendedMinesProt, Article 7, para. 1, lit. i of which uses the expression ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’ as found in Article 53 AP I and Article 16 AP II. The paragraph states: ‘For the purposes of interpreting subparagraph 1(i) of article 7, of Protocol II, the Russian Federation understands the cultural or spiritual heritage of peoples as cultural property in the terms of article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.’ See too G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 2nd edn (CUP, 2016), para. 18.3, although cf. para. 18.2.2.

³⁷ See also *ICRC Commentary on the Additional Protocols*, paras 2068, 4838; K. J. Partsch, ‘Protection of Cultural Property’, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, 1st edn (OUP, 1995), 377 at 382.

³⁸ CDDH/III/17 and Rev.1, Records 1974–7, III, 213.

³⁹ CDDH/III/GT/95, Records 1974–7, IV, 65. See also CDDH/III/SR.49, paras 13, 14, Records 1974–7, XV, 110 (Greece); CDDH/III/SR.24, para. 29, Records 1974–7, XIV, 222 (Netherlands).

- ⁴⁰ CDDH/236/Rev.1, para. 62, Records 1974-7, XV, 395. See also CDDH/III/353, Records 1974-7, XV, 437.
- ⁴¹ *ICRC Commentary on the Additional Protocols*, para. 2065.
- ⁴² *Ibid.*, paras 2065, 4843.
- ⁴³ *ICRC Commentary on the Additional Protocols*, para. 2067. Places of worship not constituting the cultural or spiritual heritage of peoples are protected as civilian objects by Article 52 AP I, as made clear by the reference to them in Article 52, para. 3.
- ⁴⁴ See, e.g., CDDH/III/SR.59, para. 61, Records 1974-7, XV, 219 (Ireland).
- ⁴⁵ See CDDH/SR.42, Annex, Records 1974-7, VI, 227. See also CDDH/SR.41, para. 167, Records 1974-7, VI, 171 (Holy See). The relevant amendment was proposed by Saudi Arabia, the Holy See, Italy, and a coalition of Islamic states.
- ⁴⁶ *ICRC Commentary on the Additional Protocols*, para. 4844. See also, not dissimilarly, *Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (Eritrea/Ethiopia), Partial Award* (2004) 135 ILR 295 at 330, para. 113; *UK Manual*, para. 5.25.1; *US Manual*, para. 5.18.10; J. d'Aspremont and J. Hemptinne, *Droit international humanitaire* (Pedone, 2012), 248-9. See, too, Rogers, above (n. 24), 205-7 (undecided).
- ⁴⁷ So too the statements in *ICRC Commentary on the Additional Protocols*, paras 2064 and 4840, based solely on an intervention by the Greek delegate at the diplomatic conference (CDDH/III/SR.59, para. 69, Records 1974-7, XV, 220), subsequently cited in *Kordić*, Appeals Chamber Judgment, para. 91.
- ⁴⁸ CDDH/215/Rev.1, para. 69, Records 1974-7, XV, 278. See also CDDH/III/224, Records 1974-7, XV, 333.
- ⁴⁹ Vol. I *CIHL*, 130, 132.
- ⁵⁰ Vol. I *CIHL*, 130.
- ⁵¹ Vol. I *CIHL*, 130, especially n. 19.
- ⁵² See Vol. II/1 *CIHL*, chap. 12, paras 180 (Canada), 193 (FRG), 220 (UK), 227 (US). The statement by the Netherlands cited, as reproduced and in the original, makes no reference either to Article 1 CultPropConv or to Article 27 HagueReg, and the Australian statement cited deals with a different question altogether.
- ⁵³ For possible aids to this determination, see *UNESCO-IIHL Manual*, above (n. 17), paras 46-74, 74-7.
- ⁵⁴ See also *ICRC Commentary on the Additional Protocols*, para. 2079, n. 30; Toman, above (n. 24), 389; *UK Manual*, para. 5.26.8.
- ⁵⁵ *Prosecutor v Brđanin*, IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 337; *Prlić*, Appeals Chamber Judgment, para. 411. See also Article 8, para. 2 lit. b(ix) and Article 8, para. 2, lit. e(iv), ICC Statute, providing for the war crime of directing attacks against historic monuments 'provided they are not military objectives'.
- ⁵⁶ '[A]nd even then attacks on it may not be necessary': *UK Manual*, para. 5.26.3 n. 120. See also *Prlić*, Appeals Chamber Judgment, diss. op. Pocar, para. 8. See also below, Section 16.02, paras 6 and 10.
- ⁵⁷ See also *ICRC Commentary on the Additional Protocols*, para. 2079.
- ⁵⁸ See, e.g., Canada, statement on ratification of AP I, 20 November 1990, 1591 UNTS 462 at 465; France, statement on accession to AP I, 11 April 2001, para. 13, (2001) 83 *IRRC* 549 at 552; Ireland, statement on ratification of AP I, 19 November 1999, 2073 UNTS 28, 30; Italy, statement on ratification of AP I, 27 February 1986, 1425 UNTS 438 at 439; Netherlands, statement on ratification of AP I, 26 June 1987, para. 8, (1987) 69 *IRRC* 444 at 445; UK, statement on ratification of AP I, 28 January 1998, 2020 UNTS 75, 77; *US Manual*,

para. 5.18.10. See also *ICRC Commentary on the Additional Protocols*, para. 2079; Toman, above (n. 24), 390; Wolfrum, above (n. 24), para. 17; Solis, above (n. 36), para. 18.3, by implication.

⁵⁹ See also Dinstein, above (n. 24), paras. 572–73.

⁶⁰ See Article 30, para. 2, Vienna Convention on the Law of Treaties.

⁶¹ See also *Strugar*, Trial Chamber Judgment, para. 309; *ICRC Commentary*, para. 2072 n. 28; Toman, above (n. 24), 389; E. David, *Principes de droit des conflits armés*, 6th edn (Bruylant, 2019), para. 2.82; R. Kolb, *Ius in bello. Le droit international des conflits armés*, 2nd edn (Basel/Brussels: Helbing & Lichtenhahn/Bruylant, 2009), 282; Sivakumaran, above (n. 24), 379; Dinstein, above (n. 24), para. 564.

⁶² Diplomatic Conference on a Draft Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 15–26 March 1999, Daily précis of the Diplomatic Conference, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/hague_1999_diploconf_precis_en_20120523.pdf. The full *travaux préparatoires* of Prot2CultPropConv remain publicly unavailable. But see the excerpts reproduced in J. Toman, *Cultural Property in War: Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (UNESCO, 2009), 105–10.

⁶³ HC/1999/5/Add.5, draft Article 4 (eventual Article 6 Prot2CultPropConv).

⁶⁴ Précis, Wednesday 24 March 1999, in Diplomatic Conference on a Draft Second Protocol, Daily précis, above (n. 56), sixteenth unnumbered page. See also J. M. Henckaerts, ‘New rules for the protection of cultural property in armed conflict’ (1999) 81 *IRRC* 593 at 602.

⁶⁵ Précis, Wednesday 24 March 1999, in Diplomatic Conference on a Draft Second Protocol, Daily précis, above (n. 58), seventeenth unnumbered page.

⁶⁶ Canada, for example, annexed to its instrument of accession to Prot2CultPropConv a statement declaring its understanding ‘that the definition of a military objective in Article 2(f) is to be interpreted the same way as Article 52(2) of Additional Protocol I to the Geneva Conventions of 1949’ and ‘that under Article 6(a)(i), cultural property can be made into a military objective because of its nature, location, purpose or use’, http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES.

⁶⁷ See below in this Section, para. 8.

⁶⁸ Art. 57, para. 3, AP I provides that when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be the one which, if attacked, may be expected to cause the least danger to civilian lives and to civilian objects. Cultural property is a species of civilian object.

⁶⁹ *Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25, & 26* (Eritrea/Ethiopia), Partial Award, 135 ILR 565 at para. 120, endorsing *UK Manual*, para. 5.4.4, in turn endorsing *ICRC Commentary on the Additional Protocols*, para. 2022.

⁷⁰ See also *ICRC Commentary on the Additional Protocols*, para. 2078. For example, the defending German forces can be taken to have made passive or *de facto* use of the abbey of Monte Cassino in the Second World War.

⁷¹ See also Henckaerts, above (n. 65), at 602–6. Indeed, *UK Manual*, para. 5.26.3 n. 120, goes so far as to state that waiver under Article 4, para. 2, CultPropConv ‘only arises where

the enemy unlawfully uses such property for military purposes'. See also Wolfrum, above (n. 24), para. 14.

⁷² See in this context the finding, not challenged on appeal, in *Prosecutor v Prlić et al.*, IT-04-74-T, Trial Chamber, Judgment, 29 May 2013, vol. 3, para. 1582, that, on account of its use by the adversary for reinforcement and resupply, the Old Bridge at Mostar constituted a military objective at the time of the attack which destroyed it in 1993.

⁷³ Henckaerts, above (n. 65), at 603–6, notes agreement among delegations to the 1999 Diplomatic Conference on a Draft Second Protocol to the 1954 Hague Convention that neither the nature nor the purpose of cultural property could in practice ever turn it into a military objective, with the debate focusing instead on whether, in addition to its use, the mere location of cultural property could be practically relevant.

⁷⁴ See also *Prlić*, Appeals Chamber Judgment, diss. op. Pocar, para. 16; *UK Manual*, para. 5.26.8; Rogers, above (n. 24), 186–7.

⁷⁵ Rogers, above (n. 24), 186.

⁷⁶ See also Johannot-Gradis, above (n. 27), at 1262–3. For other, hypothetical examples, see *Prlić*, Appeals Chamber Judgment, diss. op. Pocar, para. 16; *UNESCO-IIHL Manual*, above (n. 17), para. 94.

⁷⁷ See *US Manual*, para. 5.18.4 nn 506, 507, and *UNESCO-IIHL Manual*, above (n. 17), paras 71–82, 95–101, both highlighting best practice.

⁷⁸ For examples of best practice in the application of these precautions, see *US Manual*, para. 5.18.5.1 n. 516; *UNESCO-IIHL Manual*, above (n. 17), paras 116–24.

⁷⁹ See also Johannot-Gradis, above (n. 27), 1263; E.-C. Gillard, 'Proportionality in the Conduct of Hostilities. The Incidental Harm Side of the Assessment', Chatham House Research Paper (London: Royal Institute of International Affairs, 2018), paras 71, 152.

⁸⁰ Both points are all the more telling in the case of cultural property under enhanced protection, which is by definition 'cultural heritage of the greatest importance for humanity', in the words of Article 10, lit. a, 2ProtCultPropConv (see below, Section 16.17).

⁸¹ Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War (1992) 31 ILM 612 at 626.

⁸² See also M. Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (The Hague/Boston/London: Nijhoff, 1982), para. 2.5.2; *ICRC Commentary on the Additional Protocols*, para. 2070; Toman, above (n. 24), 389.

⁸³ See Art. 52, para. 2, AP I, as consonant with custom. The customary definition of the term 'attack' comports with Art. 49, para. 1, AP I ('acts of violence against the adversary, whether in offence or defence').

⁸⁴ Covering memorandum to General Order No. 68, 29 December 1943, reproduced in *Hansard*, HC, Vol. 396, col. 1116, 1 February 1944. See also *US Manual*, paras 5.18.3.1, 5.18.1.

⁸⁵ CLT-97/CONF.208/3, para. 5(ii).

⁸⁶ 155 EX/51, Annex, para. 14.

⁸⁷ Partsch, above (n. 37), 388. See also *UK Manual*, paras 5.26.3 n. 120, 5.26.8; Rogers, above (n. 24), 186–7; R. Wolfrum, 'Protection of Cultural Property in Armed Conflict' (2003) 32 *IsrYHR* 305 at 325. See, too, H. Grotius, *De Jure Belli ac Pacis*, first published 1625, text

of 1646 translated by F. W. Kelsey (Clarendon Press, 1925), Book II, Chapter 22, section 6 ('Advantage does not confer the same right as necessity').

88 Partsch, above (n. 37), 385, speaks in this respect of 'indirect' use. See also German Federal Ministry of Defence, *Law of Armed Conflict: Manual*, Joint Service Regulation (ZDv) 15/2 (1 May 2013), para. 904.

89 See also *US Manual*, para. 5.18.3 ('it is prohibited to use deliberately the threat of potential harm to cultural property ... to shield, favo[u]r, or impede military operations'); Dinstein, above (n. 24), para. 556.

90 See also *US Manual*, para. 5.18.3 (billeting military personnel in buildings constituting cultural property).

91 Rogers, above (n. 24), 188 n. 101. See, similarly, *US Manual*, para. 5.18.3 (placing artillery, mortars, or anti-aircraft systems in the grounds of cultural property).

92 See *UNESCO-IIHL Manual*, above (n. 17), paras 134, 182-3, for hypothetical examples of such use and for an example of best practice in ensuring its non-occurrence.

93 So, for example, the former Ukrainian SSR reported that, even in peacetime, Soviet armed forces were not allowed to be quartered, to stock arms, or to install military targets in the immediate surroundings of historic monuments or groups of historic monuments, 'as stated in Article 4, paragraph 1 of the Convention': CC/MD/11, 38. That certain provisions of the CultPropConv apply in peacetime is made clear in Article 18, para. 1.

94 *UK Manual*, para. 5.25.3, emphasis omitted.

95 German Federal Ministry of Defence, *Der Schutz von Kulturgut bei bewaffneten Konflikten*, ZDv 15/9 (15 July 1964), 16, cited in Rogers, above (n. 24), 187.

96 Records 1954, para. 1170. See also Toman, above (n. 24), 70, 75; *UK Manual*, paras 5.26.3 n. 120, 5.26.8.

97 See above, Section 16.02.

98 *ICRC Commentary on the Additional Protocols*, para. 2078.

99 See, e.g., Guidelines2ProtCultPropConv, para. 43, applying the same principle to cultural property under enhanced protection.

100 See, e.g., *US Manual*, paras 5.18.6.1, 5.18.8.2; *IIHL NIAC Manual*, above (n. 24), 58; C. Phuong, 'The Protection of Iraqi Cultural Property' (2004) 3 *ICLQ* 985 at 985-7; Sivakumaran, above (n. 24), 378; Y. Dinstein, *The International Law of Belligerent Occupation*, 2nd edn (CUP, 2019), paras 642-3. See, generally, *UNESCO-IIHL Manual*, above (n. 17), paras 157-61.

101 For the use of identical *a fortiori* reasoning to read a prohibition on commission into an obligation to prevent, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, *Merits, Judgment*, ICJ Reports 2007, 43 at para. 166. That Article 4, para. 3, CultPropConv implies a prohibition on theft, pillage, misappropriation, confiscation, or vandalism of cultural property by a party to the conflict is uncontested.

102 Toman, above (n. 24), 71; *US Manual*, para. 5.18.6.2.

103 See below, Section 16.29.

104 *UNESCO-IIHL Manual*, above (n. 17), para. 143. See also, generally, *ibid.*, paras 142-51, highlighting best practice.

- 105** See also SC Res. 2347 (2017), para. 16; Article 1, lit. vi, UNESCO-ICRC Memorandum of Understanding, 29 February 2016.
- 106** See, in this connection, Article 12 Federal Law No. 520.3 of 20 June 2014 on the Protection of Cultural Property in the Event of Armed Conflict, Natural Disaster or Emergency (Switzerland); Protect and Preserve International Cultural Heritage Act 2016 (US); Article 56 Law No. 2016-925 of 7 July 2016 on Creative Freedom, Architecture and Heritage (France); Section 28 Cultural Property (Armed Conflicts) Act 2017 (UK). Note that, while the provisions of binding international agreements are usually called ‘articles’, Prot1CultPropConv refers to its provisions as ‘paragraphs’.
- 107** Indeed, see *UK Manual*, para. 5.26.4 n. 123 ([‘t]he actual protection is the same as for [cultural] property under ordinary protection’); *US Manual*, para. 5.18.8, citations omitted ([‘t]he standards governing the protection of such cultural property are essentially the same as the standards governing the protection of cultural property under customary law and the protection afforded all cultural property under the 1954 Hague Cultural Property Convention’).
- 108** See also *US Manual*, para. 5.18.8.
- 109** Toman, above (n. 24), 108.
- 110** See International Register of Cultural Property under Special Protection, CLT/HER/CHP (23 July 2015). The Register is maintained by the Director-General of UNESCO, in accordance with Articles 12–16 RegExCultPropConv.
- 111** For a fuller account, see O’Keefe, above (n. 1), 140–62.
- 112** Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 15–26 March 1999), Summary Report, <http://unesdoc.unesco.org/images/0013/001332/133243eo.pdf> (June 1999), para. 15.
- 113** See International List of Cultural Property under Enhanced Protection (2019), comprising cultural property in Azerbaijan, Belgium, Cambodia, Cyprus, the Czech Republic, Georgia, Italy, Lithuania, and Mali.
- 114** Diplomatic Conference on the Second Protocol, Summary Report, above (n. 111), para. 22. See also Toman, above (n. 62), 231.
- 115** *ICRC Commentary on the Additional Protocols*, para. 2078.
- 116** This is leaving aside Art. 13, para. 1, lit. a, Prot2CultPropConv, not considered here.
- 117** E. Clément and F. Quinio, ‘The role of the 1954 Hague Convention in protecting Cambodian cultural property during the period of armed conflict’ (2004) 854 *IRRC* 389 at 394.
- 118** *UNESCO-IIHL Manual*, above (n. 17), para. 111.
- 119** See above, Section 16.07.
- 120** See, e.g., *The Marquis de Somerueles*, Stewart’s Vice-Admiralty Reports (Nova Scotia, 1813), 482.
- 121** See above, Section 16.04.
- 122** 58(3) PD 443 (2004).
- 123** *Hess v Commander of the IDF in the West Bank*, HCJ 10356/02, Interim decision, 12 February 2003.
- 124** See above, Section 16.06.

- ¹²⁵ *UNESCO-IIHL Manual*, above (n. 17), para. 182.
- ¹²⁶ See, e.g., *Candu v Minister of Defence* (1989) 43(1) PD 738, especially at 742; *Shikhrur v Military Commander of the Judea and Samaria Region* (1990) 44(2) PD 233 at 234-5; *Hess v Commander of IDF Forces in the West Bank* (2004) 58(3) PD 443, para. 17. Consider also the factual background to *Ruidi and Maches v Military Court of Hebron* (1970) 24(2) PD 419, involving the enforcement by the Israeli occupation authorities in the occupied West Bank of the export licence requirement of the Jordanian Antiquities Law (No. 51) of 1966.
- ¹²⁷ See above, Section 16.07. For best practice in the context of belligerent occupation, see *UNESCO-IIHL Manual*, above (n. 17), paras 185-6, 190-4.
- ¹²⁸ An example is the obligation under Article 4, para. 3, *CultPropConv* to prohibit, prevent and, if necessary, put a stop to all forms of theft, pillage, misappropriation, or vandalism of cultural property in the territory (see above, Section 16.25).
- ¹²⁹ For best practice in this regard, see *UNESCO-IIHL Manual*, above (n. 17), para. 196.
- ¹³⁰ 7 C/PRG/7, Annex I, 9.
- ¹³¹ For best practice in this regard, see *UNESCO-IIHL Manual*, above (n. 17), paras 204-5.
- ¹³² Records 1954, paras 1912-15.
- ¹³³ Records of the General Conference, Ninth Session, New Delhi 1956: Resolutions, 40. Article 32 provides that, in the event of armed conflict, any member state of UNESCO occupying the territory of another state should refrain from carrying out archaeological excavations in the occupied territory.
- ¹³⁴ 7 C/PRG/7, Annex I, 8.
- ¹³⁵ 7 C/PRG/7, Annex I, 8.
- ¹³⁶ 7 C/PRG/7, Annex I, 8, emphasis omitted.
- ¹³⁷ CLT-95/WS/13, 22.
- ¹³⁸ See CC/MD/11, 15 (FRG). See also, in this light, Article 4 *RoerichPact*, providing for an obligatory system of this nature.
- ¹³⁹ CL/484, Annex, 14.
- ¹⁴⁰ CL/484, Annex, 11.
- ¹⁴¹ SHC/MD/1, 34. See also the recommendation to this end in Final Communiqué of the NATO-Partnership for Peace (PfP) Conference on Cultural Heritage Protection in Wartime and in State of Emergency (21 June 1996), para. 3.5, and the analogous suggestion in M. Dutli (ed.), *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts (Geneva, 5-6 October 2000)* (ICRC, 2002), 178.
- ¹⁴² SHC/MD/1, para. 13.
- ¹⁴³ CLT-95/WS/13, 43.
- ¹⁴⁴ CLT-95/WS/13, 22.
- ¹⁴⁵ CLT/CH/94/608/2, 6.
- ¹⁴⁶ CLT/CH/94/608/2, 6.
- ¹⁴⁷ For the various possibilities, see *UNESCO-IIHL Manual*, above (n. 17), para. 68.
- ¹⁴⁸ See *UNESCO-IIHL Manual*, above (n. 17), para. 69 for examples. In Italy, the role is assigned to the *Carabinieri Tutela Patrimonio Culturale*, the specialized cultural heritage protection unit within the *Arma dei Carabinieri*, a militarized police force constituting a branch of the armed forces, in connection with which see Italy-UNESCO Memorandum of

Understanding on the Italian National 'Taskforce in the framework of UNESCO's Global Coalition Unite4Heritage', 16 February 2016.

149 See above, Section 16.30.

150 See, e.g., *US Manual*, para. 4.14.

151 *US Manual*, para. 4.14.1; Rogers, above (n. 24), 190.

152 77 EX/Decision 4.4.4, para. 5, lit. a, referring to 33 UNTS 261.

153 CLT-95/WS/13, 22.

154 For example, in 1991, the Croatian authorities affixed the emblem to 794 historic buildings, a fraction of the total immovable cultural heritage in the republic: CLT-95/WS/13, 22.

155 Decision 6.SP 2, 9 December 2015.

(p. 205) 9 Protection of the Natural Environment

1. Introduction

International Humanitarian Law (IHL) establishes limitations on warfare to protect the natural environment from extremely serious damage and to prevent unnecessary or wanton harm. IHL protection of the environment developed from the principle of protection of civilians, and it has similar motives and goals. This chapter describes a legal regime that is undergoing development. All three temporal branches of international law relating to armed conflict—the laws governing resort to armed force (*jus ad bellum*), the conduct of armed conflict (*jus in bello*, or IHL), and activities in the post-conflict period (*jus post bellum*)—address the natural environment. Protection of the environment in relation to land wars and the terrestrial environment is the most fully addressed, the marine environment less so. The International Law Commission (ILC) termed the overall topic ‘Protection of the Environment in Relation to Armed Conflict’ (PERAC).¹

The central rules of IHL that are well accepted as customary law provide protection to aspects of the environment that can be considered public or private property, or that are essential to human survival. These aspects of PERAC are firmly rooted in the earliest law of war protections for drinking water, crops, and cultural elements, and in modern domestic environmental law and social norms. Yet protection of the environment during armed conflict as a specific legal obligation is a sufficiently recent international norm that its status as binding law has been more contested than early humanitarian commitments like neutrality of medical personnel. This reflects the tension between recognition of the importance of ecological integrity to peace and the interests of states in retaining freedom in their conduct of military operations. Environmental protection’s status as customary international law has been challenged by those who take a restricted view of international commitments other than those made in treaties.² Some important military powers and some of the most active belligerents in recent years are not parties to all relevant treaties, so it is important to examine the extent to (p. 206) which the treaty norms are applied by all states and to evaluate the status of norms as customary international law.³

Notwithstanding this position, political and operational considerations—including respect for the norms of host countries and allies—may counsel adoption of rules that others hold as binding. Interoperability is an important consideration for allied military forces, which extends to law as well as technology.⁴ Allies coordinate their approaches to international law, which sometimes means that a state agrees to apply treaty norms, although it is a non-party.⁵

It is also useful to remember that responsibility and liability can be incurred under international law obligations other than IHL, triggering the consequences of state responsibility.⁶ Reparations bodies may apply a much more inclusive standard than IHL. For example, Iraq paid over US \$5 billion for environmental damage, including damage from military fortifications, land and submarine mines, water pollution, and hazardous waste, as a result of the 1990–1991 Gulf War.⁷ Uganda incurred liability for the consequences of its looting, pillage, and exploitation of the Democratic Republic of the Congo’s natural resources, in violation of IHL.⁸

To understand and apply IHL in this context, it is necessary to understand what drives the evolution of these legal norms. Concern for the environment—whether environmental integrity as a whole, pollution threats to public health, or constituents like elephants, gorillas, or marshlands—is increasingly influential in the interpretation and application of legal rules. This is partly because we have a better scientifically based understanding of how environmental systems function; partly because we fill the environment more densely now—the human population grew from about 1.2 billion at the time of Francis Lieber’s

General Order No 100 to over 7 billion people today; partly because we now have technology that enables vast environmental destruction; and partly because military officers and citizens (p. 207) have adopted an environmental protection ethic.⁹ The rules governing armed forces are also influenced by changes in domestic law, which impose environmental accountability on military officers for their activities whether or not related to armed conflict.¹⁰

Since the primary purpose of IHL is to prevent unnecessary suffering, the rules call for difficult predictive decisions by legal advisers and planners. Tools to manage uncertainty about the potential environmental impacts of military activities include remote sensing, advanced scientific information, and the increasingly standard practice of environmental assessment. IHL rules are relevant for post-conflict accountability as well. Compensation commissions, transitional justice reviews, and war crimes trials will assess the extent of environmental damage, and the intent or knowledge of responsible parties. Military forces conduct their own reviews. The retrospective accounting will generally focus on actual damage, although in principle acting with the intent to cause harm or simply the knowledge that great environmental harm would be a likely outcome may be culpable even if no or only slight damage actually occurs.¹¹

The effect of breach of IHL obligations may be criminal sanctions or reparations. Reparations may include satisfaction; a declaration of fault; restitution; or compensation. A new approach is taken in the revised version of the African Convention on the Conservation of Nature and Natural Resources article XV, paragraph 1d, which requires parties to restore and rehabilitate the damage. A similar focus on restoring the environment is found in the UNCC's Follow-up Programme.¹²

Section 2 of this chapter discusses the definition of 'environment' for the purposes of IHL. Section 3 'Damage to the Environment' turns to the application of the IHL principles of distinction, necessity, and proportionality, followed by section 4 'Environment as Weapon' on the customary and treaty law restricting the use of methods and means of warfare. Treatment of some kinds of environmentally damaging attacks as war crimes follows in section 5 'War Crimes'. The concept of solidarity and its application for environmental matters during armed conflict is next in section 6 'Protection of the Environment by Third Parties: Solidarity, followed by section 7 'Non-International Armed Conflict'. Finally, section 8 'Status of International Environmental Law and Domestic Law—Conflicts of Laws' addresses the treatment of international and domestic environmental law and problems of the *lex specialis* rules applicable to IHL, human rights, and international environmental law.

2. Definition of 'environment' in IHL

The intention of this section is to illustrate what we should identify as potentially protected environment. The lack of a commonly agreed definition of 'environment' in IHL should (p. 208) not pose a serious problem.¹³ An initial legal analysis of a planned activity should consider the effects that it may have in the relevant region on the 'environment' broadly defined, including soil, land, water, air, the living and non-living elements, and physical processes.¹⁴ Relevant legal rules may apply to some or all of these aspects of the environment, as discussed below. The use of 'natural environment' rather than 'environment' was an artificial distinction of mainly academic interest and is not repeated here.¹⁵ A broad definition is particularly important in this transitional period because developing norms are leading to broader coverage of environmental features than was common in the nineteenth and early twentieth centuries.

Modern warfare planning must take account of the traditional elements of the environment addressed by IHL—water, crops, extractive resources such as coal, and the land that is part of the urban fabric—as well as specially protected areas and the modern elements that are addressed by newer treaties, judicial decisions, and state practice—such as World Heritage sites, wildlife, and ecosystem services.¹⁶ The latter aspects of environment were intended to

be invoked by the expression 'natural environment', but it will generally be impossible and unnecessary to draw a distinction.¹⁷ The International Court of Justice (ICJ) gave this eloquent description of environment in its *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion: 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.¹⁸ This poetically captures the modern meaning, (p. 209) which has advanced well beyond early military codes concerned with crops and drinking water.¹⁹

An example may be helpful. Imagine a hypothetical forest. It conceals enemy movements, and is therefore a military objective. There are people living in parts of the forest, and those areas are therefore civilian objects, private, and public property. The forest ecosystem includes a river that is kept pure by multiple interrelated living and non-living components, systems, and processes; the river is the sole drinking water supply for the forest peoples and for other humans downstream. The river is a civilian object. The forest ecosystem that provides the water and keeps it pure is therefore logically also a civilian object. The forest is, of course, a source of firewood and timber, which are useful, have commercial value, and which may be civilian objects or military objectives.²⁰

A. Legal Categorization: Civilian or Military Object?

Discrimination between civilian objects and legitimate military objectives is a fundamental legal obligation; therefore, an adviser, planner, decision-maker, or executer needs to know into which legal category the natural environment falls. This is, however, a grey area. It has been said that although the principle of discrimination is 'a major part of the foundation on which the law of war is built, it is one of the least codified portions of that law'.²¹ This is particularly true for the treatment of the environment as a civilian object. Some IHL rules apply to particular environments, leaving gaps or doubts about coverage. Environment that was not associated with humans as property or as a resource essential to human survival was, until the late twentieth century, simply not thought of at all. With the evolution of norms, the value of non-market resources, ecosystem services, and other instances of 'pure environment' is now acknowledged.

The environment is *ab initio* considered a civilian object. Like other civilian objects, some instances of environment can be converted to military objects. There is a limitation on the extent to which environment can be stripped of protection. That is, some environmental damage is prohibited even if the environment in question becomes a military objective, as discussed in greater detail below. Further, it is prohibited under all circumstances to destroy or disrupt ecosystem services that are indispensable to human survival.

Customary law, now codified in treaties, distinguishes military objects from property,²² 'civilian objects', and 'objects indispensable to the survival of the civilian population', which (p. 210) are protected.²³ These broad terms are traditionally understood to be applicable to certain instances of the environment. Additional Protocol I (API) specifies 'environment'.²⁴ The environment encompasses all four of these terms. For example, crops and water sources are public or private property, they are civilian objects, they are indispensable objects, and they are instances of environment. A rare species of wildlife might be considered by some to be public property and 'environment', and by others to be also a civilian object. A hydrological system that is integral to a water supply would be a civilian object, possibly public property, and clearly environment.²⁵

Elements of the environment may become military objectives when they, 'by their nature, location, purpose or use make an effective contribution to military action and [when their] total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.²⁶ Where it is uncertain whether an object that is normally 'dedicated to civilian purposes' is making 'an effective contribution to military

action', the presumption is that it is civilian.²⁷ Thus, the environment should generally be presumed to be civilian.²⁸

Examples of objects indispensable to the survival of the civilian population are given in API article 54 as 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works'.

Turning to the hypothetical forest to illustrate these rules, the forest could be considered a civilian object, a military objective, or an indispensable object. The general rule is that the forest is a civilian object. The exception to the rule is that the forest may become a military objective if one side is using it for military purposes, such as concealment. But the parts of the forest that contribute to water supply, and therefore have sustenance value to the civilian population or the adverse party, could be analysed as indispensable objects. Damage to the forest cannot be analysed only in terms of harm to the trees, as loss of trees will cause changes in other systems, such as the quality and quantity of water resources; on the other hand, an endangered species or a sacred site might warrant particular attention.

B. Marine Environment and Outer Space

IHL regarding the marine environment and outer space has particular features that stem from their (past) relative inaccessibility compared to land, therefore it must be clear when they are included in legal rules referencing 'environment'.²⁹ The IHL regime for space has (p. 211) been scarcely addressed.³⁰ Marine areas are divided into zones of national sovereignty (internal waters and territorial sea),³¹ limited sovereignty (exclusive economic zone and extended continental shelf, if the coastal state has declared them)³² and high seas;³³ the legal rules vary according to the type of resource and its location. Both the high seas and space pose special problems as areas beyond national jurisdiction (ABNJ): the concern that harm to these environments will affect neutral states or environmental resources that are the common heritage of humankind.³⁴ The law of these zones is in transition, rapidly shifting to ecosystem protection and resource management, from the bygone approach of freedom from regulation.³⁵

As the setting for conflict, the military goal is likely to be sea denial and sea control.³⁶ The UN Convention on the Law of the Sea (UNCLOS) provides the definitional rules for the ocean zones noted above (which are also accepted as customary international law)³⁷ and its article 30 requires warships to 'comply with the laws and regulations of the coastal State concerning passage through the territorial sea'. The territorial principle applies as well to internal waters and archipelagic waters. Under UNCLOS, article 236, the convention's provisions regarding protection and preservation of the marine environment do not apply to 'any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service', but some measure of environmental protection is provided by also requiring such vessels and aircraft to act in a manner consistent, so far as is reasonable and practicable, with the convention.³⁸

As the subject of protection, particular aspects of the marine environment are not defined or described in the law of naval warfare. The marine environment includes life in the water column, on the seabed, and its subsoil; the living marine environment provides about half the oxygen humans need to breathe. Its physical processes are also essential to maintaining the Earth's climate. The *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (*San Remo Manual*) protects 'the natural environment' without more precise definition, including it as an element of 'collateral damage'.³⁹ (p. 212) More specifically, the *San Remo Manual* requires due regard for neutral coastal states' rights of exploitation and duties of protection regarding the economic resources of their exclusive economic zone, continental shelf, and marine environment, and rights of exploration and exploitation of the deep seabed on the high seas.⁴⁰ The kinds of marine environmental resources that are within the meaning of the *San Remo Manual* are fish populations, minerals, and marine ecosystems. The marine environment is included as part of the 'natural environment' under

API article 35, and possibly under article 55.⁴¹ While there is no authoritative interpretation to determine where the marine environment ends and the terrestrial environment begins, a conservative approach would be to consider as land the area landward of the lowest low tide.

C. Protected Areas, Sensitive Areas

It has been recommended that especially valuable or sensitive environments should be identified for protection in order to mitigate the difficulty of discriminating between legitimate military objectives and protected objects and of applying the test of balancing military advantage with extent of harm to the environment. One study found that 'over 90% of the major armed conflicts between 1950 and 2000 occurred within countries containing biodiversity hotspots, and more than 80% took place directly within hotspot areas'.⁴² According to the International Union for Conservation of Nature, 'roughly a tenth of the world's land surface is under some form of protected area'.⁴³ Some of these sites are declared as protected under domestic law; using this information would aid in identifying zones where military activity is likely to cause significant damage. Other sites are designated under international conventions, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) and the Convention on Wetlands of International Importance (Ramsar Convention);⁴⁴ international law obligations apply to those, at least for parties to the relevant convention. There is no distinctive emblem to identify protected environmental sites such as those used for medical sites.⁴⁵

Under the World Heritage Convention, state parties agreed that in order to protect 'natural heritage' they would not 'take any deliberate measures which might damage [property (p. 213) listed as world heritage] directly or indirectly' in Article 6(3). The Convention, article 2, defines natural heritage as:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.⁴⁶

It is also referred to as 'natural property ... to whatever people it may belong'. Armed conflict is referenced as one of the threats that might lead to placing a site on the List of World Heritage in Danger.⁴⁷

The *San Remo Manual*, rule 11, also provides a means of identifying sensitive and valuable environments. It states:

The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:

- (a) rare or fragile ecosystems; or
- (b) the habitat of depleted, threatened or endangered species or other forms of marine life. ⁴⁸

Similar protections have been extended to cultural objects and places of worship, and have been implemented in combat.⁴⁹ For example, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954⁵⁰ was applied by the allies during the 1990–1991 Gulf War.⁵¹ Some environmental sites hold important cultural and religious significance, but whether cultural protection should be considered as part of environmental protection is disputed.⁵²

(p. 214) In some cases, the customary rules found in the *Lieber Code* and the Hague Regulations, articles 46 and 56, may apply to protect environmental sites. Those rules protect private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences. It can certainly be imagined that sacred groves, research forests, and similar locations should be considered protected in the same way that a church or a research laboratory would be.

3. Damage to the Environment

Under customary international law, anticipated environmental damage must be proportional to the expected military advantage. At some very high level, environmental damage will never be justifiable. An explanation of this rule is that such severe damage will be disproportionate to any possible military advantage and it will have indiscriminate effect on combatants and non-combatants. Under customary international law, the principles of distinction, necessity, and proportionality apply to the environment.⁵³ These rules are codified in various treaties, as are more specific prohibitions. Further support is found in principle 24 of the Rio Declaration, which provides that: ‘Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.’

A. Applying the Principles of Distinction, Necessity, Proportionality

The application of the principles of distinction, necessity, and proportionality to the environment is generally accepted as customary international law.⁵⁴

1. Principle of distinction: discrimination in attacks

When the environment is a civilian object, under the principle of distinction it may not be targeted unless it is militarily necessary.⁵⁵ The obligation to discriminate between civilian and military objects applies to both parties: attackers may not target civilian objects and defenders may not place military targets where civilian objects are located.

The principle that military and civilian personnel and objects must be distinguished is well-accepted customary international law.⁵⁶ The Convention on Certain Conventional Weapons (CCW), protocol III, article 2(4) illustrates the principle of distinction, prohibiting attacks on ‘forests and other kinds of plant cover’ unless they are ‘used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives’.⁵⁷

(p. 215) Additional Protocol 1 to the Fourth Geneva Convention (API), article 48, states the basic customary rule:⁵⁸

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

To implement the principle of distinction, those responsible for selection of targets and siting of military installations, personnel, and materiel should identify and account for areas identified as legally protected or especially sensitive and/or valuable environments. For example, during the 1990–1991 Gulf War, US target intelligence analysts compiled a ‘joint no-fire target list’ of ancient cultural monuments in Iraq and Kuwait.⁵⁹

2. Principle of necessity

The prohibition of environmental damage not justified by military necessity is within the scope of several treaties and is now considered customary international law.⁶⁰ An absolute prohibition on extreme environmental damage, irrespective of whether it was associated with an act that was necessary to obtain a legal military aim, is considered by some to also be a rule of customary international law.⁶¹

The customary international law principle of necessity is codified in the Hague Regulations article 23:⁶²

In addition to the prohibitions provided by special Conventions, it is especially forbidden ... (g) To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.

The Nuremberg Tribunal declared that by 1939, the Regulations ‘were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war’.⁶³ The United Nations General Assembly invoked this principle to condemn as illegal ‘environmental damage and depletion of natural resources, including the destruction of hundreds of oil-well heads and the release and waste of crude oil into the sea’ caused by Iraq during the 1990–1991 Gulf War.⁶⁴ The ICJ also recognized that this customary international law principle applies to the environment, in its *Nuclear Weapons Advisory Opinion*, stating that ‘Respect for the environment is one of the elements that (p. 216) go to assessing whether an action is in conformity with the principles of necessity and proportionality.’⁶⁵

Article 53 of the Fourth Geneva Convention (GCIV) provides that an occupying power may not destroy any property unless it is absolutely necessary for military operations.

Naval warfare is subject to an additional variant on the balancing of military advantage with protection of environmental resources. Belligerents conducting hostile actions in the exclusive economic zone or on the continental shelf of a neutral state are to have ‘due regard’ to the coastal state’s rights and duties, regarding both economic resources of the exclusive economic zone and continental shelf that may be exploited, and the marine environment that must be protected and preserved.⁶⁶ A foreign state may lay mines in these zones if it judges that to be necessary, but it must notify the neutral coastal state.⁶⁷

3. Principle that harm may not be disproportionate to military advantage

Excessive destruction is a violation of customary international law. Potential harm to the environment must be considered in planning and carrying out an action, and it is lawful only if the anticipated environmental damage is not excessive in relation to the expected military advantage.⁶⁸ This is a corollary of the principle of necessity.

Under article 147 of GCIV, the ‘extensive destruction ... of property, not justified by military necessity and carried out unlawfully and wantonly’ is a grave breach; grave breaches of GCIV are war crimes under the Rome Statute.

The *San Remo Manual*, rule 46(d) states that collateral damage, which the *Manual* defines to include the marine environment, that is excessive in relation to the anticipated concrete and direct military advantage is prohibited.

Proportionality balancing can be done for each target and for overall campaign objectives.⁶⁹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) report on the NATO bombing campaign opined that ‘in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate’.⁷⁰

Both the importance of the anticipated military advantage and the extent, severity, and duration of the environmental harm are subjective and uncertain. This is the greatest weakness in the legal regime.⁷¹ The attempt to provide clarity through (p. 217) the provisions governing means and methods of warfare in API was not very successful.⁷²

B. Verification and Precautions

Planners, decision-makers, and executors of military actions must do everything feasible to verify that they do not target sites protected under applicable conventions, including protected environment.⁷³ More broadly, they must take all reasonable precautions to prevent excessive collateral damage to the environment, including through their choice of means and methods of attack.⁷⁴ When collateral damage is anticipated, they must not launch an attack that would cause excessive damage in relation to the military advantage expected.⁷⁵ If circumstances change, the decision to attack must be re-evaluated and the attack cancelled or suspended if it may cause such harm.⁷⁶ Defenders also have the obligation to protect civilian objects—including the environment—by not locating military objectives in zones that should be protected.⁷⁷

These precautionary measures represent an affirmative duty, set out in API and the Conventional Weapons Convention, Protocols II, III, and V. They are the logical consequence of the principle of distinction; as such they may be considered customary law.⁷⁸ Some states support the principle that parties ‘exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces’ while rejecting API article 57 as customary international law.⁷⁹

C. Methods and Means: Weapons

Many states consider that customary international law prohibits the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the environment.⁸⁰ France, the UK, and the US are persistent objectors to this provision.⁸¹ The rule has been criticized by others as both too vague and too stringent.⁸²

(p. 218) Methods and means of warfare are limited by several treaties, though only two—API and Protocol III of the 1980 Conventional Weapons agreement—have explicit strictures on harming the environment. API article 35 prohibits methods and means of warfare which are intended or may be expected to cause a high level of environmental damage:

Article 35. Basic Rules. 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited ... 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.⁸³

This exact prohibition is repeated in the preamble to the 1980 Conventional Weapons Convention and its Protocols, which reiterate certain Geneva Convention protections for civilians.

Article 55 of API extends a more general duty of care to protect the environment:

Protection of the Natural Environment.

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁸⁴

It is the use of such methods or means that is prohibited, whether or not such damage actually occurs. While it might be difficult to prove intent, the foreseeability of a high level of environmental damage can provide an objective standard. Although in the past ignorance of foreseeable effects of many kinds of attacks might have been a defence, a higher level of constructive knowledge should be implied from improved reporting of the long-term environmental effects from World War 1 battlefields, the 1990-1991 Gulf War, and more recent conflicts.

The next paragraph, Article 55, paragraph 2, prohibits reprisals against the environment, with no qualifications. The threshold of widespread, long-term, and severe damage found in paragraph 1 and in article 35(3) is not included in paragraph 2.

The threshold requirement was included because the drafters of API recognized that some environmental damage would be inevitable during armed conflict. The negotiation report summarizes that the articles are intended to address 'such damage as would be likely to prejudice, over a long term, the continued survival of the civilian population or would risk causing it major health problems'.⁸⁵

The threshold for damage is very high, but it is absolute: neither military necessity nor a proportionality balancing test apply in article 35(3) and article 55. Civilians and combatants (p. 219) are protected under both articles with language that is intentionally general and which does not specify only the civilian or non-combatant population.⁸⁶

There is ambiguity as to whether widespread, long-term, and severe environmental damage from non-combat military activities such as oil spills from fuel depots falls within the scope of article 55. Modern military manuals, status-of-forces agreements, and domestic laws provide general and specific rules and procedures for managing environmentally hazardous activities.⁸⁷ When activities threaten a very high level of harm, they may fall within the scope of article 55.

A difficulty in applying the threshold test is that it asks military planners to predict environmental impacts, which will often be uncertain. Oil spill damage from the 1990-1991 Gulf War is an excellent example: several commentators opined that the damage would not be sufficiently long-term to meet the threshold.⁸⁸ However, evidence submitted to the UN Compensation Commission showed that impacts to the intertidal and seabed environments had persisted for over ten years after the conflict and were likely to continue for twenty or more years longer, causing widespread, long-term, and severe damage.⁸⁹ While no cases have yet interpreted articles 35 and 55, commentaries have also opined on their application to the NATO bombing of Kosovo,⁹⁰ the oil spill in Lebanon,⁹¹ and environmental damage from the conflict between Eritrea and Ethiopia.⁹² Lack of guidance on how to interpret the threshold for damage is one of the most serious gaps in this area of law.

API is generally held to apply at sea. The *San Remo Manual*, Rule 44, further provides that:

Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

This rule, to the extent that it represents customary international law, calls for a wider analysis of relevant international law in the particular circumstances and balancing of military requirements with the nature and extent of environmental damage. Marine pollution response vessels may not be attacked, according to rule 47(h) of the *Manual*; and under rule 136(g) they may not be captured if they are actually responding to pollution. No such provisions exist to protect terrestrial pollution response equipment.

(p. 220) There are specific weapons that are prohibited or whose use is restricted. Some states consider that the Hague law and Geneva law apply only to the use of conventional weapons. In their view, atomic, bacteriological, or chemical warfare is addressed elsewhere.⁹³ Other states consider that all arms are included.⁹⁴ Other important differences of position exist regarding the legality of use of nuclear weapons, which were not resolved by the ICJ in its advisory opinion on the *Threat or Use of Nuclear Weapons*.⁹⁵ The ICJ said that customary and conventional international law neither authorize nor prohibit the threat or use of nuclear weapons, and that the Court could not definitively conclude whether it would be lawful in response to an existential threat to a state, but that any such use must be compatible with the United Nations Charter and other relevant international law.⁹⁶ Otherwise, nuclear weapons are generally addressed through the extensive nuclear weapons regimes.⁹⁷ Several treaties establish nuclear-free zones, limiting the development and use of nuclear devices in the designated region.⁹⁸

More recently, the use of depleted uranium (DU) for tank-armouring and anti-tank munitions has raised questions of legality.⁹⁹ While DU is used for its physical qualities, including high density and high melting point, and not its radiological properties, when used in conflict it can lead to toxic and, to a lesser degree, carcinogenic exposures. The extent to which DU leaves environmentally damaging remains is still being investigated.¹⁰⁰

While other weapons treaties may have general application to protection of the environment, the Convention on Certain Conventional Weapons (CCW) has two Protocols of particular relevance to environmental protection.¹⁰¹ They are: the restrictions on mines, (p. 221) booby-traps, and other devices (CCW Amended Protocol II);¹⁰² and incendiary devices (CCW Protocol III).¹⁰³ Mines pose multiple environmental hazards. Protocol III article 2(3) specifically provides that:

It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.¹⁰⁴

Cyber weapons that target the environment are governed by IHL rules.¹⁰⁵ Cyber warfare might, for example, disable the control system of critical infrastructure such as a nuclear power plant, dam, chemical plant, or a sewage system, resulting in a release of pollution.¹⁰⁶ Such an attack would be subject to the requirements of distinction, necessity, and proportionality, and the special rules of API and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) for the parties to those conventions.¹⁰⁷

To consider how these rules might apply, assume that the army of state A is using our hypothetical forest for cover as it moves between its bases and it is staging attacks on state B from the forest. If there are ways for state B to obtain its military goals so that destroying all or part of the forest is not imperatively required—for example, observing the enemy using infrared imaging—state B is prohibited from destroying the forest by Hague Regulations article 23(g), if the forest is in state A and is therefore ‘enemy property’. The same standard applies if state B is an occupier in state A, under GCIV article 53.

Furthermore, under article 147, ‘extensive destruction ... carried out unlawfully and wantonly’ is a grave breach (see also section 5 ‘War Crimes’ below).

State B might claim that deforestation is necessary to achieve its military goals, in which case the extent of the anticipated destruction must be limited to that which is necessary. Under customary international law, applicable to all states, the extent of damage to the forest must be in proportion to the military advantage sought: the ability to observe state A’s activities. In making this evaluation, state B’s planners must consider the environmental significance of the areas they intend to deforest. For example, the risk of polluting a water source or causing species extinction by targeting a protected area must be given more weight, and would likely not be justifiable by non-critical military goals. For parties to API, state B cannot make an intentional attack on the forest if the responsible actors expect it to have widespread, long-lasting, *and* severe environmental effects, even if their military objective requires that extent of destruction. Wherever the forest is located—in B’s, A’s, or another state’s territory—this rule applies to all international conflicts. Not only are all kinds of weapons covered, but under API article 55, even a belligerent’s accidental destruction of the forest may (p. 222) be illegal, if it causes widespread, long-lasting, *and* severe environmental effects where those effects are foreseeable.¹⁰⁸

Further assume that the forest is providing cover for only a small number of troops, without great strategic importance, and remember that the forest also provides ecosystem services to the civilian population. In that case, state B’s attack on the forest may be a violation of the fundamental IHL principle of proportionality, depending on how destructive it is under GCIV and customary international law. The forest is a military objective, but the terrible damage (which we have said is widespread, long-lasting, and severe) to civilian objects may be both indiscriminate and disproportionate to the military advantage anticipated. If the weapons used against the forest are incendiary weapons, Protocol III of the Conventional Weapons Convention applies. But it does not prohibit their use, since in this hypothetical, the forest is a military objective.

D. Remnants of War

A final step in fighting a war is cleaning up afterwards.¹⁰⁹ Explosive remnants of war combine the hazards of mines with the risk of toxic materials pollution of land, water, and sea.¹¹⁰ Protocol V to the Convention on Certain Conventional Weapons, Explosive Remnants of War, article 4, requires parties to an armed conflict to record and keep information on their use and on the abandonment of explosive ordnance to the extent possible and as far as practicable—during the conflict. After hostilities end, article 3 commits its parties first to mark and then to clear, remove or destroy any explosive remnants of war in their territory.¹¹¹ All users of explosive ordnance must provide assistance, wherever feasible, for such efforts if they do not control the territory under article 1.¹¹² Cooperation between parties to Protocol V is expected under Article 2.¹¹³

4. Environment as Weapon

All weapons are ‘environment’, shaped and harnessed into different forms, in the broadest, most literal sense, but certain uses of environment as a weapon are prohibited by specific treaty regimes. The Convention on the Prohibition of Military or Any Other Hostile Use of (p. 223) Environmental Modification Techniques (ENMOD)¹¹⁴ governs techniques that weaponize environmental forces. Chemical, bacteriological, and radiological weapons have their own treaty regimes. Use of dams, dykes, and nuclear power plants, referred to as ‘works and installations containing dangerous forces’—where the dangerous forces are water and radiation—as weapons is addressed in API. To the extent that an attack, for example on a dam, is intended to release dangerous floodwaters in order to destroy what

lies below the dam, API might apply. Customary international law and treaties that govern conventional methods and means of warfare, discussed in earlier sections, may also apply. ENMOD prohibits deliberate manipulation of natural processes used as a weapon against other parties to the convention when such use has widespread, long-lasting, *or* severe environmental effects anywhere. ENMOD article 1(1) states:

Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

Parties also undertake not to ‘assist, encourage or induce’ any other state or international organization to do so, in article 1(2). Article 2 defines weaponization of the environment under ENMOD as any technique for changing the ‘dynamics, composition or structure of the Earth ... or of outer space’. The Earth includes ‘its biota [living things], lithosphere [the Earth’s crust and upper mantle], hydrosphere [water] and atmosphere’.

ENMOD protects targets that could include ‘cities, industries, agriculture, transportation and communications system and its natural resources and assets’¹¹⁵ of states parties. In fact, the nature of the target is immaterial, but it must be another state party to ENMOD—whether hostile, ally, or neutral.¹¹⁶ A number of uses of environmental modification are nonetheless allowed. Uses of environmental modification techniques that only affect one’s own territory, the territory of a non-party, or areas beyond national jurisdiction are not prohibited by the treaty, nor are hostile uses that do not exceed any of the thresholds: severe, widespread, or long-lasting. Peaceful use of environmental modification techniques, consistent with other rules of international law, is specified as permissible in ENMOD article 3(1). Anthropogenic climate change may lead some states to consider geoengineering methods and technologies to deliberately manipulate the planetary environment at large scale to counteract warming.¹¹⁷ Whether geoengineering intended to affect global warming could be regulated by ENMOD is a matter of current discussion.¹¹⁸

Exceeding any one of the three parameters (called ‘the troika’) of the threshold for environmental damage triggers the obligation, in contrast to API and the Rome Statute, where all three must be exceeded. Environmental damage exceeding the threshold and thereby (p. 224) placing the environmental modification technique off-limits may occur anywhere; by the terms of the convention it is not restricted to the territory of state parties.

The meaning of the terms when used in ENMOD is defined as follows in the ‘Understandings’ that were included in the final report of the negotiating committee to the UN General Assembly:

- (a) ‘widespread’: encompassing an area on the scale of several hundred square kilometres;
- (b) ‘long-lasting’: lasting for a period of months, or approximately a season;
- (c) ‘severe’: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.¹¹⁹

What exactly constitutes prohibited environmental modification is unclear, and may be one reason this convention has never been invoked in a judicial context. Examples offered during the negotiations included: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types, and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere.¹²⁰ At the Second (and last) Review Conference of the Parties to ENMOD in 1992 the parties agreed to

include herbicides that upset the ecological balance of a region within the scope of article 2.¹²¹ The important change in position by the parties to include herbicide use suggests a shift to a broader prohibition on the use of any environmental modification expected to exceed the threshold.

Non-compliance with ENMOD is addressed first by consultation and cooperation, and may include the use of a Consultative Committee established by the convention.¹²² A complaint may be made to the UN Security Council, and state parties undertake to cooperate with the Security Council's investigation of complaints. If the Security Council finds a party has been or is likely to be harmed by a breach of the convention, other parties will 'provide or support assistance'.

The distinction made between lesser damage and that which reaches the threshold of widespread, long-lasting, and severe does not have the same logic for ENMOD that it has for API and is another indicator of the parties' hesitancy to forego military options. API uses the threshold to distinguish regrettable but 'normal' environmental damage caused by armed conflict from unacceptable levels of damage, in light of the fact that the environment is everywhere and it would be impossible to absolutely ban any harm. However, ENMOD is a weapons treaty and absolutely banning the use of certain types of weapons, without a threshold, is the ordinary approach. The 1925 Geneva Protocol, which bans chemical and bacteriological weapons, does not set a threshold: they are banned absolutely.¹²³

(p. 225) Another form of using the environment as a weapon is an attack on installations that contain or control powerful natural forces.¹²⁴ Dams, dykes, and nuclear electrical generating stations may almost never be the object of an attack when it may lead to severe civilian losses due to flooding or radiation exposure, under API article 56.¹²⁵ This prohibition covers installations, and their defences, that are themselves military objectives, and extends to military objectives located where the attack might unleash the 'dangerous forces'. The exception is when the planned attack is the only feasible way to stop the facilities from being used in 'regular, significant and direct support of military operations'. Like medical facilities, these facilities may be marked with a special symbol—three bright orange circles in line—to make them easy to identify. Although it has been suggested that the requirement for defenders and attackers alike to take precautions might mean that a state would be obliged to drain the reservoir to avoid catastrophic flooding from a dam,¹²⁶ this would be not only impractical in many cases, but it would be likely to cause the very kind of environmental damage that other legal rules are intended to prevent. The suggestion itself points to the danger of focusing on narrow legal rules. The US is a persistent objector to customary law that may have formed in relation to this provision of API; however, the US has not attacked any facility covered by the provision since the Vietnam War.¹²⁷

5. War Crimes

The criminalization of damage to the environment during armed conflict is a signal of its heightened seriousness for the international community.¹²⁸ Even if the likelihood of criminal prosecution appears low, describing certain acts as an environmental war crime has symbolic meaning.

Individuals and states may be prosecuted for committing war crimes. Prosecution can be the responsibility of an international court or a relevant domestic court. Modern trials for grave breaches of IHL and war crimes have been conducted by the International Criminal Court (ICC) and several ad hoc tribunals, including the Nuremberg Tribunal. The sources of law include customary international law; treaties and the statutes of international criminal tribunals; and domestic law.

Customary international law provides a basis for prosecution when a belligerent destroys or seizes the enemy's public or private property without military necessity.¹²⁹ Such behaviour may constitute a grave breach of IHL—behaviour that is illegal but that is not always criminal—in contrast with war crimes, which are simply criminal behaviour. For a judicial body, the applicability of a grave breach or a war crime will have different consequences and will depend on the circumstances of the case.¹³⁰ Some charges are subject to the defence (p. 226) that the activities were defensive measures that satisfied the customary international law principles of necessity, distinction, and proportionality.

A number of acts, treated as either war crimes or grave breaches of the Hague and Geneva Conventions by the Nuremberg Tribunal, would have caused serious environmental damage integrally related to the purpose of the legal prohibition. Treated by the Tribunal as customary international law, they included the following:

- looting and destruction of agricultural products, minerals, and other natural resources, whether public or private property; ¹³¹
- plunder of public and private property; ¹³²
- wanton destruction of cities, towns, and villages and devastation not justified by military necessity; ¹³³
- inundations not justified by military necessity; ¹³⁴
- the practice of 'total war' including 'methods of combat and of military occupation in direct conflict with the laws and customs of war, and the commission of crimes perpetrated on the field of battle during encounters with enemy armies ... and in occupied territories against the civilian population of such territories'. ¹³⁵

The Charter of the International Military Tribunal (Nuremberg Tribunal), article 6(b) gave the following definition:

War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to ... plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity¹³⁶

The Indictment described minerals and crops being taken, including coal, iron ore, bauxite, wheat, and oats, as well as the complete destruction of cities.¹³⁷ It argued that, 'The result of this policy of plunder and destruction was to lay waste the land and cause utter desolation.'¹³⁸ The judgment reasoned that treaties, particularly the Hague and bilateral Agreements, established the illegality of plunder of public and private property and that custom and practice had punished violations as war crimes.¹³⁹

The elements of a grave breach under the Hague Convention IV of 1907, Regulations, article 23(g), are:

In addition to the prohibitions provided by special Conventions, it is especially forbidden ... To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

(p. 227) Under GCIV article 147, the level of harm for the criminal standard of grave breach is higher:

extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.¹⁴⁰

Common Article 49/50/129/146 of the Geneva Conventions commits the parties to enact domestic legislation to enforce liability and sanctions.¹⁴¹

Iraq's destruction of oil wells in Kuwait has been called a grave breach of article 147.¹⁴² Over 1 billion barrels of oil were released when Iraqi forces detonated more than 600 oil wells, contaminating groundwater and desert ecology.¹⁴³ Iraq's claim that the smoke from the fires was intended as a defensive manoeuvre was dismissed on the grounds that the same effect could have been achieved without destroying the well-heads, an action that resulted in months of continuous burning and spilling of oil.¹⁴⁴

The Rome Statute considers intentional, serious violations of the environmental integrity norm a war crime, as well as destruction and plunder of civilian property.¹⁴⁵ So far, no other international criminal tribunal statute has done so. The Rome Statute defines war crimes for activities occurring after the ICC began working in 2002, when the state of the perpetrator is a member of the ICC. It extends the protections for environment from the traditional categories of civilian property and life-support system that were previously provided in IHL—in the words of the Nuremberg Indictment, 'devastation not justified by military necessity'—to the modern conception of the environment.

Relevant law for the ICC is its Statute, the *Elements of Crimes*, and, 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict', general principles of law, and principles and rules of law as interpreted in its previous decisions.¹⁴⁶ War crimes specified in the Rome Statute that are or may be applicable to environmental damage are:

Article 8—War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

(p. 228) 2. For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: ...

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly ...

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ...

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; ...

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated ...

For grave breaches under article 8(2)(a)(iv), the environment must be shown to be protected as public or private property under the Geneva Conventions.¹⁴⁷ A similar showing

is required under article 8(2)(b)(ii), that the perpetrator intended that, and in fact that, the object of the attack was civilian objects, not military objectives.

Specifically intended to protect the environment, article 8(2)(b)(iv) sanctions an attack that is launched in the knowledge that it would cause particularly serious harm to the natural environment that would be disproportionate to the expected military advantage.¹⁴⁸ The environment in this case could be a military objective—the very high threshold offsets this wider scope. The relevant value judgment is the attacker's, based on the facts known to her at the time regarding the level of damage and the military advantage.¹⁴⁹ The attacker must therefore not launch an attack, knowing that it is the kind of attack that will cause environmental damage exceeding the threshold, unless the direct overall military advantage is of extraordinary importance.

These requirements are more stringent than API. First, the Statute requires intent to launch the attack and knowledge that it will cause the environmental damage, which is appropriately a more demanding *mens rea* than API, other treaty provisions, or customary international law that do not carry criminal sanctions; moreover, it is required by the Rome Statute article 30. The required intent and knowledge can be inferred from relevant facts and circumstances.¹⁵⁰ Second, the military advantage expected must be deficient when compared to the environmental damage. However, it may not be necessary for actual damage to occur.¹⁵¹

(p. 229) The threshold of damage—widespread, long-term, and severe—was adopted from a draft statute prepared for the ICC by the ILC, which borrowed from API. No judicial opinion has yet interpreted the three terms in either treaty; commentators differ on whether they should be understood to mean the same thing and whether they should be interpreted according to terms proposed during the API negotiations.¹⁵² The serious, intentional environmental damage that was ordered by the Iraqi leadership during the 1990–1991 Gulf War did reach the level of harm for a war crime.¹⁵³ The oil spills Iraq could have claimed necessary in defending its destruction of Kuwaiti oil wells and creation of a massive oil spill in the Persian Gulf,¹⁵⁴ but on the facts the defence would have likely failed.¹⁵⁵ In another modern case, the Committee advising the ICTY Prosecutor decided that 'the environmental damage caused during the NATO bombing campaign does not reach the API threshold'.¹⁵⁶

6. Protection of the Environment by Third Parties: Solidarity

Though not yet a formal part of IHL treaties, solidarity as an evolving legal principle is quite pertinent to the conduct of a state in taking steps to protect the environment during armed conflict. Solidarity is a concept rooted in Emer de Vattel's argument that states have a legitimate expectation that others will assist them when they are threatened with 'disaster and ruin', although its modern meaning and status in international law is much debated.¹⁵⁷ Currently, the actions of states that aid in responding to conflict-related disasters and environmental damage are considered voluntary, but are increasingly tinged with a sense of obligation.

Examples of this development include recent treaty terms, international commission decisions, and various international declarations. Parties to the CCW, Protocol V on Explosive Remnants of War agree to cooperate and assist each other by providing technical, financial, material, and human resources and by other means, under article 3(5).¹⁵⁸ During the 1990–1991 Gulf War:

specific appeals for assistance in dealing with the environmental damage caused by Iraq's invasion and occupation of Kuwait were made by the United Nations General Assembly and by other organizations and bodies of the United Nations system as

well as by the countries affected by environmental damage or threat of such damage resulting from Iraq's invasion and occupation of Kuwait.¹⁵⁹

(p. 230) A number of international agreements and declarations recognize the obligation to provide assistance to respond to environmental emergencies. For example, principle 18 of the Declaration of the United Nations Conference on Environment and Development (Rio de Janeiro) 1992, provides that 'States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.'¹⁶⁰

7. Non-International Armed Conflict

The majority of armed conflicts are not international; that is, they occur within the territory of a single state and the armed forces of no other state are engaged against the central government.¹⁶¹ The ILC Special Rapporteur has written, 'it is clear that fundamental principles, such as the principle of distinction and the principle of humanity (the dictates of public conscience), reflect customary law and are applicable in all types of armed conflict'.¹⁶² Customary international law protecting civilian objects continues to apply in non-international armed conflict (NIAC).¹⁶³ Some international instruments state that some of their terms apply to NIAC.¹⁶⁴ State practice fills the gap,¹⁶⁵ but it is exceedingly difficult to obtain documentation.¹⁶⁶

Protocol II to the Geneva Conventions (APII), relating to the protections of victims of non-international conflicts, does not refer directly to 'environment' but it does extend protection to cultural objects and objects indispensable to the survival of the civilian population and it prohibits attacks on installations containing dangerous forces, IHL measures that are applicable to the environment as discussed above in section 6 'Protection of the Environment by Third Parties: Solidarity'.¹⁶⁷ Frequently referenced in relation to NIAC, the four Geneva Conventions of 1949 each include 'Common Article 3' which purports to extend some of the core constraints on all parties to NIAC. It binds the parties to an internal conflict to provide humane treatment of persons not taking active part in hostilities, the wounded, and the sick; to allow access to impartial humanitarian bodies; and to make (p. 231) special agreements to apply the other provisions of the Geneva Conventions. It makes no reference that directly applies to the environment, property, or civilian objects.

While it seems unlikely that belligerents in most cases will respect these legal rules,¹⁶⁸ the existence of the rules provides a guide for governments, the basis for sanctions to be imposed eventually, and a standard of behaviour for would-be leaders to observe if they wish to be admitted to the community of nations.

8. Status of International Environmental Law and Domestic Law—Conflict of Laws

There has been far less examination of choice of law in the environmental protection context than in the well-developed discussion of conflicts between relatively permissive rules of international humanitarian law and more restrictive human rights law.¹⁶⁹ At the minimum, some environmental treaty provisions are, by their terms, applicable during armed conflict; treaties and customary international environmental law rules that are silent on this point will sometimes be applicable as well. Domestic law—of an invading force, of a host nation, or of a neutral state—may also apply and are discussed briefly first.

Generally, host nation domestic law, including environmental law, applies with two significant exceptions. Where a foreign military enters another state with consent, specific agreements with the host nation can suspend application of some or all of the host's domestic law; these include status-of-forces agreements (SOFA) and stationing agreements. The second exception is the immunity provided for warlike acts done under military

authority and in accordance with the law of war, committed when combatants are present in the host country.¹⁷⁰ And, of course, most nations implement their international humanitarian law commitments through their own domestic law. If a domestic law has extraterritorial effect, which depends on the specific law, and lacking an explicit statement suspending the law due to armed conflict, the law can be assumed to remain in effect.¹⁷¹

The general international law principle guiding the applicability of international environmental law is that *lex specialis*—special law—co-exists in parallel with non-conflicting law and takes precedence over more general rules of law that conflict.¹⁷² A state of armed conflict does not automatically or necessarily suspend peacetime domestic and international law relating to the environment.¹⁷³ Some conventions expressly continue to apply; others allow parties to suspend the operation of the convention during conflict; others are silent.¹⁷⁴ Where two bodies of special rules, such as IHL and environmental law or human (p. 232) rights law, conflict, the traditional concept was that IHL controlled.¹⁷⁵ Where a general rule of IHL conflicts with a specific rule of an environmental treaty that is clearly intended to apply during armed conflict, the environmental treaty rule will control, for the parties to that treaty.

The easy case is where a treaty applicable to the belligerents includes an express statement. An example would be the World Heritage Convention, under which state parties agree not to take any deliberate measures that might directly or indirectly damage listed sites.¹⁷⁶ The fact that this convention provides a list of specific sites entitled to protection makes this operationally feasible. The International Watercourses Convention, article 29, ‘serves as a reminder that there are rules of international law that protect international watercourses and related installations, facilities and other works during hostilities’.¹⁷⁷ This stakes out a general position that requires state parties to the Watercourses Convention to examine potentially relevant agreements with the understanding that they may continue to apply during armed conflict.

Other treaties are more ambiguous. For instance, several treaties for control of oil pollution at sea extend immunities to ‘warships and other government ships operated for non-commercial purposes’ as defined in the treaties,¹⁷⁸ but otherwise the conventions are held to continue to apply during conflict.¹⁷⁹

The Law of the Sea is another *lex specialis*. It has both the force of a nearly unanimously subscribed treaty, UNCLOS, and status as customary international law. As seen in section 2.B. ‘Marine Environment and Outer Space’ above, UNCLOS establishes sovereign rights that are relevant to armed conflict. There remains ambiguity over the applicability of the Convention’s protective measures in war time.¹⁸⁰ UNCLOS article 236 attempts to address the conflict:

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a state and used, for the time being, only on government non-commercial service. However, each state shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

The continuing development of international law in many specialized areas means that legal advisers will be obliged to regularly review the continuing application of the UN Charter, (p. 233) international security law, IHL, international criminal law, human rights law, international environmental law, international economic law, and other bodies of international law.¹⁸¹ These bodies of law must be taken into account as they may constitute: binding legal obligations; norms informing special rules effective during armed conflict as

stated in the Law of Armed Conflict; international standards; non-binding norms; and guidelines and/or state practice, including practice integrated into rules of engagement, status-of-forces agreements, and military manuals, handbooks, and training guides.¹⁸²(p. 234)

Footnotes:

1 Three reports of the International Law Commission (ILC) provide a comprehensive review of the topic, including the comments on the reports by national legal advisers during Sixth Committee meetings. The ILC offered nine draft principles as a result of this study. ILC 'Report of the International Law Commission on the Work of Its Sixty-Sixth Session: Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts' UN Doc A/CN.4/674 (30 May 2014); ILC 'Report of the International Law Commission on the Work of Its Sixty-Seventh Session: Second Report on the Protection of the Environment in Relation to Armed Conflicts' UN Doc A/CN.4/685 (28 May 2015); ILC, 'Report of the International Law Commission on the Work of Its Sixty-Eighth Session: Third Report on the Protection of the Environment in Relation to Armed Conflicts' UN Doc A/CN.4/700 (3 June 2016); ILC, Draft Principles A/CN.4/L.870/Rev.1 (26 July 2016); ILC Draft Principles A/CN.4/L.876 (3 August 2016).

2 Michael P Scharf and Paul R Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (CUP 2010) 56–8.

3 Hugh Thirlway, *The Sources of International Law* (OUP 2014); Catherine Redgwell and Jutta Brunnée, 'The Sources of International Environmental Law: Interactional Law', in Samantha Besson and Jean d'Aspremont (eds), *Oxford Handbook on the Sources of International Law* (OUP 2017) ch 22.

4 See eg North Atlantic Treaty Organization (NATO), *Joint NATO Doctrine for Environmental Protection During NATO-Led Military Activities*, STANAG 7141, Edition 6 (15 May 2014).

5 The give-and-take is reflected in a study of US practice: 'Even when the LOAC permits a given practice, U.S. policymakers may alter policies to reflect political or operational concerns. The resulting implementations, reflecting both legal and nonlegal factors, shape decisions on such matters as rules of engagement, targeting procedures, and the development of weapon systems.' Bryan Frederick and David E Johnson, *The Continued Evolution of US Law of Armed Conflict Implementation: Implications for the US Military* (RAND Corporation 2015) (*Law of War Manual*) iii, 83–84. See also Dale G Stephens, 'Coalition Warfare: Challenges and Opportunities' (2006) 82 *ILS* 245, 246; UK Ministry of Defence (MoD), *Joint Service Manual of the Law of Armed Conflict* (Joint Doctrine and Concepts Centre 2004) 1.13.2.

6 See generally, Dinah Shelton and Isabelle Cutting, 'If You Break It, Do You Own It?' (2015) 6 *JHLS* 1, 32, 39–44.

7 UN Compensation Commission (UNCC) 'Report and Recommendations Made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims' UN Doc S/AC.26/2005/10 (30 June 2005) paras 777, 784, approved by the Governing Council, Decision 248, UN Doc S/AC.26/Dec.248 (30 June 2005). For a comprehensive account, Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (OUP 2011).

8 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168; Carl Bruch and Akiva Fishman, 'Institutionalizing Peacebuilding', in Payne and Sand (eds) 221 (above n 7). It is, however, notable that the case focused on conflict resources and other environmental impacts are not discussed, despite reports including severe impacts on the World Heritage site, Kahuzi Biega National

Park, and its rare gorillas. International Alert, 'The Role of the Exploitation of Natural Resources in Fuelling and Prolonging Crises in the eastern DRC' (January 2010) para 15 www.international-alert.org/sites/default/files/publications/Natural_Resources_Jan_10.pdf.

9 Ronald A DeMarco and John P Quinn, 'The Impact of War and Military Operations other than War on the Marine Environment: Policy Making on the Frontiers of Knowledge', in Richard J Grunawalt, John E King, and Ronald S McClain (eds), *Protection of the Environment During Armed Conflict* (Naval War College Press 1996) 87. ILC, 'Second Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) paras 63, 64 (summaries of statements by states that operational law for their armed forces incorporates environmental rules).

10 DeMarco and Quinn (above n 9). UNEP Environment Assembly, 'Protection of the Environment in Areas Affected by Armed Conflict' UN Doc UNEP/EA.2/L.16 (May 2016).

11 Yoram Dinstein, 'Protection of the Environment in International Armed Conflict', in Joram A Frowein and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Kluwer Law International 2001) 534.

12 UNCC Governing Council Decision 258 UN Doc S/AC.26/Dec.258 (8 December 2005); Cymie R Payne, 'Oversight of Environmental Awards and Regional Environmental Cooperation', in Payne and Sand (eds) 105 (n 7).

13 'Conclusions by the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities', in Alexandre Timoshenko (ed), *Liability and Compensation for Environmental Damage: Compilation of Documents* (UNEP 1998) para 30; Jean de Preux, 'Article 35—Basic Rules', in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) (AP Commentary) 389, 410–20. NATO defines environment as 'the surroundings in which an organization operates, including air, water, land, natural resources, flora, fauna, humans, and their interrelations': NATO, agreed 31 October 2013.

14 Cymie R Payne, 'The Norm of Environmental Integrity in Post-Conflict Legal Regimes', in Carsten Stahn, Jennifer S Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 502.

15 For example, 'environment' is used in UNGA Resolution 47/37 'Protection of the Environment in Times of Armed Conflict' (9 February 1993).

16 NATO doctrine asks its members to consider the following characteristics of the environment that may be impacted by or have an impact on all phases of NATO-led missions: general environmental condition of the area; climate; water quality; air quality; natural and cultural resources; presence of endangered species and critical habitats; and presence of birds or bird migration routes. The doctrine also identifies common sources of pollution and provides guidelines to minimize it, and direction on planning exercises and operations to minimize environmental damage: NATO, *Joint NATO Doctrine for Environmental Protection* (above n 4). The UN Compensation Commission found that Iraq was liable for damage that included over 600 km of the Saudi Arabian coastline contaminated with oil whose toxicity will likely persist for decades more; in Kuwait, contaminated groundwater and desert ecology from the release of millions of barrels of oil when Iraqi forces detonated over 600 oil wells; construction of military fortifications, including ditches, berms, bunkers, trenches, and pits; the laying and clearance of mines; and in Iran, Jordan, and Turkey, damage to vegetation and water resources from hundreds of thousands of refugees and their livestock. UNCC, 'Report and Recommendations made by the Panel of Commissioners concerning the Second Instalment of "F4" Claims' UN Doc S/AC.26/2002/26 para 85, approved by the Governing Council Decision 171 UN Doc S/AC.26/Dec.171 (3 October 2002); UNCC, 'Report and Recommendations made by the Panel of

Commissioners concerning the Third Instalment of “F4” Claims’ UN Doc S/AC.26/2003/31 (18 December 2003) paras 61, 62, 64–74, 86–99, 106–111, 121–125, 134–138, 170–178, approved by the Governing Council Decision 212 UN Doc S/AC.26/Dec.212 (18 December 2003); UNCC, ‘Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of “F4” Claims’ UN Doc S/AC.26/2004/16 (9 December 2004) paras 68, 70–71, 105–108, approved by the Governing Council Decision 234 UN Doc S/AC.26/Dec.234 (9 December 2004).

17 See eg de Preux (above n 13) 398.

18 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons*) para 29.

19 *Instructions for the Government of Armies of the United States in the Field*, General Orders No 100 (24 April 1863) (*Lieber Code*); Ameer Zemmali, ‘The Protection of Water in Times of Armed Conflict’ (1995) 308 *IRRC* 550.

20 The ILC debated whether exploitation of natural resources (such as timber) was directly related to the scope of PERAC. Among the arguments for including it, ‘it was noted that the human rights implications caused by extraction and other actions relating to natural resources might be pertinent to address’. ILC, ‘Third Report on the Protection of the Environment in Relation to Armed Conflicts’ (above n 1) para 25.

21 US DoD, ‘Final Report to Congress on the Conduct of the Persian Gulf War’ (1992) 31(3) *ILM* 612.

22 *Lieber Code* articles 15–16; Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations) articles 23(g), 46, and 56; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) articles 33 and 53.

23 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) article 54, which is accepted as representing customary international law.

24 de Preux (above n 13) 414.

25 Grotius told the story of the King of Cappadocia, held liable for the chain of events unleashed by his action blocking a river, which burst its dam, which caused the Euphrates to flood. Hugo Grotius, *De jure belli ac pacis* (Carnegie Endowment for International Peace trans of 1646, 1925) Vol II, ch XVII, 434.

26 API article 52. Previous efforts at a definition of ‘military objective’ failed.

27 API article 52(3).

28 ILC, ‘Third Report on the Protection of the Environment in Relation to Armed Conflicts’ (above n 1) para 28.

29 The legal regime for Antarctica is similarly unique. The Antarctic Treaty, article 1(1), requires Antarctica to be ‘used for peaceful purposes only’. The Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

30 See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (signed 27 January 1967,

entered into force 10 October 1967) 610 UNTS 205. The scope of the ENMOD Convention, discussed below, includes outer space.

31 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) articles 2–4 (territorial sea), 5–26 (baseline), 33 (contiguous zone), 46–49 (archipelagic waters), 50 (internal waters); Convention on the Territorial Sea and Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, articles 1, 5.

32 UNCLOS articles 55, 57 (exclusive economic zone), 76 (continental shelf).

33 *ibid* article 86 (high seas); Tullio Treves, 'High Seas', *Max Planck Encyclopedia of Public International Law* (January 2010) www.mpepil.com

34 Jutta Brunneé, 'Common Areas, Common Heritage and Common Concerns', in Daniel Bodansky, Jutta Brunneé, and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (OUP 2007) 557–64; Wolff Heintschel von Heinegg, 'The Law of Armed Conflict at Sea', in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 474. Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995) (*San Remo Manual*) rule 36.

35 UNGA, 'Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction' UN Doc A/RES/69/292 (6 July 2015).

36 Heintschel von Heinegg (above n 34) 463; UNCLOS articles 88, 141, 279, and 301.

37 For direct application see section 8 'Status of International Environmental Law and Domestic Law—Conflict of Laws' below.

38 Thomas A Mensah, 'Environmental Damages under the Law of the Sea Convention', in Jay E. Austin and Carl E Bruch (eds), *The Environmental Consequences of War* (CUP 2000) 248–9.

39 *San Remo Manual* rule 13(h). See also ILC, 'Second Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 183.

40 *San Remo Manual* rules 34, 35. Note that the high seas marine environment, other than the natural resources of 'the sea-bed and ocean floor, and the subsoil thereof' is not afforded protection.

41 Erik V Koppe, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict* (Rijksuniversiteit Groningen 2006) 136 ('the conclusion seems justified that both articles [35(3) and 55] do not only protect the "natural environment" on land, but also the marine environment and the atmosphere').

42 Thor Hanson, Thomas M Brooks, Gustavo AB Da Fonseca, Michael Hoffmann, John F Lamoreux, Gary Machlis, Cristina G Mittermeier, Russell A Mittermeier, and John D Pilgrim, 'Warfare in Biodiversity Hotspots' (2009) 23 *Conserv Biol* 578, 578.

43 International Union for the Conservation of Nature (IUCN), *Guidelines for Applying Protected Area Management Categories* (IUCN 2008).

44 Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention).

45 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol 1: Rules* (CUP 2005) (CIHL) rule 30 (Persons and Objects Displaying the Distinctive Emblem).

46 Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 23 November 1972, entered into force 15 December 1979) 1037 UNTS 151 (World Heritage Convention).

47 Meyer discusses the various approaches to referencing armed conflict during the negotiations. Robert L Meyer, 'Travaux Préparatoires for the UNESCO World Heritage Convention' (1976) 2 *Earth LJ* 45, 52 reprinted in Peter H Sand (ed), *The History and Origin of International Environmental Law* (Elgar 2015); Britta Sjöstedt, 'The Role of Multilateral Environmental Agreements in Armed Conflict: Green-Keeping in Virunga Park—Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo' (2013) 82 *Nordic J Int'l L* 129.

48 *San Remo Manual*.

49 See *Lieber Code* articles 34–36.

50 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 Convention).

51 US DoD, 'Conduct of the Persian Gulf War' (above n 21) 605–6.

52 ILC, 'Second Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 24 (whether protection of cultural and natural heritage should be addressed as part of the PERAC topic was raised by ten states in 2014) and para 224 ('some members of the Commission suggested that cultural heritage should be included in the present report because to do otherwise would lead to inconsistencies. Most speakers, however, remained of the view that cultural heritage should be excluded').

53 CIHL rule 43.

54 *ibid* rule 43; ILC, Draft principle 9 (above n 1).

55 CIHL rule 43; Dinstein (above n 11) 533 (the environment, 'once classified as a civilian object', may not be the object of an attack).

56 See discussion at section 2.A 'Legal Categorization: Civilian or Military Object?' above.

57 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 162 (CCW).

58 While Dinstein reviewed arguments that API is customary international law, he suggested that it had not become so at the time of the ICJ's 1996 *Nuclear Weapons* advisory opinion, the ICJ having described it at para 31 as providing 'additional protection for the environment' for the states 'having subscribed to these provisions'. Dinstein (above n 11) 534. This may have changed now, twenty years later.

59 US DoD, 'Conduct of the Persian Gulf War' (above n 21) 100.

60 CIHL rule 43 (identifying support in military manuals, national legislation, and official statements); Dinstein (above n 11) 545.

61 CIHL rule 45 but contested by Bellinger and Haynes, 'A US Government Response to the ICRC Study Customary International Humanitarian Law', (2007) 89(867) *IRRC*, 443, 455, 456.

- 62** Hague Regulations article 23.
- 63** 'Judgment of the Nuremberg International Military Tribunal 1946' (1947) 41 *AJIL* 172, 253-4.
- 64** UNGA Resolution 47/37 (9 February 1993).
- 65** *Nuclear Weapons* para 30. The ICJ referred to UNGA Resolution 47/37 as evidence of customary international law para 32.
- 66** *San Remo Manual* rules 34, 35. This refers to coastal state rights and duties under UNCLOS. Note that the high seas marine environment, other than the natural resources of 'the sea-bed and ocean floor, and the subsoil thereof' is not afforded protection. ILC, 'Second Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 184.
- 67** *San Remo Manual* rule 35.
- 68** Dinstein (above n 11) 523-49, 524.
- 69** Discussed in section 6 'Protection of the Environment by Third Parties: Solidarity' below.
- 70** International Criminal Tribunal for the Former Yugoslavia (ICTY), 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2000) 39 *ILM* 1257 para 22.
- 71** The Nuremberg Tribunal's decision that the devastation of Finnmark, Norway under the orders of General Rendulic was justified by military necessity was criticized as a flawed example of balancing. Djamchid Momtaz, 'Le Recours à l'Arme Nucléaire et la Protection de l'Environnement: L'Apport de la Cour Internationale de Justice', in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 365.
- 72** Discussed in section 3.C 'Methods and Means: Weapons' below.
- 73** API article 57(2)(a); ILC, Draft principle 9 (above n 1).
- 74** API article 57(2)(a)(ii)(c). See also Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Protocol V) (adopted 28 November 2003, entered into force 12 November 2006) 2399 UNTS 100, article 5.
- 75** API article 57(2)(a)(iii). The *San Remo Manual* rule 46(c) reiterates these requirements with regard to collateral damage, which the *Manual* defines to include the marine environment.
- 76** API article 57(2)(b).
- 77** *ibid* article 58(c); US DoD, *Law of War Manual* 186.
- 78** Stefan Oeter, 'Methods and Means of Combat', in Dieter Fleck (ed) (n 34) 178-9.
- 79** See eg US DoD, *Law of War Manual* 185-6, 188-92.
- 80** CIHL rule 45. cf ICTY (above n 70) para 15 (equivocating about customary international law status of articles 35(3) and 55 of Additional Protocol I). See also ILC, Draft principle 8(1) (above n 1) ('Care shall be taken to protect the natural environment against widespread, long-term and severe damage.').
- 81** See eg Bellinger and Haynes (above n 61) 457-8, 459.

82 UNEP (Elizabeth Maruma Mrema, Carl Bruch, and Jordan Diamond, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* (UNEP 2009) 4.

83 API article 35.

84 The report prepared for the ICTY in relation to claims of Yugoslavia against NATO forces for the 1999 Kosovo bombing observed that article 55 of API might be considered customary international law and thus applicable to non-parties. ICTY (above n 70) paras 14–25 (applying law of armed conflict principles of necessity and proportionality).

85 *Official Record of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol 1 (1974–1977) 268–9 www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html.

86 *ibid* para 82.

87 See eg NATO, *Joint NATO Doctrine for Environmental Protection* (above n 4).

88 See eg UK MoD (above n 5) n 153.

89 UNCC, ‘Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of “F4” Claims’ (above n 16) para 177.

90 ICTY (above n 70) paras 14–25.

91 Serge Bronkhorst and Erik Koppe, *Lebanon Oil Spill Legal Assessment* (Institute for Environmental Security 2007).

92 Murphy, Kidane, and Snider discussed the potential for environmental damage claims for violations of *jus in bello*. Ethiopia claimed compensation for losses of gum Arabic and resin plants and damage to terraces in the Tigray region for a value of approximately US\$1 billion and for loss of wildlife. It failed to provide evidence of harm beyond the claim forms, with no details and no supporting evidence, and the Commission rejected the claims on that basis; the wildlife claim was withdrawn. Sean D Murphy, Won Kidane, and Thomas R Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commission* (OUP 2013) 146, 227–8. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the State of Eritrea (Peace Agreement) (adopted 12 December 2000, entered into force 12 December 2000) 2138 UNTS 94.

93 For example, in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II, and III) (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 162, with Protocol II (mines, booby-traps and other devices and Protocol III (incendiary weapons); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 9 May 1926) 94 LNTS 65; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163.

94 de Preux (above n 13) 411.

95 *Nuclear Weapons* para 33.

96 *ibid* para 105.

97 de Preux (above n 13) 398 and n 39.

98 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Tlatelolco Treaty) (opened for signature 14 February 1967; entered into force 25 April 1969) reproduced in UN Doc A/6663 (23 February 1967); Treaty on the Southeast Asia Nuclear Weapon-Free Zone (Bangkok Treaty) (opened for signature 15 December 1995, entered into force 28 March 1997) 1981 UNTS 129; African Nuclear Weapon-Free-Zone Treaty (Pelindaba Treaty) (opened for signature 11 April 1996, entered into force 15 July 2009) 35 ILM 698; Treaty on a Nuclear-Weapon-Free Zone in Central Asia (opened for signature 8 September 2006, entered into force 21 March 2009) and its Protocol (ratified by China, France, Russian Federation, and UK; signed by United States); and The Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

99 UNGA Resolutions 62/30 of December 2007 and 63/54 of January 2009 request the Secretary General to produce reports on the human health and environmental effects of the use of armaments and ammunitions containing depleted uranium. For an example of how DU use is assessed following conflict, see UNEP, *Lebanon: Post-Conflict Environmental Assessment* 149–52, 164–5 (2007) (no use of DU found in Lebanon). There is at this time no treaty addressing the use of DU. UNEP, *Protecting the Environment during Armed Conflict* (above n 82) 22; cf Ambassador Robert Wood, US Mission to the UN, Remarks at the 69th UNGA First Committee Cluster Five: Explanation of Vote before the Vote on L.43, Agenda Item 96(e) ‘Effects of the use of armaments and ammunitions containing depleted uranium’, 31 October 2014 (explaining position of France, UK, and US that DU does not pose a long-term health or environmental hazard).

100 A Asic, A Kurtovic-Kozaric, and L Besir et al, ‘Chemical Toxicity and Radioactivity of Depleted Uranium: The Evidence from In Vivo and In Vitro Studies’ (2017) 156 *Envir Res* 665; World Health Organization—Department of Protection of the Human Environment, *Depleted Uranium: Sources, Exposure and Health Effects*, WHO/SDE/PHE/01.1 (2001).

101 CCW.

102 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (adopted 3 May 1996, entered into force 3 December 1998) 2048 UNTS 93 (CCW Amended Protocol II).

103 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 171 (CCW Protocol III).

104 CCW Protocol III article 2(3); Dinstein (above n 11) 537.

105 Michael N Schmitt, ‘Wired Warfare: Computer Network Attack and Jus in Bello’ (2002) 846 *IRRC* 365, 374.

106 Heather Harrison Dinniss, *Cyber War and Laws of War* (CUP 2012) 220–6.

107 See section 4 ‘Environment as Weapon’ below.

108 Oeter (above n 78) 105, 117.

109 ILC, ‘Third Report on the Protection of the Environment in Relation to Armed Conflicts’ (above n 1) paras 239–265.

110 The ILC Special Rapporteur for PERAC called attention to the severity of this problem in her Third Report, particularly in the Baltic Sea and the Pacific Ocean, but noting that the Mediterranean, the Barents Sea, the Atlantic, and the Black Sea are also affected. ILC, ‘Third Report on the Protection of the Environment in Relation to Armed Conflicts’ (above n 1) paras 255–265.

- 111** While Protocol V was being negotiated, in 2002–2003, the UN Compensation Commission was reviewing environmental damage from the 1990–1991 Gulf War, including substantial harm from remnants of war. UNCC, ‘Report and Recommendations made by the Panel of Commissioners concerning the Second Instalment of “F4” Claims’ (above n 16) paras 80–117, approved by the Governing Council Decision 171 UN Doc S/AC.26/Dec.171 (3 October 2002); UNCC, ‘Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of “F4” Claims (above n 16) paras 182–240.
- 112** Protocol V article 1.
- 113** See section 6 ‘Protection of the Environment by Third Parties: Solidarity’ below.
- 114** Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD).
- 115** UNGA, ‘Report of the Conference of the Committee on Disarmament’ (1976) GAOR 31st Session Supp No 27 (A/31/27) (vol I) para 333.
- 116** Dinstein (above n 11) 529.
- 117** Royal Society, *Geoengineering the Climate: Science, Governance and Uncertainty* (RS Policy document 10/09, Royal Society 2009); National Academy of Sciences, *Advancing the Science of Climate Change* (The National Academies Press 2010).
- 118** Catherine Redgwell, ‘Geoengineering the Climate: Technological Solutions to Mitigation—Failure or Continuing Carbon Addiction?’ (2011) 2 *CCLR* 178, 182–3.
- 119** UNGA (above n 115) 91.
- 120** *ibid* 93. See also Telegram 1662 From the Mission in Geneva to the Department of State, Subject: CCD 691st Plenary Meeting, March 4, 1976, 574 Foreign Relations of the United States, 1969–1976, Vol E–14, Part 2.
- 121** ‘Final Document of the Second Review Conference of the Parties to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques’ UN Doc ENMOD/CONF.II/12 (Part II: Final Declaration) (22 September 1992) 12. The US used herbicides extensively against the North Vietnamese from 1962 until 1971.
- 122** Compliance is addressed in ENMOD article 5.
- 123** Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 9 May 1926) 94 LNTS 65.
- 124** See the discussion of cyber warfare above.
- 125** Oeter (above n 78)M 217–21.
- 126** *ibid* 221.
- 127** Stephens (above n 5) 249–50.
- 128** Michael Bothe, ‘Criminal Responsibility for Environmental Damage in Times of Armed Conflict’, in Richard J Grunawalt et al (eds) (above n 9) 473–8.
- 129** Françoise J Hampson, ‘Liability for War Crimes’, in Peter Rowe (ed), *The Gulf War 1990–91 in International and National Law* (Routledge 1993) 254.
- 130** Marko Divac Öberg, ‘The Absorption of Grave Breaches into War Crimes Law’ (2009) 91 *IRRC* 163, 164.

131 *Trial of the Major War Criminals before the International Military Tribunal*, Vol 1 (International Military Tribunal 1947) 55, 239–40, 297.

132 *ibid* 281–2 (Göring convicted), 287 (Von Ribbentrop), 295 (Rosenberg), 297 (Frank), and 324–5 (Jodl).

133 *ibid* 61.

134 *ibid* 61.

135 *ibid* 43 (Göring).

136 *ibid* 11, 173–4.

137 *ibid* 57, 58, 60.

138 *ibid* 60.

139 *ibid* 219–24.

140 See also GCIV article 53.

141 GCIV article 146.

142 US DoD, ‘Conduct of the Persian Gulf War’ (above n 21) 710.

143 UNCC, ‘Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of “F4” Claims’ (above n 16) paras 61, 86–99, 106–111, 121–125, 134–138.

144 See also Rex J Zedalis, ‘Burning of the Kuwaiti Oilfields and the Laws of War’ (1991) 24(4) *Vand J Transnat’l L* 711, 738–9.

145 Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

146 Rome Statute article 21. ICC, *Assembly of States Parties to the Rome Statute of the International Criminal Court* (New York 3–10 September 2002) 1st Session (UN 2002) Part IIB. The *Elements of Crimes* adopted at the 2010 Review Conference are replicated from the ICC, *Review Conference of the Rome Statute of the International Criminal Court* (Kampala 31 May–11 June 2010) (ICC 2010) (*Elements of Crimes*).

147 *Elements of Crimes* 15–16.

148 For a discussion of whether use of nuclear, chemical, and biological weapons is covered by the Rome Statute, see Ines Peterson, ‘The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?’ (2009) 22(2) *LJIL* 325, 336–7.

149 *Elements of Crimes* 19.

150 *ibid* 1.

151 Peterson agrees with Dörmann that actual damage is not required. Peterson (above n 148) 14.

152 *ibid* 330 (reviewing the debate and concluding that the terms in API and the Rome Statute must be interpreted independently, as is the case with the similar threshold in ENMOD).

153 Although some commentators questioned this in the years immediately following the conflict, on the grounds that the harm was not going to persist for decades, environmental assessments undertaken from 2000 on showed that there was ongoing damage that would

likely continue for a further twenty years or more. UNEP, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (UNEP 2009) 8.

154 Mark Drumbl, 'Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes' (1998) 22 *Fordham Intern'l LJ* 122, 126.

155 Hampson (above n 129) 250-1, 259.

156 ICTY (above n 70) paras 14-25.

157 Rudiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2010).

158 Protocol on Explosive Remnants of War (adopted 28 November 2003, entered into force 12 November 2006) 2399 UNTS 100 (CCW Protocol V).

159 UNCC, 'Report and Recommendations made by the Panel of Commissioners Concerning the Second Instalment of "F4" Claims' (above n 16) paras 32-35, 34.

160 UNGA, 'Report of the United Nations Conference on Environment and Development', Annex I: Rio Declaration on Environment and Development (Rio de Janeiro, 3-14 June 1992) UN Doc A/CONF.151/26 (Vol I). See also UNCLOS article 194.

161 Michael N Schmitt, Charles HB Garraway, and Yoram Dinstein (eds), *The Manual on the Law of Non-International Armed Conflict: With Commentary* (International Institute of Humanitarian Law 2006) definition 1.1.1 www.ihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf.

162 ILC, 'Second Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 6.

163 Schmitt et al (above n 161) 59.

164 For example, Convention on Conventional Weapons (CCW); CCW Protocol III; Rome Statute 8(e); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211; CWC; Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 216; Second Protocol to the Hague Convention of 1954 for the protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (Second Protocol 1999).

165 Thirlway (above n 3) 185.

166 ILC, 'Second Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 8.

167 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977; entered into force 7 December 1978) 1125 UNTS 609 (APII) articles 14-16.

168 Geneva Call, a non-governmental organization, has compiled a collection of humanitarian commitments made by armed non-state actors (ANSAs) theirwords.org.

169 ILC, 'Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 3.

170 See, eg, US DoD, *Law of War Manual*, section 4.4.3.

171 John P Quinn, Richard T Evans, and Michael J Boock, 'US Navy Development of Operational-Environmental Doctrine', in Austin and Bruch (eds) (n 38) 164-5.

172 ILC, 'Third Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 10.

173 With respect to the continued vitality of treaties, see ILC, 'Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries' in *Yearbook of the International Law Commission*, Vol II, Part 2 (ILC 2011) article 3.

174 *ibid* articles 4, 6,

175 Christopher Greenwood, '*Jus ad Bellum* and *Jus in Bello* in the Advisory Opinion', in Laurence Boisson de Chazournes and Philippe Sand (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 252-3.

176 See Section 2.C 'Protected Areas. Sensitive Areas'.

177 Stephen McCaffrey, 'The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls', in Salman MA Salman and Laurence Boisson de Chazournes (eds), *International Watercourses: Enhancing Cooperation and Managing Conflict*, Technical Paper No 414 (World Bank 1998) 25.

178 UNCLOS articles 29-32; International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 November 1983) 1340 UNTS 184 article 3(3).

179 See UNEP, *Protecting the Environment During Armed Conflict* (above n 82) 35-7.

180 Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2001) 286 *RCADI* 162; Heintschel von Heinegg (above n 34) 463.

181 US positions reflect this with regard to human rights. HRC 'Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights' UN Doc CCPR/C/USA/4 (22 May 2012) para 506; US DoD, *Law of War Manual*.

182 See eg NATO, Military Principles and Policies for Environmental Protection (MC 0469/1), October 2011; ILC 'Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts' (above n 1) para 46.

(p. 118) Chapter 6 Air Warfare

1 Introduction

By World War II, airpower had become a defining element of warfare. In that conflict, the Battle of Britain saved the United Kingdom from invasion, General Doolittle's daring raid made possible the first blow against the Japanese mainland, and the retaking of territory conquered by Germany and Japan would not have been possible but for Allied air superiority. Yet airpower also subjected civilian populations on both sides of the conflict to horrendous suffering in such operations as the 'Blitz', the fire-bombing of Dresden, and the dropping of atomic bombs on Hiroshima and Nagasaki. In Vietnam, Operations Rolling Thunder and Linebacker and the bombing of Viet Cong sanctuaries in Laos and Cambodia not only captured international attention, but also influenced the length and eventual conclusion of these conflicts. By the 1990s, airpower had become a (perhaps 'the') central element of operational strategy. Its potential was vividly illustrated by the 100-day Coalition air campaign during Operation Desert Storm in 1991 that enabled the defeat of Iraqi ground forces in 100 hours of follow-on land operations. Similarly, Operation Allied Force, the 78-day air assault against the Federal Republic of Yugoslavia in 1999, stopped the slaughter of Kosovar Albanians by (p. 119) Slobodan Milošević's security forces. And in the decade before the Second Gulf War of 2003, no-fly zones in the north and south of Iraq protected civilians from Saddam Hussein's security forces.

Airpower continues to dominate the twenty-first-century battlespace. Combined with Special Forces, it allowed Afghan indigenous forces to overthrow the Taliban almost effortlessly in 2001. Airpower remains the primary means by which insurgents are targeted in that on-going conflict. In 2003, decapitation airstrikes against Saddam Hussein kicked off Operation Iraqi Freedom. The air supremacy that was established in a matter of days enabled the rapid defeat of Iraqi conventional forces. Both conflicts, however, illustrated the limitations of airpower in combatting an insurgency. During Operation Unified Protector in 2011, NATO aircraft protected a rebellious civilian population from Libyan security forces and made possible the overthrow of long-time dictator Muammar Gaddafi. Perhaps most controversially, airpower is today the primary means by which the United States is carrying out its campaign against transnational terrorism.

Despite its decisive role in modern warfare, the air paradoxically remains the operational domain that is least regulated by treaty law.² While treaties addressing land and maritime warfare stretch back well over a century,³ and military activities in space have been regulated by international law for a decade,⁴ states have never adopted any international humanitarian law instrument devoted exclusively to air warfare. This does not mean that hostilities in the air are ungoverned. A number of the general international humanitarian law treaties contain provisions that constrain air operations. Moreover, state practice and *opinio juris* have combined to create a rich, albeit somewhat abstruse, body of applicable customary international law.

This Chapter is structured in two parts. It lays the groundwork for discussion with a survey of the historical *lex scripta* directly applicable to air operations, including efforts to craft restatements of the law of air warfare. However, most discussion is reserved for the second part, which considers the extant law of air operations from the perspective of airmen. It does so by examining the law governing the four questions that are central to their operations—where can they fly, at what can they shoot, how must they conduct air operations, and what weapons may they use.⁵(p. 120)

2 Codification of the Law of Air Warfare

Air warfare began in the eighteenth century when French forces at the Battle of Fleurus in 1794 famously used the balloon *Entreprenant* to monitor Austrian movements. Extension of hostilities into this new domain of warfare continued apace in the following century. For example, Austrian forces launched unmanned bomb-carrying balloons against Venice in 1849, observation balloons were used during the American Civil War (the North formed an aerial unit, the Union Army Balloon Corps), and technologically advanced states began to build dirigible airships.

By the end of the century, air warfare had captured the attention of the international legal community. In response, delegates to the First Hague Peace Conference in 1899 adopted Declaration 1, in which Parties agreed 'to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature'.⁶ The five-year limitation reflected the uncertainty of states as to how to treat this new technology. On the one hand, the ban answered their humanitarian (and operational) concerns. On the other, the five-year timeframe indicated an unwillingness to shoulder permanent prohibitions, at least not until the states had a better sense of the opportunities aerial platforms might offer. Their dilemma was that while aircraft could theoretically cause untold suffering, they might also contribute measurably to military victory. This tension between humanity and the need for military effectiveness infuses efforts to regulate new means and methods of warfare to this day.⁷

In 1903, the Wright brothers conducted the first sustained flight of a 'heavier than air vehicle', thereby launching the age of the aircraft. Hague Declaration 1 expired two years later. At the Second Hague Peace Conference in 1907, states were hesitant to permanently ban these new aerial machines, for they had begun to glimpse their battlefield utility. Instead, the conference adopted Hague Declaration XIV, which restated the prohibition in its 1899 counterpart, but again limited it temporally.⁸ Declaration XIV was only to remain in effect until the Third Peace Conference. As that conference was never held, the treaty technically remains in effect for states parties. Its impact on the conflicts to come proved negligible, as Austria-Hungary, France, Germany, Italy, Japan, and Russia never became parties, and the United (p. 121) States announced in 1942 that it would no longer abide by its terms. Moreover, like Declaration 1, the treaty contained an 'all participation' clause by which the instrument only applied during conflicts in which all the belligerents were party to it. In effect, Hague Declaration 1 is meaningless today.

The only other treaty affecting air operations during the early years of the twentieth century was the 1907 Hague Convention IV, with its Annexed Regulations.⁹ Although principally addressed to land warfare, Article 25 of the Convention prohibited the 'attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended'. The 'whatever means' verbiage was intended to include air attack.¹⁰ Arguably, Article 26's obligation to warn prior to attack or bombardment and Article 27's admonition to spare certain enumerated protected places (both precursors to the contemporary requirement to take precautions in attack) also extended to air attack.

These two instruments exerted little influence on the development of air warfare. Five years after their adoption, the tactic of modern bombardment was born when Italian aircraft bombed a Turkish camp in Libya. Aircraft were also used in the Balkan War of 1912 and by the United States against Pancho Villa in 1916.

The sole attempt to directly address the law applicable to air warfare before the outbreak of World War I came in 1911. In that year, the *Institut de droit international* adopted a resolution stating that air warfare was lawful only on the condition that it placed civilians and civilian property at no greater risk than land or maritime warfare.¹¹ The bombing of

cities and the destruction of civilian property from the air during World War I demonstrated the ineffectiveness of this non-binding declaration by a group of eminent jurists.

World War I was the first conflict where air operations played a critical role. Aircraft were widely used by both sides for observation, bombing, and dog fighting. In the aftermath of the war, the 1921–22 Washington Conference on the Limitation of Armament considered whether and how to address this relatively new method of warfare. By then, a number of states were actively building air forces, the prime example being the establishment of the Royal Air Force in 1918. The conference could reach no agreement on limiting aircraft, but did appoint a Commission of Jurists to examine legal issues associated with air operations.¹² In 1923, the Commission (p. 122) issued its general Report on the Revision of the Rules of Warfare, which included ‘Rules of Air Warfare’.¹³

The Hague Rules of Air Warfare were generally recognized as an authoritative soft law pronouncement, much of which undoubtedly became customary law over the ensuing decades. Of particular note are Chapter III on ‘Belligerents’, which set forth the principle that only military aircraft may conduct combat operations, and Chapter IV, which dealt with the conduct of hostilities. Two of the instrument’s Articles were especially relevant to the air operations that took place in the next World War. Article 22, an early version of the principle of distinction, provided that ‘[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants, is forbidden’. Article 24 built on that principle by offering humanitarian law’s first definition of ‘military objectives’: ‘air bombardment is legitimate only when it is directed against a military objective, ie an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent’.¹⁴ Today, these two articles, which undoubtedly reflect customary law, are codified in Articles 51 and 52 of the 1977 Additional Protocol I to the 1949 Geneva Conventions.¹⁵

The Rules also contained a listing of military objectives: ‘military forces, military works, military establishments or depots, manufacturing plants constituting important and well-known centres for the production of arms, ammunition or characterized military supplies, lines of communication or of transport which are used for military purposes’.¹⁶ The notion of an exhaustive list has since been rejected as under-inclusive, in particular because it would inevitably fail to account for civilian objects that become military objectives through use (or future use) by the enemy for military purposes.¹⁷

Beyond the 1925 Gas Protocol, which extends to delivery by air, no other major international effort to address air warfare was undertaken before World War II. Nevertheless, it became clear during that period that air warfare could not only significantly influence the course of battle, but also tragically affect the civilian population. The paradigmatic example was the infamous bombing of Guernica during the Spanish Civil War. Such events sometimes led states to assert that despite the (p. 123) dearth of treaty law on point, a customary body of norms had emerged to govern air warfare. For instance, in 1938, Neville Chamberlain famously articulated three fundamental rules of air warfare in the House of Commons: the civilian population may not be attacked; targets must be military objectives; and care must be taken in attack to avoid harm to civilians.¹⁸ Moreover, irrespective of the direct bombing of civilian populations during World War II by both sides, the parties to the conflict characterized the 1923 Hague Rules as reflective of customary law and accused their opponents of violations.

Some progress has been made since World War II in codifying the law of air warfare. Each of the four 1949 Geneva Conventions mentioned aircraft, albeit primarily with respect to their medical functions, not their use in the conduct of hostilities.¹⁹ Certain instruments that are not specific to warfare also contain rules restricting air operations. Examples include the 1956 Hague Cultural Property Convention, various aspects of the Protocols to the 1980 Convention on Conventional Weapons, and the Cluster Munitions Convention.²⁰

However, the 1977 Protocol Additional I to the 1949 Geneva Conventions, the first comprehensive attempt to regulate conduct of hostilities norms since the 1907 Hague Regulations, represents the high water mark with respect to regulating air warfare.

While Additional Protocol I, building upon the provisions found in the 1949 Geneva Conventions, addresses medical aircraft in some depth,²¹ the most significant aspects of the instrument are found in Section I of Part IV. That section sets forth the general protection of the civilian population against the effects of hostilities by codifying such customary norms as the principle of distinction, the prohibition on indiscriminate weapons and attacks, the rule of proportionality, and the requirement to take precautions in attack.²² It also extends protection from, or delineates restrictions on, attacks against specified objects that range from nuclear electrical generating stations to the environment.²³(p. 124)

Article 49(3) contains an important limiting clause on the scope of the Protocol: ‘the provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air’. Therefore, the treaty cannot be characterized as a thorough restatement of the legal architecture governing air warfare since it does not address air-to-sea, sea-to-air, ground-to-air, or air-to-air combat except as they have incidental effects on civilians or civilian objects on the ground.

Given the extensive air-to-air, air defence, and sea-based air warfare that had occurred during and since World War II, this approach seems curious. The Commentary to the Additional Protocols published by the International Committee of the Red Cross (ICRC) is revealing. It notes that ‘[a]s regards air warfare, there is no precise written law on this subject, apart from some unclear customary law (for example: external marks indicating the nationality of aircraft)’.²⁴ It continues:

Admittedly both sea and air warfare are subject to restrictions imposed by treaties of general application, such as, for example, the Hague Convention of 1954 for the Protection of Cultural Property and the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, but there are hardly any specific rules relating to sea or air warfare, and insofar as they do exist, they are controversial or have fallen into disuse.²⁵

An unofficial commentary prepared by three eminent scholar-practitioners who participated in the Diplomatic Conference leading to adoption of Additional Protocol I explains that the ICRC had done little preparatory work with regard to air warfare. That being so, concern was expressed that trying to address air (or naval) warfare might have the effect of scuttling the entire effort.²⁶ The omission of air warfare was, however, controversial. For instance, a number of Arab states tried to draw attention to the issue by citing the shooting down of a Libyan airliner by Israeli aircraft.²⁷ Despite these efforts, the original draft provision survived as set forth above because of the desire to complete the rest of the instrument in the time allotted for the Conference and because its participants ‘recognized that care should be taken to avoid changing [the law on air and naval warfare] inadvertently’.²⁸

Additional Protocol I has nevertheless exerted significant influence on the conduct of air warfare. Most air warfare today consists of ground-to-air operations in the form (p. 125) of close air support and deliberate targeting and is therefore regulated by the instrument for parties thereto. It is significant that 172 states, with the notable exceptions of Israel, Turkey, and the United States, are party to Additional Protocol I. Even non-party states acknowledge, publicly or in practice, that its provisions relevant to air-to-ground operations in great part reflect current customary international law. And despite its limitation to air-to-

ground operations, most states treat the general norms it enunciates regarding such issues as proportionality and precautions in attacks as reflective of customary international law applicable in all air operations.

In 2003, Harvard University's Program on Humanitarian Policy and Conflict Research launched a major project under the direction of the eminent scholar, Yoram Dinstein to thoroughly examine the contemporary law of air warfare. Many of the world's top academics and practitioners participated in the effort. Six years later, the group produced the *Manual on International Law Applicable to Air and Missile Warfare* (AMW Manual), which represents the most authoritative and comprehensive treatment of air warfare to date. Although non-binding, it serves states and scholars as a reliable catalogue of those customary international law rules that govern twenty-first-century air warfare. In this Chapter, heavy reliance is therefore placed on this Manual, for which the author served as a member of the core drafting team.

3 The Law of Air Warfare

Air warfare is complex, as is the law that governs it. The AMW Manual, for instance, consists of 175 Rules with extensive accompanying commentary. However, reduced to essentials, the key provisions of the law of air warfare address one of four issues on which airmen focus: (1) Where may air operations be conducted? (2) Who and what may be attacked? (3) How must air operations be conducted? (4) What weapons may be used? Each of these questions will be addressed in turn.

A. Where may air operations be conducted?

During an international armed conflict, air operations may be conducted over the territory of any of the belligerent states. They may also be conducted in international airspace, that is, all airspace over international waters. International waters begin at the outer limit of a coastal state's territorial sea.²⁹(p. 126)

Belligerent military activities in neutral territory, including in neutral airspace, have long been prohibited. The general principle that neutral territory is inviolate appears in Article 1 of both the 1907 Hague Conventions V and XIII.³⁰ The Hague Rules of Air Warfare and the AMW Manual apply the general principle to neutral airspace.³¹ It is unquestionable that the prohibition on conducting belligerent military operations in neutral airspace is customary in nature.³² The prohibition includes both flying through neutral airspace and conducting air operations from belligerent airspace into neutral airspace, as with launching a missile into the area. It also extends to combat search and rescue operations.³³

Neutral national airspace includes all airspace over a neutral's land and territorial sea. Note, in this regard, that there is no right of innocent passage for aircraft, as there is for warships sailing through territorial waters.³⁴ However, the rights of transit passage through an international strait and archipelagic sea lanes passage do apply to aircraft.³⁵ Neutrals enjoy certain rights in maritime zones beyond the territorial sea, such as the exclusive economic zone, but do not possess analogous rights in the airspace lying above them.

Although the principle of sovereignty generally allows states to consent to activities on their territory, a neutral state may not agree to the presence of belligerent aircraft in its airspace during an armed conflict. Allowing belligerent aircraft to use the airspace would breach its obligations under the law of neutrality. Indeed, in the event of a violation of neutral airspace, the neutral state is obliged to take whatever measures are necessary to expel the violating aircraft or otherwise terminate the breach of their neutrality.³⁶ Action by the neutral may include attacking the belligerent aircraft if required in the circumstances.³⁷

If the neutral state fails to comply with its duty to exclude belligerent activities from its airspace, either because it cannot or simply because it elects not to do so, opposing belligerents are entitled to take measures, including the use of force, to put an end to its enemy's use of the airspace. They must first warn the neutral state to enforce its neutrality and give it an opportunity to do so unless doing so is not (p. 127) feasible in light of the nature of the violation (eg an attack is underway from neutral airspace).³⁸

It is sometimes asserted that belligerents may exclude civil (and neutral military) aircraft from particular airspace by establishing exclusion or no-fly zones. The former are set up outside the territory of the belligerents, whereas the latter are located in belligerent airspace. Such zones are legal fictions in that they do not absolve a belligerent of its responsibilities under international humanitarian law. In particular, they do not create a so-called 'free fire zone', since aircraft within an exclusion or no-fly zone may only be attacked if they fully qualify as military objectives.³⁹ Of course, belligerents may take measures to control the activities of civil aircraft in the immediate area of operations and to ensure force protection.⁴⁰ In particular, they may do so in the 'contact zone' (the area where opposing forces are facing each other), a principle recognized as early as the Hague Rules of Air Warfare.⁴¹

The extent, location, and duration of an exclusion zone must be limited to that which is necessary in the circumstances; anyone who may encounter the zone must be notified of its existence; and the zone may not bar access to the airspace of neutrals.⁴² Because zones may not be enforced against aircraft that do not qualify as military objectives, they are, in effect, merely areas of heightened risk. Although they do not alter the applicable legal regime, the fact that an aircraft has penetrated an exclusion zone may, depending on the circumstances, contribute to verification of that aircraft as an enemy military aircraft that may be attacked.

No-fly zones are on a slightly firmer normative foundation in that they exist either in airspace over which the belligerent enjoys sovereignty or over the enemy's territory, an area where the prerogatives of sovereignty are diminished by virtue of the armed conflict. Therefore, the state declaring the zone has the right under international law to exclude aircraft that have not been granted its consent to fly in the area, at least over its territory or territory that it has occupied. Nevertheless, the state's right to engage civil aircraft in such areas is no greater than that which it would enjoy during peacetime (a controversial subject) or pursuant to international humanitarian law, as when a civilian aircraft is used for military purposes.

Blockade, by contrast, is a distinct legal regime that has rested on legal *terra firma* for over a century. The method of warfare consists of belligerent operations to prevent all vessels from entering or exiting specified ports or coastal areas belonging to, or under the control of, the enemy.⁴³ There are strict and complicated requirements for the establishment and maintenance of a naval blockade, the discussion of which (p. 128) lies beyond the scope of this Chapter.⁴⁴ However, what is significant in respect of air warfare is that aircraft may be used to enforce a naval blockade.⁴⁵ In particular, because a vessel which resists capture while attempting to breach a naval blockade qualifies as a military objective, force, including an attack from the air, may be used against it.⁴⁶

Although aerial blockades are of more recent vintage, they are increasingly viewed as lawful.⁴⁷ Such blockades are intended to prevent aircraft from entering or exiting specified airfields or coastal airspace that the enemy controls. They must conform to all the requirements (eg, effectiveness) and limitations (eg, does not bar access to neutral territory) of a naval blockade and are generally announced through a Notice to Airman

(NOTAM). In addition to aircraft, naval and ground forces may be employed to render the blockade effective.

Lines of naval blockade are usually established in international waters and enforcement is permitted once it becomes clear that a vessel will try to breach the blockade. Due to the speed of modern aircraft, a line of aerial blockade would have to be placed at a significant distance from the coast to be effective. However, this fact does not preclude such a blockade from being established as a matter of law.

B. Who and what can be attacked?

The principle of distinction applies in air warfare precisely as it does in land or sea warfare.⁴⁸ Article 48 of Additional Protocol I reflects the customary norm: 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'.⁴⁹ This broad principle is operationalized in a number of international humanitarian law rules, the most important of which are found in Articles 51 and 52 of Additional Protocol I. Like Article 48, the two Articles are universally regarded as customary in nature.⁵⁰(p. 129)

Article 51(2) of Additional Protocol I provides that 'the civilian population as such, as well as individual civilians, shall not be the object of attack'. Persons who are not civilians (ie, those who are members of the armed forces) are subject to attack, with the exception of those who are *hors de combat* or specially protected, such as medical or religious personnel.⁵¹

Between 2003 and 2008, the ICRC convened an international group of experts to consider the legal issues surrounding the targeting of civilians who directly participate in hostilities. The result of this effort was the ICRC publication of *The Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*.⁵² During the project, the group achieved consensus that members of an organized armed group are to be treated as members of the armed forces with regard to how and when they may be targeted.⁵³ Accordingly, such individuals are liable to being targeted from the air based solely on their status as members of the group; they may be attacked at any time so long as other requirements of international humanitarian law, such as the rule of proportionality and the requirement to take precautions in attack, are met.

The ICRC took the further position that this characterization applies only to members of the group who have a 'continuous combat function'.⁵⁴ Certain of the experts, including this author, rejected the approach, arguing that it is unfounded in law and perversely produces a disparity in treatment between members of the regular armed forces without a combat role, on the one hand, and members of an organized armed group who do not have a continuous combat function, on the other.⁵⁵ The former are targetable at all times, whereas the latter may only be attacked if and while they directly participate in hostilities. Such incongruence appears inconsistent with the underlying object and purpose of the relevant international humanitarian law norms.

Pursuant to Article 51(3) of Additional Protocol I (international armed conflict) and Article 13(3) of Additional Protocol II (non-international armed conflict),⁵⁶ civilians who are not members of an organized armed group lose their protection from attack and need not be considered in proportionality or precautions in attack (p. 130) calculations (see below) for such time as they directly participate in hostilities.⁵⁷ The experts involved in the direct participation project agreed that the two articles reflect customary international law.

In one of the project's notable achievements, consensus was achieved among the majority of experts on three 'constitutive elements' that comprise acts of direct participation. First, '[t]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm)'. Secondly, there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation). Finally, for the act to amount to direct participation, it 'must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)'.⁵⁸

Of the constitutive elements, only that requiring direct causation proved contentious. Although all the experts agreed that direct causation is required for an act to qualify as direct participation, controversy was sparked when the Interpretive Guidance characterized the assembly and storage of improvised explosive devices (IEDs) as indirect, rather than direct, participation.⁵⁹ In that, until recently, IEDs caused the greatest number of casualties among coalition troops in Afghanistan and Iraq, many militaries took the position that such activities were direct and that those involved in them could be targeted. The very existence of the debate has nevertheless complicated, and will continue to complicate, the development of multinational rules of engagement. The same is true with respect to the ICRC's controversial, and in this author's estimation unsupportable, assertion that individuals who voluntarily shield military objectives are not direct participants.⁶⁰

Once these three criteria have been met, the individual engaging in the qualifying activity may be attacked 'for such time' as he or she is so engaged. The 'for such time' verbiage had long been the source of controversy.⁶¹ Unfortunately, the direct participation project proved unable to resolve the dispute. At the risk of oversimplification, the ICRC argues that the period of direct participation, and therefore susceptibility to attack, encompasses 'preparatory measures [...] as well as the deployment to and the return from the location of its execution'.⁶² An alternative view held by a (p. 131) significant number of the experts is that the period of participation extends as far 'upstream' and 'downstream' as a causal connection exists.⁶³ Moreover, the ICRC was of the view that the loss of the protection only occurs during each separate act, such that there are intervals of protection and susceptibility to attack.⁶⁴ Those on the other side of the issue, including this author, take the position that such an interpretation creates an unacceptable 'revolving door' of targetability that makes little sense operationally. The latter group translates the 'for such time' phraseology more broadly as comprising the entire period during which the individual is engaged in sequential acts of direct participation.

Direct participation has become a prominent issue during air operations because the targeting of individuals is, for operational reasons, often likely to be carried out from the air.⁶⁵ There was, for instance, a public controversy as to whether NATO could lawfully target those involved in the Afghan drug trade on the basis that the Taliban relied on funds it generated.⁶⁶ Ultimately, it was determined (correctly) that the majority of the individuals in question were not direct participants in hostilities as a matter of law.

The continuous combat function debate has likewise complicated targeting from aircraft. In great part, this is because it is often difficult to determine from the air whether members of an organized armed group who are being considered for attack have such a continuous combat function. In a coalition like the International Security Assistance Force (ISAF), with members on both sides of the debate, achieving agreement as to the lawfulness of a particular strike can accordingly prove challenging.

Article 52(1) of Additional Protocol I is Article 51's counterpart for civilian objects. It provides that '[c]ivilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives [...]'. Since civilian objects are defined in the negative, the Article goes on to set forth the definition of military objectives: 'Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.⁶⁷ It is incontestable that the prohibition applies in air operations.

This definition of military objectives, and derivatively civilian objects, is universally accepted as an accurate expression of customary international law. It appears (p. 132) in other treaties, most military manuals, and restatements produced by international law experts.⁶⁸ However, two issues have proven contentious. Both are especially acute in the context of air warfare because aircraft permit strikes deep into enemy territory against targets that would normally not be reachable by land-based weaponry.

The first deals with objects that qualify as military objectives by nature. As noted in the ICRC's commentary on Article 52 of Additional Protocol I, 'this category comprises all objects directly used by the armed forces'.⁶⁹ For example, all military bases, aircraft, equipment, and warships satisfy the nature criterion. The controversy arises over the additional requirements set forth in the text of the Article—that the object makes an effective contribution to military action and that attacking it offers a definite military advantage. As a rule, the closer equipment is to the battlefield, the more likely it is that it contributes, or will contribute, to the enemy's military action. Similarly, the closer equipment is to the battlefield, the more likely it is that putting it out of action will yield the attacker a military advantage. However, the reach of air operations brings objects into range that, although military in nature, do not self-evidently contribute to the enemy's immediate military action such that their destruction or damage will give the attacker a military advantage.

Most commentators agree that objects that qualify by nature always make an effective contribution to military action because the condition is not context specific. It is the second requirement that is problematic. One school of thought holds that damaging, destroying, or neutralizing an object that makes an effective contribution to the enemy's military action ineludibly offers an attacker a definite military advantage. In other words, so long as a potential target is military in nature, it is a military objective. By this approach, every military installation or piece of equipment is legally subject to air attack regardless of whether it is being used, or going to be used, during the conflict (so long as other rules such as proportionality and precautions in attack are respected). Consequently, an air campaign may be conducted wherever the enemy and its equipment and facilities are located. As an example, naval vessels are legitimate targets even during a distant low-intensity land conflict in which they play no part.

A competing school of thought suggests that the inclusion of the reference to definite military advantage in Article 52 of Additional Protocol I was intended to impose a further requirement beyond qualification as a military objective based solely on an object's nature. For instance, in the example above the naval vessels would not be subject to air attack despite being objects that are military because (p. 133) sinking them would offer an attacker no definite military advantage in that particular situation.

The second contentious issue surrounds interpretation of the term 'military objectives'. There is widespread agreement that it encompasses any objects that are either 'war-fighting' or 'war-supporting'. War-fighting objects are those actually used to conduct hostilities or otherwise directly employed in military operations, while war-supporting objects are those in which the nexus between military operations and the object is relatively

clear and direct. Military aircraft or airfields exemplify the former; the paradigmatic illustration of the latter is a factory that produces munitions.

The United States has adopted a broader approach. In its *Commander's Handbook on the Law of Naval Operations*, the term 'military action' found in the Additional Protocol I definition of military objectives is replaced with 'war-fighting or war-sustaining capability'.⁷⁰ In explanation, the Handbook notes 'economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked'.⁷¹ Restated, a war-sustaining object is one without a direct nexus to military operations, but that ultimately makes such operations possible. Oil export infrastructure in a country that is reliant on export income to fund its war effort is the classic example. The differing approaches are especially relevant in the air context because the precision and range of aircraft and their associated weaponry render them uniquely suitable for conducting strikes against those categories of targets that sustain an enemy's ability to prosecute the war. For instance, the most efficient and effective manner of collapsing the enemy's oil export system would usually be through air attack (although the development of cyber operations offer an attractive option to air operations).

With regard to air-to-air operations, all military aircraft constitute military objectives unless they enjoy protected status under the law of armed conflict.⁷² Through application of the use or purpose criteria in the definition of military objectives, other aircraft may qualify as military objectives by virtue of the activities in which they engage. It is important to emphasize that the aircraft need not conduct attacks to lose their protection as civilian objects. So long as the acts in question make an effective contribution to the enemy's military action and attacking the aircraft would provide a definite military advantage, they are military objectives. The AMW Manual offers the following examples of qualifying activities:

Engaging in hostile action in support of the enemy, e.g., intercepting or attacking other aircraft; attacking persons or objects on land or sea; being used as a means of attack; engaging in electronic warfare; or providing targeting information to enemy forces.

Facilitating the military actions of the enemy's armed forces, e.g., transporting troops, carrying military materials, or refuelling military aircraft.(p. 134)

Being incorporated into the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance or command, control and communications missions.

Refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture, or clearly resisting interception.⁷³

Certain aircraft are entitled to special protection under international humanitarian law. For instance, Article 18 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field provided that '[a]ircraft used as means of medical transport shall enjoy the protection of the Convention during the period in which they are reserved exclusively for the evacuation of wounded and sick and the transport of medical personnel and material'.⁷⁴ The protection only attached while the aircraft, which had to be marked, was over territory in the control of its own forces.

The 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field also deals with medical aircraft.⁷⁵ Article 36 grants protection to medical aircraft, although only when 'flying at heights, times and on routes specifically agreed upon between the belligerents concerned'. Flights over enemy territory are expressly prohibited in the absence of an agreement thereto between the parties to the conflict. Article 37 of Geneva Convention I allows medical aircraft to 'fly over the territory

of neutral Powers, land on it in case of necessity, or use it as a port of call'. Prior notice is required and the aircraft in question are 'immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned'.

Additional Protocol I updates the 1949 protections for parties to the Protocol with a number of provisions regarding medical aircraft. Article 24 sets forth the basic scheme. As with the 1929 Convention, protection is automatic over areas not in enemy control so long as the medical aircraft performs only medical functions; there is no requirement for a pre-flight agreement with the enemy.⁷⁶ In airspace over zones where belligerent forces are in contact, an agreement is essential to ensure protection, although medical aircraft do not lose protection simply by being in the area.⁷⁷ Over areas controlled by the enemy, consent is required for flights.⁷⁸ As with civilian aircraft, 'the Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party' wherever they fly.⁷⁹

Given these treaty law standards and the substantial state practice involving medical aircraft, the experts participating in the AMW Manual project concluded that (p. 135) customary law requires no consent from the opposing party when medical aircraft fly over areas controlled by friendly forces.⁸⁰ However, '[i]n and over areas physically controlled by the enemy, as well as in and over these parts of the contact zone which are physically controlled by friendly forces or the physical control of which is not clearly established, the protection of medical aircraft can be fully effective only by virtue of prior consent obtained from the enemy'.⁸¹ Note the careful wording, as the experts did not conclude that protection only attaches once consent has been granted.

In contrast to medical aircraft, search and rescue aircraft and helicopters enjoy no protection under international humanitarian law. In fact, searching for downed aircrew or other military personnel is considered a military activity. As a result, civilian aircraft that engage in search and rescue operations lose their protection from attack for such time as they are doing so.⁸²

United Nations (UN) aircraft are protected from attack so long as the UN forces they support are entitled to protection as civilians. Those forces lose protection if they become a party to the conflict. Of course, individual UN aircraft may become legitimate targets should they qualify as military objectives (see above).⁸³ While humanitarian relief aircraft benefit from no special protective regime, the activities they engage in are entitled to 'respect and protection', as are the individuals engaging in them.⁸⁴

International humanitarian law contains no express rule regarding civilian airliners, although it is generally agreed that particular care must be taken in situations involving them.⁸⁵ This consensus is in part a reflection of international outrage over a number of instances in which civilian airliners have been downed, such as the shooting down of KAL 007 by Soviet aircraft in 1983. As to the application of international humanitarian norms *vis-à-vis* civilian airliners, there is no doubt that they may become military objectives through use or purpose, as when they are used to observe and report on military operations or fitted out to carry troops and military equipment. Of course, the resulting incidental injury and death from the shooting down of a civilian airliner would usually be excessive relative to the military advantage likely to be achieved, thereby breaching the rule of proportionality (discussed below).

Finally, even in the absence of explicit protection, international humanitarian law recognizes that aircraft may be granted protection by special agreement between the parties to a conflict.⁸⁶ Such 'cartel aircraft', which may include military aircraft, (p. 136) are used for purposes like transporting prisoners of war or *parlementaires* (individuals engaged in negotiations). The agreements affording them protection typically delineate

conditions for particular flights, such as speed, course, and altitude. Deviation from these conditions can result in a loss of protection.

In certain circumstances, protected persons and objects may be attacked in reprisal. Reprisals are actions that would otherwise be unlawful under international humanitarian law, but which are allowed in order to force the enemy to desist from its own unlawful conduct.⁸⁷ The classic example is an attack against enemy civilians in order to compel the enemy to stop attacking civilians. Reprisals are particularly likely to be taken through air operations because the range of aircraft makes it possible to strike many potential reprisal targets that would not otherwise be vulnerable to attack.

Consensus is lacking as to the legality of various types of reprisals. However, it is agreed that reprisals are unlawful as a matter of customary international law when directed against prisoners of war; interned civilians; civilians in occupied territory and their property; those who are *hors de combat*; and medical personnel, facilities, vehicles, and equipment.⁸⁸ As a general matter, these are not the sort of reprisal targets prone to air attack.

Additional Protocol I prohibits numerous forms of reprisals regarding which consensus as to their customary character is lacking. These include reprisals against the civilian population and individual civilians; civilian objects; cultural objects; places of worship; objects indispensable to the civilian population; the natural environment; and dams, dykes, and nuclear electrical generating stations.⁸⁹ Such individuals and objects are all highly vulnerable to air attack. A number of states that are party to the treaty have issued understandings with respect to reprisals directed against civilians. The understandings effectively make the prohibition conditional on compliance with international humanitarian law by the adverse party.⁹⁰(p. 137)

C. How must air operations be conducted?

Compliance with three international humanitarian law rules is required before an attack on a member of the armed forces, a civilian direct participant in hostilities, or a military objective may be lawfully attacked: the prohibition on indiscriminate attacks; the rule of proportionality; and the requirement to take precautions in attack. Although not unique to air warfare, the application of each in the context of air warfare raises particular issues.

Indiscriminate attacks are those 'of a nature to strike military objectives and civilians or civilian objects without distinction'.⁹¹ They are unlawful both as a matter of treaty and of customary international law.⁹² Such attacks must be distinguished from direct attacks on protected persons or objects. In an indiscriminate attack, the attacker conducts the operation without regard for any effect the attack may have on them.

Two forms of indiscriminate attack are particularly pertinent to air warfare. The first is an attack that is simply not directed at a military objective.⁹³ In the air environment, a violation of this norm might, for example, involve releasing weapons without aiming at a specific target, as in jettisoning live bombs that were not dropped during an attack without regard for what they are likely to hit. This might be done because of a desire not to 'waste' the weapon or because of the risks associated with landing with live ordnance. Whatever the reason, the violation occurs when the bombs are released unaimed.

The second form of indiscriminate air attack involves treating 'as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects'.⁹⁴ For instance, an enemy city may contain a district with a number of important military objectives, such as a headquarters, barracks for troops stationed there, and communications and transportation support facilities. It would be unlawful to conduct an

airstrike blanketing the entire area if each of the military objectives can be targeted separately.(p. 138)

It must be cautioned that the test for compliance is one of feasibility; the prohibition is not a blanket ban on carpet-bombing, saturation bombing, or other means of target area bombing. Such methods of air warfare are lawful if there is operationally or technically no way to strike the military objectives individually (and the operation will comply with the rule of proportionality and the requirement to take precautions in attack). Factors that might affect the operational or technical feasibility of an operation include unavailability of precision (or sufficiently accurate) weapons, enemy air defences, a lack of targeting data sufficiently detailed to individually target, or the need to preserve guided weapons for operations requiring greater precision, such as those against high priority targets in densely populated areas.

Even if a lawful target is to be attacked by a discriminate method of air warfare, the operation must comply with the rule of proportionality. Codified in Articles 51(5)(b) and 57(2)(iii) of Additional Protocol I, this customary international law rule prohibits ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’. It is an express acknowledgement that collateral damage (injury to civilians and damage of civilian objects) is often unavoidable during attacks. When this is the case, the rule permits the attack to proceed so long as the collateral damage expected is not excessive relative to the military advantage the attacker reasonably expects to attain. The rule of proportionality is especially important in the context of air warfare because air weapons may lack the precision of their land counterparts, often have greater blast and radius of effects, and are sometimes launched when the situation on the ground lacks clarity.

Assessment of whether an air attack has complied with the rule must be based on the reasonableness of the attacker’s conclusions at the time. This is apparent from the terms ‘expected’ and ‘anticipated’ in the rule. As a matter of law, therefore, it is improper to characterize an attack as a proportionality violation solely based on the actual civilian casualties or damage to civilian objects that resulted; the *ex ante* expectation of collateral damage is the determinative factor. The same is true with regard to military advantage. For instance, consider the 50 unsuccessful decapitation strikes conducted by US air forces during Operation Iraqi Freedom. Their lawfulness depends on the military advantage that would have resulted had those attacks been successful and the degree of collateral damage that the mission planners expected. Of course, actual collateral damage caused and military advantage achieved may bear on the reasonableness of an attacker’s expectations.

Air attacks are frequently employed to strike ‘dual-use’ targets. A dual-use target is one that serves both military and civilian purposes. ‘Lines of communication’ (LOC) such as major highways, airports, and rail lines exemplify the concept. Since they are fixed and lie behind enemy lines, LOCs are typically targeted from the air. The fact that these and other dual use targets continue to be used by civilians does not shield them from attack. On the contrary, any use by the military, even if such (p. 139) use is slight relative to civilian usage, renders an object a military objective subject to attack. Aspects of the target system that can be distinguished as purely civilian factor into the proportionality calculation. For example, on a dual-use airfield, the runway and taxiways are military objectives as such. However, certain of the hangars might only be used for civilian purposes. Should this be the case, expected damage to them would be included in the proportionality assessment. Civilians working at the airfield (other than those who qualify as direct participants in

hostilities) expected to be injured or killed during the attack also qualify as collateral damage.

All direct effects, like blast damage or deaths caused by the collapse of a targeted building, are factored into the proportionality calculation.⁹⁵ Application of the rule is less clear with respect to indirect effects, also known as reverberating or knock-on effects.⁹⁶ The majority view today is that any reasonably foreseeable collateral damage must be considered when performing proportionality calculations. As an example, an attack on a dual-use electrical generating system may deprive many civilian users of electricity. The mere loss of electricity is not collateral damage since it does not involve loss of life, injury, or physical damage. However, if the absence of electricity would, for example, foreseeably cause damage at a manufacturing facility, this indirect effect of the attack would have to be considered when determining whether a proposed strike will comply with the rule of proportionality.

Even when the target is a lawful military objective or an individual subject to attack, and the planned attack would comply with the proportionality rule, international humanitarian law still requires the taking of precautions in attack. Set forth in Article 57 of Additional Protocol I, and considered generally reflective of customary international law, the norm requires that 'constant care shall be taken to spare the civilian population, civilians and civilian objects'.⁹⁷ The fact that most informed criticism of contemporary air attacks alleges that the attacker failed to take sufficient precautions to avoid collateral damage attests to the rule's centrality in air operations.⁹⁸

By the requirement, those who plan or decide on attacks must do 'everything feasible' to verify that that target is a lawful one.⁹⁹ The critical aspect of this rule is the (p. 140) reference to feasibility. Feasible has been widely interpreted as meaning that which is 'practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations'.¹⁰⁰ In practice, it relieves commanders from taking measures to verify a target that do not make sense militarily. For instance, an unmanned aerial system need not necessarily be used to monitor the target area during an attack if it is needed elsewhere for use in a higher priority strike or for other more important purposes. Of course, the attacker must have a reasonable basis for belief that the target is what he believes it to be before attacking; mere speculation does not suffice.

Precautions in attack also include selecting from among the available methods or means of warfare (tactics or weapons) those that are likely to result in the least collateral damage.¹⁰¹ As with verification, a feasibility caveat lies at the core of application. To illustrate, precision weapons do not have to be used in an attack if they need to be conserved for higher priority targets or to avoid greater collateral damage in future strikes; this is so even when their employment might reduce the likelihood of collateral damage. Similarly, although flying at lower altitudes might allow aircrew to visually confirm a target, doing so within the threat envelope of enemy air defences is seldom operationally feasible.

A comparable requirement attends target selection. When multiple targets can be struck to achieve the same objective, an attacker must select the one likely to result in the least collateral damage.¹⁰² For example, an attacker may seek to deprive an enemy military facility of power received through the civilian electrical grid. An attack on the grid's substations would place adjacent residences at high risk. If it is feasible to use a carbon filament bomb to attack the power lines running into the facility while avoiding civilian harm, such an attack is required. This rule applies only when a similar military advantage can be attained. There is no requirement that an attacker forfeit any degree of military advantage to avoid collateral damage (so long as the collateral damage in question is not

excessive in violation of the proportionality rule). Moreover, the alternative course of action must be technically and operationally feasible.

Finally, the international humanitarian law requirement to take precautions in attack mandates the issuance of warnings when an attack can be expected to affect the civilian population.¹⁰³ This requirement is subject to the caveat 'unless (p. 141) circumstances do not permit'.¹⁰⁴ In air attacks, it will seldom be feasible to provide warnings because doing so would typically endanger attacking aircraft by allowing the enemy an opportunity to move air defences into the target area. Warnings could deprive the attacker of an element of surprise necessary for mission success. As an example, many airstrikes currently being conducted in and near Afghanistan target senior insurgent leaders. Warning the civilian population of an imminent attack would cause the insurgent targets to move, thereby guaranteeing mission failure.

It is sometimes reasonable to issue warnings of a general nature as to impending airstrikes. Doing so allows civilians to leave the threatened area or take measures to shelter themselves during an air attack. Yet, even general warning might sacrifice the element of surprise or heighten risk to attackers. The feasibility of warnings must, therefore, be assessed on a case-by-case basis.

D. What weapons may be used?

International humanitarian law prohibits the use of weapons that cannot be directed at a specific target or which have uncontrollable effects.¹⁰⁵ It also prohibits the use of weapons that cause unnecessary suffering or superfluous injury to combatants.¹⁰⁶ These prohibitions are unlikely to have much impact on modern air warfare both because of advancing weapons technology (even among the less technologically advanced air forces) and because of the requirement to perform a weapons review before fielding new weapons.¹⁰⁷

The prohibitions and restrictions on weaponry most likely to affect air operations are treaty-based norms governing three common air-delivered weapons. The first is the prohibition on using air-delivered land mines in the 1997 Ottawa Convention.¹⁰⁸ For states not party to that treaty, the 1996 Amended Protocol II to the Convention on Conventional Weapons imposes special requirements regarding self-destruction and self-deactivation for parties thereto.¹⁰⁹ The trend towards state acceptance of a ban on anti-personnel land mines can be expected to mature into customary international law over time.(p. 142)

Cluster munitions are, contrary to occasional mischaracterization, not prohibited by customary international law. Instead, the 2008 Dublin Convention on Cluster Munitions governs their use by parties to that instrument. The Convention is rather limited in scope. By Article 2(2), it only applies to munitions containing submunitions that weigh less than 20 kilograms, and not to:

- (a) a munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) a munition or submunition designed to produce electrical or electronic effects;
- (c) a munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
 - (i) each munition contains fewer than ten explosive submunitions;
 - (ii) each explosive submunition weighs more than four kilograms;
 - (iii) each explosive submunition is designed to detect and engage a single target object;

- (iv) each explosive submunition is equipped with an electronic self-destruction mechanism;
- (v) each explosive submunition is equipped with an electronic self-deactivating feature.

Treaty law also restricts the use of air-delivered incendiary weapons. Article 2(2) of Protocol III to the Conventional Weapons Convention prohibits their employment against military objectives located in a concentration of civilians. This provision is the subject to reservations issued by a number of states. For instance, the United States 'reserves the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.¹¹⁰ The reservation was deemed necessary because incendiaries are the weapon of choice when targeting facilities containing chemical or biological weapons; the resulting fire consumes chemicals and biological contagions, thereby preventing their spread.

Unmanned combat aerial systems (UCASs), or drones, have become a contentious weapons system over the past decade. Modern militaries increasingly turn to them to conduct attacks since they avoid risk to aircrew, loiter in the target area for extended periods, have impressive 'ISR' (intelligence, surveillance, and reconnaissance) capabilities, and offer an on-the-spot ability to track and kill a target. UCASs are the primary means used to attack individuals in counter-terrorist strikes globally and have played a central role in conventional combat operations in Afghanistan, (p. 143) Iraq, Libya, and elsewhere. All advanced air forces are increasingly relying on drone technology.

The sole issue of legal significance regarding the employment of drones involves their use in cross-border operations. This author takes the position that they may be so used in limited self-defence situations,¹¹¹ such as when the territory of a third state is being used as a base of operations and that state is unable or unwilling to police its territory.¹¹² As noted above, they may also sometimes be employed in cross-border operations during an armed conflict, for example, when a belligerent breaches neutrality by operating from neutral territory and the neutral state is unable or unwilling to address the breach. The law governing such operations is no different than that which governs any cross-border operation, such as a ground incursion by Special Forces or artillery fire across a border.

Unmanned systems are subject to the same international humanitarian law norms as other weapons systems. Application of those norms is most affected by fielding of the UCAS in the context of the requirement to take precautions in attack. In particular, recall the obligation to select that method or means of warfare that will minimize collateral damage. The ability of the UCAS to employ a multifaceted sensor suite to identify the target with greater reliability than might be possible using other systems, and of the system to loiter over a target and delay an attack until the point when collateral damage avoidance is maximized, means that as a matter of law its use will sometimes be compulsory. This point must be tempered by the caveat that any such requirement is shaped by the feasibility of doing so in the circumstances.

UCASs are sometimes criticized on the grounds that drone strikes cause civilian casualties and that the systems are employed without risk to the operator. Such criticisms are counter-normative and counter-factual. Operationally, drone strikes are less likely to cause collateral damage than many other systems. Some critics point to the fact that they can be used in high threat environments because they are unmanned and therefore make possible strikes, and resulting collateral damage, that might otherwise not be feasible. In fact, the situations in which this is the case are very rare. More to the point, international humanitarian law does not prohibit collateral damage; it prohibits attacks that are expected

to result in excessive collateral damage. The criticism that the systems make possible attack without risk is a moral argument, not a legal one. The law of targeting is about balancing military necessity and humanitarian considerations, not ensuring a 'fair fight'. (p. 144)

4 Concluding Thought

Of the recognized domains of warfare, the air is the least regulated by international humanitarian treaty law. This lacuna is best explained by the hesitancy of states to negotiate limitations on weapons systems and methods of warfare that are exceptionally useful militarily. In other words, it reflects the inherent tension that states feel between the concerns of military necessity and humanitarian considerations that pervade all of international humanitarian law. Customary international humanitarian law, developed through state practice, has nevertheless filled much of the vacuum.

Footnotes:

- ¹ The views expressed in this Chapter are those of the author in his personal capacity and do not necessarily represent those of the US Government.
- ² Cyberspace, which is increasingly characterized as an operational domain by some states, is even less regulated. The United States recently recognized it as a domain of warfare in Department of Defense, *Strategy for Operating in Cyberspace* (2011), available at <<http://www.defense.gov/news/d20110714cyber.pdf>>.
- ³ See eg Hague Conventions VI, VII, VIII, IX, XI, and XII, 18 October 1907.
- ⁴ See eg Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Art V, 27 January 1967.
- ⁵ The Chapter generally addresses the law of air warfare in the context of an international armed conflict. However, most of the law discussed, especially that dealing with targeting, applies equally in non-international armed conflicts. Greater precision on this issue can be drawn from the Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare, with Commentary* (2010) (hereinafter AMW Manual).
- ⁶ Declaration (IV, 1) to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other New Methods of a Similar Nature, 29 July 1899.
- ⁷ On the balancing of these two interests, see M. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', 50 *Virginia Journal of International Law* (2010) 795.
- ⁸ Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907.
- ⁹ Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907.
- ¹⁰ Article 29 provided that personnel in balloons were not to be treated as spies, while Art 53 addressed the seizure of air 'appliances' by an occupation force.
- ¹¹ 'La guerre aérienne est permise, mais à la condition de ne pas présenter pour les personnes ou les propriétés de la population pacifique de plus grands dangers que la guerre terrestre ou maritime.' Institut de Droit International, Le régime juridique des aerostats, Section II, (Madrid, 21/22 April 1911), available at <http://www.idi-iil.org/idiF/resolutionsF/1911_mad_02_fr.pdf>.

- 12** Including members from Great Britain, United States, France, Italy, Japan, and the Netherlands.
- 13** Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (Drafted by a Commission of Jurists, The Hague, December 1922–February 1923) (hereinafter Hague Rules of Air Warfare).
- 14** Other aspects of Art 24 address the bombardment of populated areas, including an early version of the rule of proportionality allowing for the bombardment of such areas when ‘there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will thus be exposed’, Art 24(4).
- 15** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter Additional Protocol I).
- 16** Hague Rules of Air Warfare, Art 24(2).
- 17** Additional Protocol I, Art 52.2.
- 18** A. Roberts and R. Guelff (eds), *Documents on the Laws of War* (3rd edn, Oxford: Oxford University Press, 2000), 140.
- 19** Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (hereinafter Geneva Convention I), Arts 13, 36, 37; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereinafter Geneva Convention II), Arts 12, 13, 15, 39, 40; Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949 (hereinafter Geneva Convention III), Arts 4, 75; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Geneva Convention IV), Arts 22, 111.
- 20** Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 April 1981 (hereinafter Conventional Weapons Convention); Convention on Cluster Munitions, 3 December 2008.
- 21** Additional Protocol I, Arts 24–31.
- 22** Additional Protocol I, Arts 48, 51, 52, 57.
- 23** Additional Protocol I, Arts 53–6.
- 24** Y. Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987) (hereinafter Additional Protocols Commentary), § 1896.
- 25** Additional Protocols Commentary, § 1897.
- 26** 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) (hereinafter Bothe et al), 290.
- 27** Bothe et al, 290.
- 28** Bothe et al, 290–1.

- 29** US Navy/US Marine Corps/US Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A (2007), § 1.9 (hereinafter US Commander's Handbook).
- 30** Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907 (hereinafter Hague Convention V); Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907 (hereinafter Hague Convention XIII).
- 31** Hague Rules of Air Warfare, Art 40; AMW Manual, Rule 170(a).
- 32** Hague Convention V, Arts 2, 3; Hague Convention XIII, Art 2; US Commander's Handbook, § 7.3; UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383 (2004) (hereinafter UK Manual), § 1.43; AMW Manual, Rule 166.
- 33** AMW Manual, Rule 171(d).
- 34** US Commander's Handbook, § 2.5.2.1.
- 35** US Commander's Handbook, §§ 2.7.1.1, 2.7.1.2; AMW Manual, Rule 172(a)(ii).
- 36** Hague Convention V, Art 5; Hague Air Rules, Arts 42, 47; US Commander's Handbook, § 7.3; UK Manual, § 1.43; AMW Manual, Rules 168(a), 170(c).
- 37** AMW Manual, Rule 172(b).
- 38** US Commander's Handbook, § 7.3; UK Manual, § 1.43; AMW Manual, Rule 168(b); L. Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995), § 22 (hereinafter San Remo Manual).
- 39** AMW Manual, Rule 105(a) and (b).
- 40** AMW Manual, Rule 106.
- 41** Hague Air Rules, Art 30.
- 42** AMW Manual, Rule 107.
- 43** US Commander's Handbook, § 7.7.1.
- 44** US Commander's Handbook, § 7.7.2; UK Manual, §§ 13.65–13.76; San Remo Manual, Rules 93–104.
- 45** US Commander's Handbook, § 7.7.2.3; UK Manual, § 13.69.
- 46** US Commander's Handbook, §§ 7–10; San Remo Manual, Rule 98.
- 47** US Commander's Handbook, § 7.7.1; AMW Manual, Rule 147; San Remo Manual, 177.
- 48** The International Court of Justice has recognized the principle as one of two 'cardinal principles' of international humanitarian law, the other being unnecessary suffering. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, § 78.
- 49** See eg US Commander's Handbook, § 5.3.2; J.M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) (hereinafter Customary International Humanitarian Law Study), Rules 1, 7; AMW Manual, Rule 10(a); San Remo Manual, Rule 39.
- 50** US Commander's Handbook, § 8.3; AMW Manual, Rule 11; Customary International Humanitarian Law Study, Rules 7, 9, 10; Statute of the International Criminal Court, 17 July 1998 (hereinafter Rome Statute), Arts 8(2)(b)(i) and (ii), 8(2)(e)(i), (ii), (iii), (xii).

- ⁵¹ Geneva Convention I, Arts 24, 25; Additional Protocol I, Art 41; US Commander's Handbook, §§ 8.2.3, 8.2.4.1, 8.2.4.2; UK Manual, § 5.6; AMW Manual, Rules 15(b), 71; Customary International Humanitarian Law Study, Rules 25, 87.
- ⁵² N. Melzer (ed), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009) (hereinafter Interpretive Guidance).
- ⁵³ Interpretive Guidance, 21.
- ⁵⁴ Interpretive Guidance, 70.
- ⁵⁵ See the various articles set forth in 'Forum: The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law', 42 *New York University Journal of International Law and Politics* (2010).
- ⁵⁶ Additional Protocol I, Art 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Art 13(3), 8 June 1977 (hereinafter 'Additional Protocol II').
- ⁵⁷ Article 51(3) of Additional Protocol I reads: 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'. Article 13(3) of Additional Protocol II is identical except for replacement of the word 'section' with 'part'.
- ⁵⁸ Interpretive Guidance, 16.
- ⁵⁹ Interpretive Guidance, 54.
- ⁶⁰ Interpretive Guidance, 56-7.
- ⁶¹ For instance, the Israeli Supreme Court found the provision to constitute customary international law over arguments to the contrary presented by the government in the 'Targeted Killings' case. HCJ 769/02, *The Public Committee against Torture in Israel v The Government of Israel*, § 30 [2006] (Isr).
- ⁶² Interpretive Guidance, 65.
- ⁶³ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2d edn, Cambridge: Cambridge University Press, 2010), 148.
- ⁶⁴ Interpretive Guidance, 70.
- ⁶⁵ The complexity of the issues was aptly illustrated in the Israeli Supreme Court's decision in the Targeted Killings case, which predated issuance of the Interpretive Guidance.
- ⁶⁶ On the subject, see M. Schmitt, 'Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law', 12 *Yearbook of International Humanitarian Law* (2009) 301.
- ⁶⁷ Additional Protocol I, Art 52(2).
- ⁶⁸ Protocol (to the Conventional Weapons Convention) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 October 1980 (hereinafter Mines Protocol), Art 2(4); Protocol on Prohibitions and Restrictions on the Use of Incendiary Weapons, 10 October 1980, Art 1(3); US Commander's Handbook, § 8.2; UK Manual, § 5.4.1; AMW Manual, Rule 1(y); Customary International Humanitarian Law Study, Rule 8.
- ⁶⁹ Additional Protocols Commentary, § 2020.
- ⁷⁰ US Commander's Handbook, § 8.2.
- ⁷¹ US Commander's Handbook, § 8.2.5.

- ⁷² AMW Manual, Rule 26.
- ⁷³ AMW Manual, Rule 26 (a)–(d).
- ⁷⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Art 18, 27 July 1929.
- ⁷⁵ Geneva Convention I.
- ⁷⁶ Additional Protocol I, Art 25.
- ⁷⁷ Additional Protocol I, Art 26.
- ⁷⁸ Additional Protocol I, Art 27.
- ⁷⁹ Additional Protocol I, Art 28.
- ⁸⁰ AMW Manual, Rule 77.
- ⁸¹ AMW Manual, Rule 78(a).
- ⁸² Additional Protocol I, Art 28(4).
- ⁸³ Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Art 7(1); AMW Manual, Rule 98.
- ⁸⁴ Additional Protocol I, Arts 70, 71; AMW Manual, Rules 100–104.
- ⁸⁵ US Commander’s Handbook, § 8.6.3; UK Manual, § 12.28; AMW Manual, Rule 58; San Remo Manual, § 53.
- ⁸⁶ US Commander’s Handbook, § 8.6.3; UK Manual, § 12.28; AMW Manual, Rule 64; San Remo Manual, § 53(b).
- ⁸⁷ Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Naulilaa Arbitration) (*Portugal v Germany*) (1928) 2 RIAA 1011 at 1025; US Commander’s Handbook, § 6.2.4; F. Kalshoven, *Belligerent Reprisals* (2nd edn, Leiden: Brill Academic, 2005), 33.
- ⁸⁸ Geneva Convention I, Art 46; Geneva Convention II, Art 47; Geneva Convention III, Art 13; Geneva Convention IV, Art 33; Mines Protocol, Art 3 (prohibiting the use of booby traps as a means of reprisal against the civilian population); US Commander’s Handbook, § 6.2.4.2; UK Manual, §§ 16, 18; Customary International Humanitarian Law Study, Rule 146.
- ⁸⁹ Additional Protocol I, Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4).
- ⁹⁰ For instance, the United Kingdom noted that:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the UK might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the UK will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government.

UK Additional Protocol Ratification Statement, § (m). Interestingly, France did not reserve as to Art 51(6), but did make a statement regarding Art 51(8) that seems to leave open the possibility of reprisals against civilians. French Additional Protocol Ratification Statement, §

11, available at <<http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument>>.

91 Additional Protocol I, Art 51(4).

92 Additional Protocol I, Art 51(4); Rome Statute, Art 8(2)(b)(xx); US Commander's Handbook, § 9.1.2; UK Manual, § 6.4; AMW Manual, Rule 13; Customary International Humanitarian Law Study, Rules 12, 71.

93 Additional Protocol I, Art 51(4)(a).

94 Additional Protocol I, Art 51(5)(a).

95 Direct effects are the immediate effects generated by the weapon, whereas indirect effects are those which are more remote in the causal sense. For instance, in an attack on an electrical generating facility, direct effects include the physical damage caused by the explosion. Indirect effects are those resulting from the loss of electricity.

96 AMW Manual, commentary accompanying Rule 14.

97 Additional Protocol I, Art 57(1); AMW Manual, Rule 30.

98 For instance, see the criticism of leadership strikes during Operation Iraqi Freedom. Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (HRW, New York, 2003), 21–41. The assessment is analysed at M. Schmitt, 'The Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment', 6 *Yearbook of International Humanitarian Law* (2003) 90–2.

99 Additional Protocol I, Art 57(2)(a)(i); AMW Manual, Rule 32(a).

100 Protocol (to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (hereinafter Amended Mines Protocol), Art 3(10); UK Additional Protocols Ratification Statement, § (b). See also US Commander's Handbook, § 8.3.1; UK Manual, § 5.32 (as amended); AMW Manual, Rule 1(q); Customary International Humanitarian Law Study, Rule 15.

101 Additional Protocol I, Art 57(2)(a)(ii); AMW Manual, Rule 32(b).

102 Additional Protocol I, Art 57(3); AMW Manual, Rule 33.

103 Additional Protocol I, Art 57(2)(c); AMW Manual Rule 37. Attacks on certain objects are subject to a specific warning regime. AMW Manual Rule 38.

104 Additional Protocol I, Art 57(2)(c); AMW Manual Rule 37.

105 Additional Protocol I, Art 51(4)(b)(c); Rome Statute, Art 8(2)(b)(xx); Amended Mines Protocol, Art 3(8)(b); US Commander's Handbook, § 9.1.2; UK Manual, § 6.4; AMW Manual, Rule 5(a); Customary International Humanitarian Law Study, Rules 12, 71.

106 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Preamble, 29 November/11 December 1868; Rome Statute, Art 8(2)(b)(xx); Conventional Weapons Convention, Preamble; Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Preamble, 3 December 1997 (hereinafter Ottawa Convention); US Commander's Handbook, § 9.1.1; UK Manual, § 6.1; AMW Manual, Rule 5(b); Customary International Humanitarian Law Study, Rule 70.

107 Additional Protocol I, Art 36; AMW Manual, Rule 9.

108 Ottawa Convention, Art 1(1).

- 109** Amended Mines Protocol, Art 6.
- 110** Convention on Cluster Munitions, 3 December 2008.
- 111** Pursuant to Art 51 of the UN Charter and its customary international law counterpart.
- 112** M. Schmitt, 'Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework', in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff Publishers, 2007), 157-96.

(p. 516) 17 The Law of Armed Conflict at Sea

Introductory Remarks

1. Naval warfare has never been limited to the military subjugation of the enemy. Its overall aim is sea denial and sea control. Methods necessary for sea control do not merely affect the parties to an international armed conflict but also states that are neutral or states not parties to the conflict. If the weakening of the enemy's economy is also considered a legitimate goal, the law would be incomplete if it lacked rules relating to measures taken against neutral merchant shipping. Such rules are necessary since a state party to the conflict could otherwise shift its sea trade to third states' merchant shipping, and the adversary would be unable to prevent the supply of arms and war material to its opponent.

2. Measures against neutral merchant ships, whether attacks or visit, search, and capture under prize law, are not dealt with in the present chapter, which is confined to the legal relationship between the parties to an armed conflict at sea. The rules governing the relationship between belligerents and states not parties to the conflict or their vessels and aircraft are contained in Chapter 18 on the law of neutrality. However, in the present chapter the laws of neutrality cannot be ignored completely because they are relevant for the delimitation of the geographic region of naval warfare.

3. Moreover, two caveats seem to be necessary in view of an increasingly sceptical position *vis-à-vis* the law of naval warfare. *First*, the international law of the sea as embodied in the 1982 UN Law of the Sea Convention¹ has not resulted in a demilitarization of the oceans or in a prohibition of armed hostilities at sea. It is important to bear in mind that the list of high seas freedoms in Article 87(1), lit. a-f, UNCLOS is not exhaustive (*'inter alia'*) and that the freedoms of the high seas also include 'other rules of international law'. With regard to the Exclusive Economic Zone (EEZ), Article 58(2) UNCLOS refers to 'other pertinent rules of international law'. Accordingly, the legality of the use of methods and means of naval warfare, including prize measures, outside neutral waters is to be established under the law of naval warfare (and of maritime neutrality), not in the light of the international law of the sea. *Second*, both operators and lawyers criticize the law of naval warfare as outdated and as an unreasonable obstacle to the success of their operational or strategic goals. They, *inter alia*, refer to the provisions on measures short of attack (prize measures) and on methods and means of naval warfare, especially on blockade and operational zones. In their view those provisions do neither meet the necessities of modern operations, as for example maritime interception operations (MIO) or non-military enforcement measures decided upon by the UN Security Council, nor (p. 517) do they offer operable solutions to the naval commander. This criticism is based upon an erroneous understanding of the law of naval warfare and of its scope of applicability. Maritime interception operations aimed at combating transnational terrorism,² piracy (and armed robbery at sea), or the proliferation of weapons of mass destruction³ and related components do have a legal basis that is independent from the law of naval warfare. The same holds true with regard to enforcing an embargo—either with or without the authorization of the UN Security Council.⁴ Therefore, the law of naval warfare does not pose an insurmountable obstacle to such operations. Its provisions apply exclusively to situations of international armed conflicts.⁵ MIO and other maritime security operations have to be based upon that body of law only if they occur in the course of an armed conflict between two or more States.

4. Finally, it must be borne in mind that the present chapter deals with international armed conflicts only. The law of naval warfare has long since been considered to exclusively apply to such conflicts.⁶ However, it is far from clear whether the law of naval warfare would not, at least in some respects, apply to non-international armed conflicts that involve the military use of the oceans.⁷ In any event, the applicability of the law of naval warfare to

non-international armed conflicts is a highly contentious issue. This became evident in the Algerian Crisis and during the Sri Lankan armed conflict. In the context of the blockade established by Israel off the coast of Gaza, some argued that, in view of the allegedly non-international character of the armed conflict, Israel was not entitled to establish and enforce a naval blockade.⁸ However, the Palmer Report has concluded that 'the conflict should be treated as an international one for the purposes of the law of blockade'.⁹ The unique characteristics of the Gaza conflict should, however, not distract from the fact that there seems to be wide agreement that the law of naval warfare *in toto* only applies to international armed conflicts. Of course, this does not rule out that some parts of that law may be applied to non-international armed conflicts as well.

(p. 518) I. General

1. Definitions

17.01

'Ship' means manned surface and submarine vessels. 'Aircraft' means all manned means of transport that are or can be used in the air above sea or land.

The qualification that vessels must be manned excludes from the definition surface and submarine vehicles that have no personnel on board and that are remotely controlled or operate independently from an operator, such as 'drones' employed in mine countermeasures or other unmanned maritime vehicles (UMVs). Under this rule, similar considerations are valid for aircraft. It is, however, questionable whether and to what extent the rule continues to reflect customary international law. We will return to this issue in the commentary accompanying Section 17.02.

Vessels exclusively employed in inland navigation are not 'ships' within the meaning of this definition. They are governed not by the rules of naval warfare but by those of land warfare. However, if such vessels are seaworthy and employed, for example, in coastal navigation they are to be considered 'ships' in the sense of Section 17.01.

17.02

'Warships' are ships belonging to the (naval) armed forces of a state bearing the external marks distinguishing warships of its nationality, are under the command of an officer duly commissioned by the government whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline. Warships need not be armed.

1. Warships. The definition of warships¹⁰ has its legal basis in Article 29 UNCLOS. It differs from the definition in Article 8, para. 2 of the Convention on the High Seas 1958¹¹ in that it also covers ships not belonging to the naval forces of a state. A further difference is that the name of the commanding officer need not necessarily appear in the Navy List. While it is generally agreed that the 1958 definition is customary in character, it is open to doubt whether this is also true as regards the 1982 definition. Still, the latter is here taken as the legal basis because it better meets the practical requirements of naval armed forces who then need not distinguish between warships operated by the enemy's naval forces and those belonging to other units. According to the present definition a vessel need not be armed in order to qualify as a warship. Hence and unless they qualify as auxiliary vessels, tenders, troop transporters, and supply ships are covered as soon as they meet the requirements.¹²

Merchant vessels converted into warships in accordance with the 1907 Hague Convention No. VII are also covered.¹³

2. Submarines. It follows from the inclusion of submarine vessels in Section 17.01 that submarines are warships in the sense of Section 17.02. Although especially Great Britain, (p. 519) at the beginning of the twentieth century,¹⁴ endeavoured to outlaw submarines, today they are generally considered lawful means of naval warfare.¹⁵

3. Civilian mariners on board warships. There is a tendency in state practice to crew warships with civilians or at least to make use of civilian contractors who work on board warships.¹⁶ In many cases, the contribution of civilian contractors is essential for the operation of the ship or of its weapons systems. Hence, the question arises whether the presence of civilian mariners or of civilian contractors affects the legal status of the ship concerned. The ability to exercise belligerent rights remains reserved for warships.¹⁷ Warships are authorized to engage in offensive military activities, including visit and search, blockade, interdiction, and convoy escort operations. Auxiliary vessels are expressly prohibited from exercising belligerent rights. There are convincing arguments according to which civilians on board warships should perform neither crew functions nor other functions related to the operation of the ship and its weapons or electronic systems. Such activities should indeed remain reserved for state organs proper. It should be noted, however, that the definition of warships in this section and in customary international law does not necessarily rule out the use of civilian mariners and of civilian contractors. According to that definition the warships must be manned by 'a crew that is under regular armed forces discipline'. In contrast, the 1907 Hague Convention VII Relating to the Conversion of Merchant Ships into Warships, in Article 4, provides that 'the crew' of a converted merchant ship 'must be subject to military discipline'. While the use of the definite article in Hague Convention VII rules out the (further) use of civilian mariners the indefinite article in the definition of warships justifies the conclusion that not necessarily all crew members must be under regular armed forces discipline. Leaving aside the ensuing question of the permissible proportion of civilian mariners (or private contractors) in comparison with sailors and officers proper it thus becomes clear that the manning of warships with civilian mariners does not affect the legal status of the ship as long as the other criteria are met and as long as a certain portion of the crew remains under regular armed forces discipline. Of course, these findings are without prejudice to the legal status of civilian mariners and of civilian contractors. If captured they could, with good reasons, be considered 'unlawful combatants' and prosecuted for direct participation in hostilities. The latter problem could be solved by conferring a special legal status on civilian mariners and private contractors.

4. Unmanned vehicles. Neither the present nor other sections of this Handbook contain definitions of unmanned—air or maritime—vehicles (UAVs, UMs). At first glance, UMs do not qualify as warships or ships simply because they are not manned (p. 520) by a crew.¹⁸ It should not be left out of consideration, however, that very often UMs are either integral components of a warship's weapons systems or otherwise controlled from a military platform. If that military platform is a warship or a military aircraft the UM could be considered as sharing the legal status of the controlling platform. If, however, UMs are not part of, or controlled by, a warship, especially if they operate autonomously or on a pre-programmed course, it is impossible to follow that approach. Of course, if operated by the armed forces or by another governmental institution, they constitute state craft enjoying sovereign immunity.¹⁹ That, however, does not necessarily mean that they are 'warships' within the definition and thus entitled to the exercise of the entire spectrum of belligerent rights and of independent navigational rights. Some of the problems could be solved if the scope of applicability of the rule on the exercise of belligerent rights could be limited to prize measures taken against neutral merchant vessels and neutral civil aircraft. Another solution could be to interpret the definition of 'warship' in a more liberal way. At present,

however, there is no sufficient state practice yet that would justify either approach.²⁰ In view of the increasing use of UUVs by naval forces it is to be expected that they will be included in the registries of warships, thus becoming entitled to exercise belligerent rights at sea under a newly emerged rule of customary international law.²¹

Similar problems do not exist with regard to unmanned aerial vehicles because, according to Article 8 of the 1944 Chicago Convention, an aerial vehicle need not be manned in order to qualify as an aircraft. Accordingly, an aircraft 'operated by the armed forces of a State; bearing the military markings of that State; commanded by a member of the armed forces; and controlled, manned or preprogrammed by a crew subject to regular armed forces discipline' qualifies as a military aircraft that is entitled to exercise belligerent rights.

17.03

'Government ships' are ships owned or operated by a state and used only in governmental non-commercial service (e.g. customs and police vessels, state yachts).

1. Government ships. There is at present no generally accepted definition of government ships or of state ships. However, the elements contained in Section 17.03 should not give rise to objections.²² In times of peace, the vessels covered by this definition, for example customs and police vessels or state yachts, enjoy complete immunity from the jurisdiction of any state other than the flag state. This follows from Article 9 of the Convention on the High Seas 1958 (HSC 1958). They must, however, be exclusively employed in public or government service. It goes without saying that in times of armed conflict, belligerent government ships are not immune or specially protected against measures by the enemy. Rather, they may be captured and they will become booty of war, that is property passes to the capturing state immediately without the necessity of a prior decision by a competent prize court.

(p. 521) **2. Government ships operated for commercial purposes.** It follows from Section 17.03, as well as from the Brussels Convention on the Unification of Rules on the Determination of the Immunity of Government Ships of 10 April 1926,²³ that government ships operated for commercial purposes are to be treated in the same manner as privately-owned merchant vessels and their cargoes.²⁴

17.04

'Merchant vessels' are ships other than warships as defined in Section 17.02 and used for commercial or fishery purposes or profit passenger transport (whether private or owned or controlled by the state) or private ships of non-commercial character (e.g. yachts). The mere fact that a merchant vessel is armed does not change its legal status, unless it fulfils the conditions described below in Section 17.25.

1. Merchant vessels. In international law there exists no generally accepted definition of 'merchant vessel'. This term can, however, be defined negatively, that is in contradistinction to other vessels. In order for a vessel to qualify as a merchant vessel it needs to be employed for commercial or fishery purposes or transporting passengers for profit.²⁵ The attribute 'commercial' means that the use of such vessels has to be aimed at obtaining profits. Hence, government ships operated for commercial purposes, and deep-sea and coastal fishing vessels and passenger liners, are merchant vessels within the meaning of Section 17.04. In this context it is, however, important to emphasize that small vessels used exclusively for fishing along the coast, small boats employed in local trade, and passenger liners enjoy protected status under the law of naval warfare.²⁶ Also covered by the present

definition are seagoing private vessels not used for commercial purposes, for example yachts and pleasure boats.

2. *Arming*. Traditionally, scholars differentiated between offensively and defensively armed merchant vessels, but were unable to agree on the distinguishing criteria.²⁷ Altogether, there never existed a generally accepted prohibition of arming merchant vessels.²⁸ Still, according to the *US Naval Manual* (2017) and the *Canadian Manual*, merchant vessels qualify as legitimate military objectives if they are armed 'with systems or weapons beyond that required for self-defense against terrorist, piracy or like threats'.²⁹ In view of the various difficulties involved, the *German Manual* has taken a different approach, stressing that the mere fact that a merchant vessel is armed does not change its legal status, and that it may only be attacked if it meets the conditions of the definition of 'military objectives'.³⁰

17.05

Merchant ships converted into warships in accordance with the VIth Hague Convention of 1907, thus fulfilling the conditions of the definition of warships (p. 522) described in Section 17.02, have the same status as warships. The state which converts a merchant ship into a warship has to publish this as soon as possible in its list of warships.

The conversion of merchant vessels into warships is governed by the rules laid down in the 1907 Hague Convention VII.³¹ The commanding officer must be duly commissioned by the government and his name must appear in the Navy List (Article 3). The crew must be under regular armed forces' discipline (Article 4). The conversion must as soon as possible be notified on the list of warships (Article 5). Hence, all those conditions must be fulfilled that are contained in the definition of warships proper. However, the rules of Hague Convention VII leave a number of unresolved problems. On one hand, it is silent on the question of whether a merchant vessel maybe converted only in the flag state's territorial waters or also on the high seas. On the other hand, it lacks rules on the reconversion of warships to merchant vessels. In the legal literature those questions are hotly disputed.³² In the absence of any express prohibitions, conversion on the high seas as well as reconversion should be considered permissible.³³

17.06

'Support ships' are ships with civilian crew owned or operated by the government—that is government ships as defined in Section 17.03—and which perform support services for the naval forces without being warships.

The domestic legislation of the majority of Western states provides for the incorporation of their merchant fleets into the naval armed forces in times of armed conflict or a state of emergency.³⁴ It is sometimes difficult to distinguish such support ships from converted merchant vessels.³⁵ For example, during the Falklands/Malvinas conflict, Great Britain, in accordance with the Requisitioning of Ships Order 1982³⁶ requisitioned a number of merchant vessels. Their masters and crews were subject to armed forces' discipline and to instructions by the Royal Navy. Thus, it was open to doubt whether those ships continued to be civilian merchant vessels.³⁷

The concept of 'support ship' under the present provision is broad and, thus, also applies to 'auxiliary vessels'. An auxiliary vessel is a 'vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service'.³⁸ Regularly, auxiliary vessels are under the command of a civilian master.

In any event, although supply ships and auxiliary vessels do not qualify as warships, they meet the requirements of the definition of military objectives (because they contribute to the enemy's military action by either nature or use) and may be attacked without prior warning.³⁹ In case of capture, auxiliary vessels qualify as booty of war.

17.07

'Military aircraft' are all aircraft belonging to the armed forces of a state and bearing external marks distinguishing such aircraft of their nationality. The commanding (p. 523) soldier must be a member of the armed forces, and the crew must be subject to military discipline. Military aircraft need not be armed.

As regards the details of this definition, reference is made to the commentary on Section 17.02.⁴⁰ Military aircraft are state or government aircraft within the meaning of Section 17.08. It is important to emphasize that in view of contemporary state practice unmanned aerial vehicles (UAVs) qualify as military aircraft if they meet the requirements of the definition.⁴¹

17.08

'State aircraft' are all aircraft belonging to or used by the state and serving exclusively state functions (e.g. in customs or police service).

Although there exists no generally accepted definition of state or government aircraft in international law,⁴² it is agreed that aircraft employed in customs and police services as well as those transporting heads of state are to be considered as state or government aircraft.⁴³

17.09

'Civil aircraft' are all aircraft other than military aircraft as described in Section 17.07 and state aircraft as described in Section 17.08, serving exclusively civilian transport of passengers or cargo.

Again, there is no positive definition of civil aircraft in international law. Hence, they have to be distinguished negatively from military and other government aircraft.⁴⁴

2. Scope of Application

17.10

The geographical scope of application of the law of armed conflict at sea, that is the area in which acts of naval warfare within the meaning of Section 17.14 may be performed, comprises:

- the territory of the parties to the conflict accessible to naval forces;
- internal waters, archipelagic waters, and the territorial sea of the parties to the conflict;
- the high seas including exclusive economic zones; and
- the airspace above these land and sea areas, with the exception of demilitarized zones as mentioned above in Section 3.17 .

1. *Preliminary remarks.* In contrast to earlier times, it is now difficult to determine the geographical scope of application of the law of naval warfare, or the region of naval warfare. The Third United Nations Conference on the Law of the Sea has progressively developed the law and contributed to the emergence of multiple differing regimes, some of which are now customary in character. Problems arise not so much in relation to the sea areas of the belligerents as to those sea areas that traditionally belonged to the high seas (and thus to the area of naval warfare) and in which states not parties to the conflict now enjoy certain sovereign rights. While the laws of neutrality are not dealt with in detail in the present chapter, it is necessary to describe the principles of the international law of (p. 524) the sea governing neutral coastal states' rights in order to explain the delimitation of areas of naval warfare.⁴⁵

2. *Neutral territory and neutral territorial waters.* The land territory, internal waters, archipelagic waters, and the territorial sea of states neutral or not parties to the conflict are, in principle, excluded from the region of naval warfare. Belligerents are obliged to respect the inviolability of these areas. Special rules apply to neutral states' rights in their archipelagic waters and in international straits (*see below*, Sections 18.18.48). With regard to exclusive economic zones and continental shelves of neutral states, *see* Sections 17.12 and 17.13 and the accompanying commentaries. With regard to other sea areas exempt from acts of naval warfare, *see* Section 3.17. It should be noted in this context that the Montreux Convention of 20 July 1936 provides special restrictions for the Turkish Straits (Bosporus, Dardanelles and Sea of Marmara) in times of armed conflict.⁴⁶

17.11

'Internal waters' are waters on the landward side of the baseline of the territorial sea. 'Archipelagic' waters are waters on the landward side of archipelagic baselines. The 'territorial sea' comprises the waters on the seaward side of the baseline or archipelagic baseline in a breadth not exceeding twelve nautical miles. The so-called 'contiguous zone' does not belong to the territorial sea.

1. *Baselines.* In order to be legally effective baselines must be drawn in accordance with Articles 3 *et seq.* of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 (hereinafter: TSC 1958) and Articles 5 *et seq.* UNCLOS. According to these provisions, which are customary in character, the normal baseline is the low-water line along the coast. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline. Straight baselines may also be drawn in mouths of rivers and to and from low-tide elevations if lighthouses or similar installations have been built on them which are permanently above sea level. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the areas lying within the lines must be sufficiently closely linked to the land to be subject to the regime of internal waters.⁴⁷ If straight baselines have been drawn in violation of these provisions, the low-water line applies.

2. *Internal waters.* Waters on the landward side of the baselines form part of the internal waters of a state.⁴⁸ Also included are mouths of rivers where a straight baseline is drawn across the mouth between points in the low-water line of the river's banks.⁴⁹ Bays are internal waters only if they belong to a single state and if further qualifications are met.⁵⁰ (p. 525) According to UNCLOS, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing

line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters. From this it follows that, for example, the Gulf of Sidra is not a bay in the legal sense. Nor can it—despite Libya's assertions in the past—be considered an 'historic' bay.⁵¹ Outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not, however, be considered as permanent harbour works.⁵²

3. Territorial sea and international straits. The breadth of territorial seas was the subject of a number of international conferences, all of which failed to agree upon a concrete rule. Now, according to Article 3 UNCLOS, every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. Some states claim a territorial sea of less than 12 nautical miles (e.g. Greece and Palau); others claim a territorial sea of up to 200 nautical miles (e.g. some African and South American states). Still, in view of 135 states claiming a territorial sea of twelve nautical miles,⁵³ the rule laid down in Article 3 UNCLOS can be considered as declaratory of a corresponding rule of customary international law.⁵⁴ Roadsteads which are normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.⁵⁵ Within the territorial sea, ships of all states enjoy the suspendable right of innocent passage.⁵⁶ In times of armed conflict, enemy ships, be they warships or merchant vessels, may be prohibited from entering the territorial sea of a neutral state.

In international straits, be they overlapped by the territorial sea of neutrals or of the belligerents, the non-suspendable right of transit passage continues to apply in times of armed conflict. Therefore, in those parts of the territorial sea of a belligerent that form part of an international strait the right of transit passage enjoyed by the shipping and aviation of third states may not be suspended, hampered, or otherwise impeded.⁵⁷

4. The contiguous zone is the sea area bordering the territorial sea. It may not extend beyond 24 nautical miles from the baselines from which the territorial sea is measured. (p. 526) The sovereignty of the coastal state does not extend to the contiguous zone. Rather, the coastal state's rights are functionally limited to the control necessary to prevent infringement of its customs, fiscal, immigration, or health and safety laws and regulations within its territory or territorial sea, and to punish infringements of such laws and regulations committed within its territory or territorial sea.⁵⁸

5. Archipelagic waters.⁵⁹ An 'archipelagic state' is a state comprised entirely of one or more archipelagos and may include other islands. An 'archipelago' is a group of islands, including parts of islands, interconnecting waters, and other natural features which are so closely interrelated that such islands, waters, and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such. An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1:1 and 9:1. Only a few countries, such as the Philippines and Indonesia, qualify as archipelagic states. Within such archipelagic waters the archipelagic state exercises full sovereignty. Third states enjoy the right of archipelagic sea lanes passage⁶⁰ and of innocent passage. While the former may never be suspended⁶¹ the right of innocent passage may only be suspended temporarily in specified areas if such suspension is essential for the security of the archipelagic state.

17.12

Exclusive economic zones may not be extended more than 200 nautical miles from the baselines which are relevant for the landward limitation of the territorial sea. While coastal states and archipelagic states exercise full sovereignty within their internal waters, archipelagic waters, and territorial sea, they have only certain sovereign rights in exclusive economic zones. The latter do not belong to the high seas, but third states also enjoy freedom of navigation and overflight and certain other freedoms within them. Hence, as a matter of principle for naval warfare purposes, the exclusive economic zones of neutral or non-belligerent states belong to the high seas. The rights of coastal and archipelagic states must, however, be taken into due consideration.

1. *Legal basis of the exclusive economic zone.* The right to proclaim an exclusive economic zone (EEZ) was for the first time laid down in Articles 55 *et seq.* UNCLOS. Although that Treaty entered into force only on 16 November 1994, at the time of writing 123 states have already proclaimed such a zone with a breadth of 200 nautical miles.⁶² Despite some original doubts with regard to the customary character of the right to proclaim an EEZ, there have so far been no significant protests against such proclamations. Hence, it follows that today it has become a customary right.⁶³

(p. 527) 2. *Rights in the EEZ.* In the EEZ, the coastal state has sovereign rights to explore and exploit, conserve, and manage the natural resources, whether living or non-living, of the waters superjacent to the sea bed and of the sea bed, and its subsoil, and to undertake other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and wind. For these purposes the coastal state may establish and use artificial islands, installations, and structures.⁶⁴

3. *Neutral EEZ.* The EEZ of states not parties to the conflict is not excluded from areas of naval warfare per se.⁶⁵ However, it cannot be ignored that those states enjoy certain sovereign and exclusive rights in their economic zones. Hence, even though the belligerents are not barred from taking naval warfare measures within a neutral EEZ⁶⁶ they are obliged to pay due regard to the coastal state's sovereign rights. Accordingly, if hostile actions are conducted within the EEZ of a neutral state, belligerent states shall, in particular, have due regard for artificial islands, installations, structures, and safety zones established by the coastal state.⁶⁷ The duty to pay due regard to the coastal states' rights in their EEZs is, however, subject to considerations of military necessity.

17.13

The 'high seas' comprise all parts of the sea which do not belong to the EEZ, the territorial sea, the internal waters, or archipelagic waters. The high seas also comprise the continental shelf of neutral or non-belligerent states. The rights of coastal and archipelagic states must, however, be taken into due consideration.

1. *Belligerent rights on the high seas.* Traditionally, the high seas belong to the region of naval warfare.⁶⁸ In view of the practice of the parties to the Israeli–Egyptian, Korean, and Vietnam conflicts, some international lawyers endeavoured to restrict the areas of naval warfare to the territorial waters of the belligerents.⁶⁹ They argued that under the UN Charter, the freedoms of the high seas, especially the freedom of navigation and overflight of states not parties to the conflict, may not be interfered with by states that were either unwilling or unable to refrain from the use of armed force. This position has never been generally shared by the international community. The freedom of the high seas has always been subject to the law of naval warfare. Hence, it is not seriously disputed that on the high seas belligerents are entitled to visit and search neutral merchant vessels or to attack

enemy forces.⁷⁰ Of course, in the above-mentioned conflicts, the belligerents restricted their measures to their respective territorial waters. This practice, however, does not meet the qualifications required for a rule of customary law to come into being ('widespread', (p. 528) 'uniform', 'duration'). Moreover, it is not reflective of an *opinio juris* to the effect that those states felt obliged to refrain from committing acts of naval warfare on the high seas. Rather, those abstentions were merely deliberate self-limitations due to the special circumstances ruling at those times.⁷¹ This is the sole possible understanding. Nothing else follows from the fact that, according to Article 136 UNCLOS, the so-called 'area', that is the sea bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction,⁷² and its resources are 'the common heritage of mankind'. The resulting rights and duties of states do not apply to the water column or the air space above the 'area'.⁷³ However, hostile actions on the high seas shall be conducted with due regard for the exercise by neutral states of rights of exploration and exploitation of the natural resources of the sea bed, the ocean floor, and the subsoil thereof.⁷⁴ Finally, the reservation of the high seas for peaceful purposes in Articles 88 and 301 UNCLOS is also without prejudice to the legality of acts of naval warfare.⁷⁵ These provisions merely repeat the fundamental prohibition of the threat or use of force in Article 2(4) UN Charter.

2. *The continental shelf* of a coastal state comprises the sea bed and the subsoil of the submarine areas that extend beyond its territorial sea; it does not comprise the superjacent water column.⁷⁶ According to the 1958 Geneva provisions, the term 'continental shelf' is used as referring to the sea bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.⁷⁷ According to UNCLOS, the continental shelf comprises the said submarine areas throughout the natural prolongation of the land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance.⁷⁸ The coastal state exercises exclusive sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. Hence, the same considerations apply here as with regard to neutral EEZs. Belligerents are obliged to pay due regard to those rights, subject to military necessity.

3. Acts of Naval Warfare, Entitlement, and Principles

17.14

Acts of naval warfare within the meaning of this chapter are the use of weapons including the (special) methods of naval warfare and the following measures of economic warfare at sea:

- **visit and search,**
- **ordering to take a specific course (diversion),**
- **capture,**
- **requisitioning of cargo,**
- **bringing in, and**
- **confiscation.**

(p. 529) **1. Preliminary remarks.** This enumeration of acts of naval warfare is rather general and far from exhaustive. It is meant to supplement the provisions of Sections 1015 and 1016 on entitlement. Hence, for the present purposes it is sufficient to give a short overview of the different acts of naval warfare and merely to refer to the use of methods and means of naval warfare generally. Special legal aspects relating to the use of certain methods of naval warfare are dealt with in Sections 17.39 *et seq.*⁷⁹ Further legal

restrictions on the use of weapons follow from the principles laid down in Sections 1017 *et seq.* and 1021 *et seq.* As regards so-called 'prize measures', the following should be taken into consideration: prize measures and measures of economic warfare at sea are respectively aimed at cutting off the enemy's supplies by sea and rendering impossible, or at least difficult, further enemy war efforts.⁸⁰ As long as these measures affect enemy merchant vessels and their cargoes the mentioning of prize measures in the present chapter seems to be reasonable. However, legal problems only arise with regard to specially protected vehicles and goods. Of far more practical relevance are, of course, prize measures taken against neutral merchant vessels and their cargoes. Visit, search, diversion, and capture of neutral vessels and goods are dealt with in Chapter 18. Accordingly, the commentaries on the following sections are restricted to those rules that apply to the relationship between the parties to the conflict (including their respective merchant shipping). It may be added, however, that the competences dealt with in Sections 17.15 and 17.16 are also valid if prize measures are taken against neutral merchant vessels and their cargoes.

2. Attacks. The use of naval weapon systems, such as guns, torpedoes, and missiles qualifies as an 'attack', that is an act of violence whether in offence or defence, as defined in Article 49(1) AP I and customary international law. In that context it is important to note that modern vessels, whether warships or merchant vessels, are considerable vulnerable vis-à-vis cyber attacks. The most recent example has been the alleged spoofing of GPS signals which resulted in a change of position or course while the navigational equipment reported the position or course to be correct. Such and similar cyber attacks may qualify as attacks in the legal sense, if they are expected to, or in fact result in, damage or destruction of the vessel.⁸¹ Accordingly, such cyber operations must be conducted in accordance with the rules and principles applicable to traditional attacks, that is the principle of distinction, including the definition of military objectives, the prohibition of indiscriminate attacks and precautions in attack.

3. Prize measures in detail. National implementation of international law rules on prize measures is effected in so-called Prize Rules or Prize Ordinances. As regards the Federal Republic of Germany, one may argue that the 1939 Prize Ordinance⁸² is of continuing validity as pre-constitution law. In view of the many uncertainties involved, the Federal (p. 530) Ministry of Defence had issued Standing Order No. 10 which was to remain in force until a formal revision of the law. Even though that Standing Order is no longer in force, it is worthwhile referring to the following definitions on prize measures given therein:⁸³

- Visit comprises the procedure of ordering a vessel to stop and of examining the ship's papers. ⁸⁴
- Search means the interrogation of a ship's master, its crew, and its passengers, as well as the examination of a ship and its cargo. ⁸⁵
- Diversion is an order to take a specific course in order to be visited and searched in an appropriate area or port. ⁸⁶
- Capture is exercised by sending a prize crew on board another vessel and assuming command over the ship. ⁸⁷
- Seizure of cargo is effected by the capture of a vessel. However, cargo may be seized independently, that is without capture of the vessel.
- Bringing in means to escort a vessel to a port of the captor or of an ally. This includes ports under the captor's or its allies' power.

- Confiscation of captured vessels is effected by a prize court decision. With the prize court's decision, ownership of the vessel and its equipment passes to the captor state.

17.15

The following vessels and units are entitled to perform acts of naval warfare:

- **warships and other units of naval forces,**
- **military aircraft, and**
- **units of land and air forces.**

1. Section 17.15 clarifies that only warships and military aircraft *stricto sensu* are entitled to take the measures enumerated in Section 17.14. Auxiliary vessels and supply ships are not entitled to exercise belligerent rights at sea. It is self-evident that methods of naval warfare (including the use of weapons) may only be employed by units under military command and subject to military discipline. Section 17.15 is of particular importance with regard to measures of economic warfare at sea. According to the ParisDecl 1856⁸⁸ and customary international law, 'privateering is, and remains, abolished'. Hence, such measures may be ordered by commanders of warships and of military aircraft as well as by other units of armed forces. They may also be ordered and carried out by other departments if specially authorized. However, in view of the abolition of privateering, private individuals or entities are never authorized to take prize measures at sea.

2. Recently, the question has arisen whether the exercise of belligerent rights is indeed limited to warships (and to military aircraft), that is to ships (or aircraft) meeting all the requirements of the definitions contained in Sections 17.04 and 17.07. Indeed, as regards the relationship between the belligerents' naval forces, it may seem rather odd if a lawful target, such as an enemy warship or an auxiliary vessel, could only be attacked by a warship and not by another state ship. Therefore, it could be argued that, in view of the (p. 531) object and purpose of the rule—that is transparency vis-à-vis neutral navigation by the prohibition of privateering—its scope of applicability is limited to the exercise of belligerent rights against neutral vessels and aircraft. Then, hostile acts against enemy naval forces could be taken by any state ship. However, it is far from settled whether the formal approach underlying the traditional law of naval warfare has been abandoned by states.

17.16

The following vessels and persons may not perform acts of naval warfare:

- **state ships other than warships, even when carrying out support services for the naval forces;**
- **state aircraft other than military aircraft;**
- **merchant ships;**
- **fishing boats and other civil ships;**
- **civil aircraft; and**
- **prize crews of captured ships.**
- **The crews of all ships and aircraft are, however, entitled to defend themselves against attacks by enemy forces.**

Section 17.16 re-emphasizes the rule laid down in Section 17.15 that the categories of units entitled to take measures of naval warfare are limited. In view of the characteristics of naval warfare, it is important to refer expressly to those units that, on one hand, are particularly affected but, on the other hand, are not allowed to take such measures. Of course, Section 17.16 is without prejudice to the right to convert merchant vessels into warships.⁸⁹ In this context it should be stressed that according to Section 17.25 merchant vessels visiting, searching, or attacking enemy merchant vessels are lawful military objectives, and thus liable to attack on sight, without prior warning. To a certain extent, therefore, Section 17.25 formulates the consequences resulting from a breach of Section 17.16. Although the vessels and aircraft enumerated here are not entitled to take measures of naval warfare, they may defend themselves against enemy attacks.⁹⁰ This is a well-founded principle of customary international law. However, such self-defence measures may legitimately be countered by the enemy. If, for example, a merchant vessel resists capture the enemy warship may either break that resistance by force or, if the resisting merchant vessel qualifies as a legitimate military objective, it may even be attacked and sunk.

17.17

Without prejudice to other conditions described in this chapter the following principles shall be observed in all acts of naval warfare, in particular those involving the use of arms:

- **The right of the parties to the conflict to adopt methods of warfare is not unlimited.**
 - **Neither the civilian population nor individual civilians may be the object of attacks.**
 - **The parties to the conflict shall at all times distinguish between combatants and civilians.**
 - **Attacks shall be limited strictly to military objectives. The definition of military objectives (see above, Sections 7.02-7.05) is applicable also in naval warfare.**
 - **In planning or deciding upon acts of war at sea or in the air, all parties to the conflict shall ensure that all feasible precautions are taken in accordance with international law applicable in armed conflicts to avoid losses of civilian lives and damage to civilian objects.**
- (p. 532) — **Ships and aircraft which surrender, for example by turning down the flag, communicating their intention on a common radio channel such as a distress frequency, or by any other means of clear surrender, shall not be attacked any longer.**
- **After each engagement, the parties to the conflict shall without delay take all possible action to search for and rescue the shipwrecked, wounded, and sick, to protect them against deprivation and maltreatment, to ensure necessary care, as well as to search for the dead and to protect them from pillage.**

1. Preliminary remarks. The validity of the principles enumerated in Section 17.17 follows from international treaty and customary law.⁹¹ Despite the heading of this section, these principles are not peculiar to naval warfare. They are expressly mentioned in the present chapter to stress that the fundamental principles of the laws of armed conflict apply equally in naval warfare. The principles are not absolute in character but have to be weighed against considerations of military necessity.⁹² However, such considerations do not render these principles obsolete. Such considerations justify deviations only if the norm in question

expressly refers to military necessity. On the other hand, the principles are rather general in character. It is, therefore, difficult to determine specific duties beforehand and in the abstract. Such duties can be formulated only if the said principles are applied to a concrete case.⁹³

2. *The problem of the applicability of AP I to naval warfare.* According to Article 49, para. 3, AP I the provisions of Part IV, Section I (Articles 48–67) ‘apply to any land, air or sea warfare which may affect the civilian population, individual civilians, or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.’ As regards the applicability to naval warfare of the rules of AP I dealing with the civilian population, this provision as well as Article 49, para. 4, AP I have been cited in support of contradictory positions.⁹⁴ Today, there is general agreement on the following solution: Article 49, para. 3, AP I merely excludes the application of Articles 48–67 AP I to naval warfare proper. The other provisions of AP I, especially Articles 35–41, are applicable. Section I governs methods of naval warfare ‘which may affect the civilian population on land’ and is moreover applicable to attacks from the sea against objectives on land. The second sentence of Article 49, para. 3, AP I is restricted to attacks against military objectives on land. Attacks against civilian objects are already dealt with in the first sentence. Hence, Section I is applicable to ship-to-ship, ship-to air, or air-to-ship operations only if the civilian population, individual civilians, or civilian objects may be affected. In other words: those operations are covered by Section I if there (p. 533) is or may be collateral damage to human beings or civilian objects on land. Therefore, Articles 51 and 52 AP I are not applicable to attacks on merchant vessels or to mine warfare. These operations are subject to ‘the rules of international law applicable in armed conflict at sea’. That is made clear by the second sentence of Article 49, para. 3, and by Article 49, para. 4, AP I.⁹⁵ It follows from the preceding that the provisions of AP I may also be taken into consideration when it comes to the identification of principles and rules applicable in armed conflicts at sea.

3. *No unlimited right to choose methods of warfare.* This fundamental principle, first codified in Article 22 of the 1907 Hague Regulations, was reaffirmed in Article 35 AP I. As concerns the latter provision, its applicability to naval warfare as part of Section I, Part III follows from the interpretation of Article 49, para. 3, AP I favoured here. Moreover, it is applicable to all methods of naval warfare *qua* customary law.⁹⁶ The fact that the wording of the Hague Regulations differs from that of AP I is without prejudice to the principle’s customary character as codified in Article 35, para. 1, AP I. The formulation in AP I is merely an adaptation to modern conditions.⁹⁷ In view of its relatively abstract wording, this principle, as such, allows no conclusions as to the extent of the limitations on the right to choose methods of warfare. These limitations are specified in the following principles as well as in the other rules laid down in the present chapter.

4. The customary prohibition of making the civilian population or individual civilians the object of attack is for the first time codified in Article 51, para. 2, AP I.⁹⁸ This provision is directly applicable to measures of naval warfare ‘which may affect the civilian population, individual civilians, or civilian objects on land’.

5. *The principle of distinction.* Also customary in character, and thus valid in naval warfare, is the principle of distinction, now codified in Article 48 AP I. Of course, Article 48 AP I, as such, is applicable to naval warfare only within the limits mentioned above. Still, the applicability of the principle of distinction to naval warfare *qua* customary law is undisputed.⁹⁹ Hence, it is prohibited to employ in naval warfare means that are not, or cannot be, directed against a specific military objective or whose effects cannot be limited to such objectives. However, the principle does not prohibit attacks that result in non-

excessive collateral damage which has to be tolerated in the light of the principle of proportionality.

6. The definition of military objectives.

a) Validity. In view of Article 49, para. 3, AP I the definition of military objectives laid down in Article 52, para. 2, AP I is not directly applicable to naval warfare. Despite the differences between land and naval warfare there is, however, general agreement that this definition is also valid in the context of naval warfare *qua* customary law. For example, the Round Table of Experts of International Law Applicable to Armed Conflicts at Sea, at its Bochum session (1989), affirmed its applicability to naval warfare.¹⁰⁰ Accordingly, (p. 534) in land as well as in naval warfare, only military objectives may be attacked. The fact that the 1974–1977 Diplomatic Conference agreed on excluding naval warfare proper from the applicability of Part III, Section I does not justify a position to the contrary. In their military manuals, Canada¹⁰¹ and the US¹⁰² expressly acknowledge the validity of the definition of military objectives for naval warfare. As concerns the US, however, the definition also includes an effective contribution to the ‘war-supporting, or war-sustaining capability’.¹⁰³ The present Manual does not adopt that approach and limits lawful targets to those objects that make an effective contribution to the enemy’s military action.¹⁰⁴

b) Legal consequences arising from the validity of the definition of military objectives. It follows from the validity of the definition of military objectives that, in naval warfare too, military objectives are not merely those which, according to present day language, qualify as genuinely ‘military’. A contribution to military action is ‘effective’ not only if there is a direct connection between action and object; indirect contributions are also sufficient as long as they conduce to (specific) military actions. Moreover, the total or partial destruction, capture, or neutralization of such an object must offer a definite military advantage. It is impossible to determine in advance and in the abstract when an attack will offer such a definite military advantage. Accordingly, multiple military considerations will have to be taken account of, especially the object of the military operation in question. ‘Definite’ does not mean that the advantage anticipated must be obvious or that it has to be effected directly. It means rather that the advantage must be not merely hypothetical but concrete and discernible. ‘In the circumstances ruling at the time’ is meant to exclude advantages that materialize sometime during the course of hostilities; they must be ascertainable at the time of the attack. This presupposes the ability to base the selection of targets upon reliable and up-to-date information. If there remain doubts as to the military character of an objective non-military character must be presumed unless the omission to take military measures would entail significant dangers.¹⁰⁵

7. Precautions in attack. The obligation to take appropriate precautions before launching or ordering an attack is codified in Article 57 AP I. However, its validity *qua* customary law follows implicitly from the preceding principles.¹⁰⁶ If belligerents are obliged to limit attacks strictly to military objectives and to spare, as far as possible, civilians and civilian objects they are also obliged to take the appropriate precautions. Otherwise, the definition of military objectives and the principle of distinction were meaningless. It is (p. 535) important to note that, according to AP I, the standard of feasibility¹⁰⁷ only applies in cases of naval bombardments, that is when targets on land are attacked by naval forces. For naval attacks that are not directed against targets on land but that may affect the civilian population, civilians, or civilian objects on land, the standard of reasonableness applies, Article 57(4) AP I. Seemingly, the standard of reasonableness is less strict. While it is arguable that the standards do not differ considerably,¹⁰⁸ Section 17.17 is based on the premise that, under customary law, the standard of feasibility applies to all naval engagements irrespective of their potential effects on civilians or civilian objects on land.¹⁰⁹

8. No attacks on ships and aircraft that have surrendered. The obligation to suspend attacks upon vehicles that have surrendered follows from the customary rules codified in Article 41 AP I and Article 23, lit. c, HagueReg.¹¹⁰ The protective scope of this prohibition is limited to the people on board such vehicles. Consequently, a ship that has surrendered may, for example, be sunk after its passengers and crew have been taken to a place of safety.¹¹¹ Traditionally, hoisting the flag was considered a clear indication of surrender. While this rule has not become obsolete its practical relevance has certainly decreased because in modern armed conflicts at sea there will, in most instances, be no visual contact at all. While it is envisaged in this section that there may be other ways of 'clear surrender' it must be doubted whether that is indeed the case. So far, there is no other conduct than hoisting the flag that is generally recognized as clearly indicating surrender and that would entail an obligation to refrain from an attack. Radio or electronic signals are not considered sufficient proof for surrender. This also holds true for every other conduct, like stopping the engines, manoeuvring in a way that would make it impossible for the ship to effectively defend itself against attacks, or switching off the ship's systems.

9. Search for and rescue of survivors. After each engagement the parties to the conflict shall take all possible measures to search for and collect the shipwrecked, wounded, and sick. This obligation is codified in Article 18, para. 1, GC II. It follows from the principle of humanity and is applicable to naval warfare also *qua* customary law.¹¹² It needs to be stressed that, in contrast to land warfare, the parties to an armed conflict at sea are not obliged to search for and collect survivors 'at all times, and particularly after an engagement'¹¹³ but only 'after each engagement'. The formulation 'after each engagement' is, however, not restricted to major naval hostilities but covers all situations of hostilities at sea that have caused victims.¹¹⁴ Thus, the special circumstances of naval warfare, especially the vulnerability of ships engaged in rescue operations, is taken into account.¹¹⁵ Of course, an omission to search for and collect the shipwrecked, wounded, and sick is justified only if such measures, in view of considerations of military necessity or of the circumstances (p. 536) ruling at the time, are not possible. Accordingly, a submarine may not be obliged to engage in rescue operations because of its vulnerability when surfaced. However, the obligation rests not only on individual commanders but also on the parties to the conflict. Therefore, other units or government institutions continue to be obliged.¹¹⁶

17.18

Ruses of war are permissible also in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags or military emblems (Article 39, para. 3, AP I). Before opening fire, however, the true flag shall always be displayed.

1. State practice. A famous example of flying false flags in naval warfare is the case of the German cruiser *Emden*. In 1914, the *Emden* while flying the Japanese flag entered the port of Penang. Before attacking the Russian cruiser *Shemtshug*, the *Emden* displayed the German Navy's war flag. Another example is the case of the German ship *Kormoran*. After it had been stopped by the Australian destroyer HMS *Sydney*, the *Kormoran* pretended to be registered in the Netherlands. Before the *Sydney* could verify the true character, the *Kormoran* displayed the German flag and sank the Australian warship.¹¹⁷ No cases of ruses are reported from state practice during the post-World War II conflicts.

2. Legitimate ruses in naval warfare. In contrast to land warfare, the use of false flags and markings has always been considered a legitimate ruse in naval warfare. This has been expressly reaffirmed by Article 39, para. 3, AP I. It should be noted, however, that such ruses may be performed only by warships and the other ships and aircraft enumerated in Section 17.15. It is hotly disputed whether merchant vessels are also entitled to fly false flags.¹¹⁸ Be that as it may; for the present purposes this problem needs no further consideration. Its relevance is restricted to the determination of the enemy character of

merchant vessels. As will be shown, the flag flown by a merchant vessel is only *prima facie* evidence of its true character.¹¹⁹ In view of the technological development (over-the-horizon targeting, etc.) the use of false flags has almost become a negligible issue. The true character of a vessel will only in rare cases be determined by visual means. It is more likely that in future the use of civilian radar equipment by warships will be of practical relevance. Other electronic means of misleading the enemy may also be taken into consideration in the present context; for example, a transponder with an 'identification of friend or foe' (IFF) code whose use is intended to make the enemy believe that the ship or aircraft in question belongs to his allies. As regards their legitimacy, these and other ruses are legally restricted only by the prohibition of perfidy. Other legitimate ruses are, for example, the use of camouflage, decoys, mock operations, and misinformation.¹²⁰

The *San Remo Manual's* rules on deception are too vague and, thus, do not provide the necessary guidance for naval commanders. On the one hand, it is rather difficult to distinguish 'active simulation'¹²¹ from 'passive simulation'. The capabilities of modern (p. 537) technologies could open a vast grey area and, consequently, could render the provision obsolete. It needs to be emphasized in this context that it is not always sufficient to draw the necessary conclusions from the prohibition of perfidy. For example, actively feigning the status of a protected vessel is prohibited by paragraph 110 of the *San Remo Manual* and the corresponding customary law.¹²² This finding, however, is without prejudice to the admissibility of feigning neutral status by the use of civilian radars or other electronic equipment. According to the position taken here, the use of civilian navigational radars (and thus taking advantage of the respective emissions) is to be considered a permissible ruse of naval warfare if the radar is switched off immediately prior to the launching of an attack. It may well be, however, that this position is not shared by all. It should be recalled that, in 1983, the World Administrative Conference for the Mobile Services adopted Resolution No. 18¹²³ on the identification of vessels and aircraft of states not participating in an international armed conflict, recommending the use of adequate transponders and that 'the frequencies specified in No. 3021 of the Radio Regulations may be used by ships and aircraft of States not parties to an armed for self-identification and establishing communications. The transmission will consist of the urgency or safety signals, as appropriate, described in Article 40 followed by the addition of the single group "NNN" in radiotelegraphy and by the addition of the single word "NEUTRAL" pronounced as in French "neutral" in radiotelephony. As soon as practicable, communications shall be transferred to an appropriate working frequency [. . .]' It would, of course, be a considerable progress if the protection of neutral vessels were enhanced. However, that proposal is not suited for achieving that aim. As *Fenrick* has rightly pointed out, the resolution 'appears to have been issued by a forum unfamiliar with law of armed conflict issues and without consultation with national officials responsible for such matters. Ships and aircraft using such procedures may assume they are entitled to protection when in fact they are not. The fact that a ship or aircraft is registered in a state not party to the conflict does not, in and of itself, mean that it is not a legitimate military objective.'¹²⁴

17.19

Perfidy is prohibited also in naval warfare. In particular, it is prohibited to misuse the emblem of the Red Cross or to give a ship, in any other way, the appearance of a hospital ship for the purpose of camouflage. It is also prohibited to make improper use of other distinctive signs equal in status with that of the Red Cross (Article 45 GC II; Article 37 AP I) and of the flag of truce, or to feign surrender or distress by sending a distress signal or by

the crew taking to life-rafts. In addition, the principles described in Section 7.38 apply.

As regards the prohibition of perfidy, see first Articles 37, para. 1, and 38 AP I as well as the commentary in Chapter 4 above. The example of the use of a transponder in the commentary to Section 17.18 is to be considered an act of perfidy if, for example, one of the electronic means of identification for medical aircraft (Article 8 Annex I to AP I) is used. It would also be perfidious to use one of the other internationally recognized marks, signs, or signals which indicate a right to special protection.¹²⁵

(p. 538) **17.20**

It is prohibited to employ weapons or warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment (Article 35, para. 3, AP I).

This provision hardly allows conclusions as to concrete obligations, nor legal evaluation of specific behaviour. In view of the obscure meaning of the terms used in Article 35, para. 3, AP I, like 'natural environment', 'widespread', and 'long-term', one can only think of extreme and exceptional cases in which this prohibition would cover the use of methods and means of naval warfare. That would, presumably, be the case if the belligerents massively employed weapons in an enclosed or semi-enclosed sea (like the Baltic Sea) and if the resulting severe damage to the flora and fauna in the entire ecosystem would last for decades. The events during the second Gulf War (Kuwait-Iraq)¹²⁶ have made evident the difficulties of a proper legal evaluation of the effects of the use of methods of naval warfare on the natural environment.¹²⁷ In any event, it is incorrect to characterize the Iraqi conduct as war crimes or 'ecological terrorism'.

Similar difficulties of interpretation are involved when it comes to the application of the 1977 ENMOD Convention. However, this Convention has to be strictly distinguished from Article 35, para. 3, AP I. The prohibition of using the modified environment as a means of warfare does not seem to reflect existing technologies. Obviously, only in exceptional cases will states dispose of the technical means massively to modify the natural environment.¹²⁸

Finally, it is noted that at least those states bound by AP I are obliged to take into consideration the natural environment when it comes to the use of methods and means of naval warfare.¹²⁹ Measures which may be expected to have an impact on the natural environment should not be taken if the resulting damage would be excessive in relation to the military advantage anticipated.¹³⁰ In any event, damage to, or destruction of, the natural environment not justified by military necessity, or carried out wantonly, is prohibited.¹³¹ However, the mere fact that the use of methods and means of warfare may have an impact on the natural environment, whether marine or coastal, does not imply a legal duty on the parties of the conflict to refrain from their employment.¹³²

(p. 539) II. Military Objectives and Protected Objects in Armed Conflicts at Sea

1. Enemy Warships and Military Aircraft

17.21

Without prejudice to the principles applicable in the law of armed conflict at sea, enemy warships and military aircraft may be attacked, sunk, or seized at any time without warning. Upon seizure, such ships and the cargo on board become war booty and property of the seizing state, as they do not fall under prize law. Members of the crew falling into the hands of the

adversary become prisoners of war. The same applies to persons on board who accompany the armed forces.

1. *Military objectives.* Enemy warships, including converted merchant ships, and military aircraft are entitled to perform acts of naval warfare. They are, thus, military objectives by nature that may be attacked, sunk, or captured without prior warning anywhere and at any time within the region of naval warfare.¹³³

2. *The principles of naval warfare,* that is those peculiar to naval warfare as well as the general principles of the laws of armed conflict, continue to be applicable. In the case of enemy warships and military aircraft—military objectives by nature—there is almost no situation conceivable, other than surrender, in which they would be immune from attack on sight. Therefore, the special mentioning of the principles in the first sentence is to be understood as a reference to the rules on target identification and to the prohibition of excessive collateral damage.

3. *Booty of war.* According to customary international law, enemy warships and military aircraft, as well as other state ships not merchant vessels, are not subject to the law of prize. As soon as capture is completed, they are to be considered war booty. Upon capture, property automatically passes to the captor state.¹³⁴ Cargo on board such vehicles owned by the enemy state is also considered to be booty of war. Private property is subject to the laws of prize.¹³⁵

4. *Prisoners of war.* The crews of warships, converted merchant vessels, and military aircraft are combatants within the meaning of Article 43 AP I. They therefore become prisoners of war as soon as they fall into the power of an adverse party according to Article 4 A, No. 1, GC III and Article 44, para. 1, AP I. As regards persons who accompany the armed forces, this follows from Article 4 A, No. 4, GC III. Civilian mariners as well as private contractors on board warships do fall into that category. However, if not members of the regular armed forces or if not integrated into the regular armed forces and if they have directly taken part in the hostilities, for example by operating the ship's weapons systems, the question arises whether they may be held criminally responsible for having directly participated in the hostilities. It should be emphasized in this context that, according to the law of naval warfare, there is no prohibition of making use of civilian mariners or of civilian contractors. Moreover, it is far from settled whether the notion of (p. 540) direct participation in the hostilities applies at all in the context of naval warfare because that law is primarily concerned with platforms rather than with individuals. For a further discussion on direct participation in hostilities see the commentary on Section 17.32.

2. Enemy Merchant Ships, their Cargo, Passengers, and Crew

a. Enemy merchant ships

17.22

In principle, the enemy character of a merchant ship is determined by the flag which the ship is entitled to fly (Article 57 LondonDecl 1909).

Flying the enemy's flag has always been considered sufficient proof of the enemy character of merchant vessels.¹³⁶ Hence, in such cases the commander of a warship need not bother with questions of proper registration or ownership. This does not mean, however, that only those merchant vessels flying the enemy's flag have enemy character. The fact that a merchant vessel is flying the flag of a neutral state or a state not party to the conflict is only *prima facie* evidence of its neutral character.¹³⁷ If search of the ship's papers, or other information available to the commander, reveal that there has been a transfer of flag in order to evade the consequences to which an enemy vessel is exposed, then a vessel flying a neutral flag may be treated as an enemy merchant vessel.¹³⁸ If, however, there has been a

transfer of one neutral flag to another neutral flag the vessel concerned may not be considered as enemy in character even if the transfer was made with a view to the ongoing hostilities.¹³⁹ Moreover, according to the international laws of armed conflict, the enemy character of merchant vessels flying neutral flags may be presumed if there exist reasonable grounds for suspicion that it in fact belongs to the enemy.¹⁴⁰ These cases are, however, of no relevance for the naval commander. He may regularly rely upon the information made available to him by higher authorities. The final determination of the enemy character of vessels lies with the competent prize court which has to decide on the legality of capture and other acts in any event.

17.23

In relation to enemy merchant ships, all acts of economic warfare at sea may be performed, without consideration of the cargo and its owner. The same applies in principle to other seagoing private vessels, such as yachts and pleasure-boats, subject to particular provisions of protection. Prize law also applies to wrecks and to ships still (p. 541) in construction. After the capture of an enemy merchant vessel it must be decided in a prize court procedure whether the capture was lawful. Upon confirmation by the prize court the ship becomes property of the capturing state.

1. *Protection of enemy private property in naval warfare.* In contrast to the law of land warfare, enemy private property is not exempt from capture in naval warfare.¹⁴¹ The traditional rule according to which enemy private property is liable to capture and confiscation has not been modified by the definition of military objectives that is also applicable in naval warfare. According to that definition, the capture of objects is permissible only if capture 'offers a definite military advantage' and if the objects concerned 'make an effective contribution to military action'. This does not, however, imply that according to the law of prize only objects qualifying as military objectives are liable to capture. The laws of prize on capture and confiscation of enemy private goods have not been altered by the validity of the definition of military objectives. The reference to 'capture' in that definition is merely a clarification of the principle of proportionality, as set out in Section 17.21.¹⁴²

2. *Procedure.* Whereas neutral merchant vessels may, in principle, be captured only after prior visit and search, that is not the case for enemy merchant vessels.¹⁴³ That does not mean that they may not be visited and searched. Visit and search should be exercised in order to verify whether a vessel belongs to a category of specially protected vessels. Property of a captured enemy merchant vessel does not pass to the captor automatically on assuming command over the ship. It only passes if the competent prize court decides upon confiscation.¹⁴⁴ The decision of the prize court on confiscation is without prejudice to the legality of capture.¹⁴⁵

17.24

A merchant ship belonging to one of the parties to the conflict located in an enemy port at the commencement of the hostilities shall be allowed to depart freely within a reasonable time. It may be furnished with a pass permitting it to proceed to its port of destination or any other port indicated (Article 1 HC VI). Merchant ships unable, owing to circumstances of *force majeure*, to leave the enemy port within the period fixed, or which have not been allowed to leave, cannot be confiscated. The belligerent may only detain such ships subject to the obligation to return them after the armed conflict or requisition them on payment of compensation (Article 2

HC VI). These rules do not affect merchant ships whose design shows that they are intended for conversion into warships (Article 5 HC VI).

(p. 542) During the Crimean War, it was common practice to capture and confiscate, upon the declaration of war, enemy merchant vessels in one's own port.¹⁴⁶ Hague Convention VI of 1907 then took into account the practice of states during the second half of the nineteenth century. During the two World Wars, HC VI was of no practical relevance.¹⁴⁷ On 14 November 1925, Great Britain and, on 13 July 1939, France denounced that Convention. Germany took the Convention into consideration when it passed its Prize Ordinance of 1939, whose applicability was, however, made subject to strict reciprocity. The US never ratified Hague VI. Today the provisions of Hague VI, probably apart from those referring to *force majeure*, are of even less practical relevance. Only in rare and exceptional cases will merchant vessels travel to an enemy port without knowledge of the outbreak of hostilities. Moreover, in modern armed conflicts at sea the belligerents will certainly not wish to release ships likely to make an effective contribution to the enemy's war efforts. For these and other reasons the exception in the last sentence of Section 17.24 will be interpreted widely.

17.25

Without prejudice to the principles applicable in the law of armed conflict at sea, enemy merchant ships are military objectives and may be attacked at any time without warning, if they are:

- **engaging in acts of war (e.g. laying mines; mine-sweeping; cutting submarine cables and pipelines; visiting, searching, or attacking other merchant ships);**
- **making an effective contribution to military action (e.g. by carrying military material, troop-carrying, or replenishing);**
- **incorporated into or assisting the enemy's intelligence system, subject to, where necessary, a prior political determination;**
- **sailing in convoy with enemy warships or military aircraft;**
- **refusing an order to stop or actively resisting visit, search, or capture;**
- **armed to an extent that they could inflict damage on a warship; or**
- **engaging in any other activity bringing them within the definition of a military objective.**

1. Preliminary remarks. According to the LondonProt 1936, warships are allowed to sink merchant vessels whether enemy or neutral only if certain preconditions are fulfilled.¹⁴⁸ At first sight the provisions of that agreement could be interpreted restrictively. The sinking of a merchant vessel without prior warning and without first taking passengers, crews, and ship's papers to a place of safety would be permissible only if the vessel concerned persistently refused to stop on being duly summoned or if it actively resisted visit and search. However, this would be a too simplistic way of looking at the 1936 Protocol. The rules laid down in that document formed part of the 1922 Washington Treaty and were reaffirmed by the 1930 London Conference. During that conference a committee of legal experts presented a report in which the matter was clarified as follows: 'The Committee wish to place it on record that the expression "merchant vessel", where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.' Whereas it remains unclear what is meant (p. 543) by 'participating in hostilities' it is obvious that merchant vessels are not in all circumstances

protected by the LondonProt 1936. This was confirmed by the judgment of the Nuremberg Tribunal.¹⁴⁹ Hence, enemy merchant vessels that, by their conduct, qualify as legitimate military objectives¹⁵⁰ are not protected by the LondonProt 1936 and may—as an exceptional measure—be attacked and sunk.¹⁵¹ As made clear above, this applies only if sinking offers a definite military advantage and there are no other means available. The last sentence shows that the enumeration in Section 17.25 is not exhaustive. Hence, enemy merchant vessels may also be attacked if they commit acts other than those mentioned here.¹⁵² Such cases should, however, be treated with utmost care. If an enemy merchant vessel does *not* commit one of the acts expressly enumerated in Section 17.25, the responsible commander will have to prove that the vessel in question did effectively contribute to military action and that destruction offered a definite military advantage.

2. *Engagement in acts of war*, including the exercise of visit, search, and capture, is a breach of the prohibition laid down in Section 17.16. An enemy merchant vessel engaging in any of the activities enumerated in the first sub-paragraphs is making an effective contribution to the enemy's military action by use, thus rendering it a lawful military objective.

In this context, it is important to re-emphasize that the law of naval targeting is primarily concerned with platforms (objects), not with individuals. Therefore, the qualification of the respective merchant vessel as a lawful military objective is without prejudice to the legal status of its crews and passengers. This is dealt with in Sections 17.32 and 17.33.

3. *Effective contribution to military action* is regularly fulfilled by the acts enumerated.¹⁵³ Since Section 17.25, as an exceptional provision, has to be interpreted narrowly, the term 'war material' may not be understood as comprising goods which have some tenuous relevance for the enemy's war efforts. Rather, the objects concerned must be directly apt for use by the enemy's armed forces. If that is not the case, enemy merchant vessels and goods on board such vessels are subject to the laws of prize only. With regard to the exceptional permissibility of the destruction of captured enemy merchant vessels,¹⁵⁴ see Section 17.26.

4. *Incorporation into or assisting the enemy's intelligence system*. Even during the World Wars this was considered sufficient ground for attack without prior warning. In its sentence against Admiral Dönitz, the Nuremberg Tribunal ruled that such vessels lose the protection of the 1936 London Protocol.¹⁵⁵ Attacks on vessels incorporated into the enemy's intelligence system may, however, be undertaken only after a prior political decision to (p. 544) that effect. This reservation was deemed necessary to avoid an escalation of relatively low-scale conflicts.

5. *Convoy*. Sailing in convoy with enemy warships and military aircraft, too, has always been considered a sufficient justification for attacking enemy merchant vessels on sight. By travelling under convoy the merchant vessel concerned manifests its readiness to actively resist—with the help of the accompanying warship—visit, search, and capture.¹⁵⁶

6. *Refusal to stop on being duly summoned or active resistance to visit, search, and capture*. These exceptions were acknowledged in the 1936 London Protocol. It is emphasized that resistance to visit, search, and capture must be 'active'. Enemy merchant ships are under no legal obligation to facilitate such measures.¹⁵⁷ The legitimacy of attack in such cases is in no way affected by the right of self-defence of enemy merchant vessels against attacks or other belligerent acts of the enemy, as laid down in Section 17.16. The right of self-defence conflicts with the warship's right of capture and right to enforce capture whenever necessary.

17.26

Enemy merchant ships may only be destroyed if it is impossible to bring them into a port of one's own or that of an ally, and without having first brought the passengers, crews, and ships' papers to a safe place (Article 2 LondonProt 1936). The ship's boats are not regarded as a safe place unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board (Article 2 LondonProt 1936). Where possible, the personal belongings of the passengers and crew shall also be recovered.

Enemy merchant vessels are often not legitimate military objectives because they do not commit any of the acts enumerated in Section 17.25. However, they are always subject to capture according to the laws of prize. If military circumstances preclude taking or sending an enemy merchant vessel for adjudication as an enemy prize it may become necessary to destroy it. This situation is covered in Section 17.26. The legality of the destruction of a (captured) enemy merchant vessel as an exceptional belligerent right follows from the LondonProt 1936.¹⁵⁸ However, before destruction passengers, crew, and ship's papers must be taken to a place of safety. The 1936 Protocol contains no further restrictions on the right of destroying enemy prizes.¹⁵⁹ However, such destruction may never take place for its own sake. It is an exceptional right, to be strictly distinguished from the destruction of enemy merchant vessels qualifying as legitimate military objectives. In the majority of cases it will suffice to destroy the cargo or simply to divert the vessel.¹⁶⁰ The destruction of passenger vessels carrying only civilian passengers is prohibited at sea. For the safety of the passengers, such vessels must be diverted to an appropriate area or port in order to complete capture.¹⁶¹

(p. 545) b. Cargo of enemy merchant ships

17.27

The enemy or neutral character of cargo is determined by the nationality of the owner or, if the owner is a stateless person, by his residence (Article 57 LondonDecl 1909). In the case of corporations and companies, their registered office is relevant. Where after the outbreak of hostilities enemy ownership of goods is transferred in transit they retain their enemy character until they reach their destination (Article 60 LondonDecl 1909).

This provision stems from the 1909 London Declaration which never entered into force. As far as the rules laid down in that treaty are here taken into consideration they are, however, reflective of customary international law. Many of the provisions of the LondonDecl 1909 have been implemented in national legislation and in prize regulations. The enemy character of the cargo's¹⁶² owner is determined by his nationality.¹⁶³ Contrary to Anglo-American doctrine and jurisprudence, his residence is of relevance only if he is a stateless person. If cargo is owned by a corporation its head or registered office is decisive. The nationality of owners and/or shareholders is irrelevant unless the so-called 'control test' applies.¹⁶⁴ If, according to the preceding criteria, a determination of enemy or neutral character is impossible there is a rebuttable presumption that goods on board enemy vessels are of enemy character.¹⁶⁵ Transfers of title effected in the course of the vessel's journey do not have to be recognized. If, however, such transfer has been effected before the commencement of a journey, neutral cargo of enemy origin remains immune from seizure.¹⁶⁶

17.28

Enemy cargo on board enemy ships may be requisitioned and confiscated no matter whether such cargo is contraband or whether it is state or private property.

In international treaties or drafts there is no express rule that enemy cargo on board enemy vessels is liable to capture and confiscation. The validity of the rule follows, however, from international customary law¹⁶⁷ and, indirectly, from the ParisDecl 1856. According to that Declaration only neutral goods and enemy goods on board neutral merchant vessels are exempt from capture. In principle, seizure of goods is effected by capturing the vessel carrying them. If the vessel's master consents or if the vessel concerned can neither be captured nor diverted or destroyed, only its cargo may be seized. Confiscation of seized cargo is subject to a confirmatory prize court decision.

17.29

Neutral cargo on board enemy ships is exempt. Such cargo may, however, be requisitioned and confiscated if:(p. 546)

- **the cargo is contraband, for example goods designated for the adversary and apt to be used for war purposes;**
- **the ship is breaching a blockade, unless the shipper proves that at the time of loading he neither knew nor should have known of the intention to breach the blockade; or**
- **the ship is sailing in convoy with enemy warships or engaging in any other activity bringing it within the definition of a military objective.**

1. According to the ParisDecl 1856 and international customary law, neutral goods are exempt from seizure.¹⁶⁸ The exceptions to that principle enumerated in the present section are also part of customary law.¹⁶⁹

2. Neutral goods are not exempt from seizure if they are contraband. If contraband goods on board neutral merchant vessels are not exempt, *a fortiori* they are not protected when on board enemy merchant vessels. The classification of goods as contraband is closely related with prize measures taken against neutral shipping. Therefore, reference is made to the commentaries on Sections 1142 and 1143. In the present context it suffices if the goods in question are contained in a belligerent's contraband list.¹⁷⁰

3. The provision on breach of blockade is based upon Article 21 LondonDecl 1909 which—despite doubts as to the continuing validity of the Declaration—is generally accepted as customary law.¹⁷¹

4. Neutral cargo on board enemy merchant vessels travelling in convoy or qualifying in some other way as a legitimate military objective is liable to seizure and confiscation. This is consistent with the legality of attacking such vessels without prior warning. In such cases the cargo shares the destiny of the vessel.

17.30

Private and official postal correspondence found on board enemy ships is inviolable. If a ship conveying such postal correspondence is captured the captor shall ensure that the correspondence is forwarded without delay (Article 1 HC XI). Before sinking a ship postal correspondence shall as far as possible be recovered and forwarded. The enemy ship itself, even a mail ship, shall be liable to capture. The prohibition relating to the seizure of postal correspondence does not apply to postal consignments destined for or proceeding from a blockaded port. Parcels are exempt from seizure if

they are destined for neutral persons and do not contain any contraband. The captor shall be entitled to open mail bags and inspect their contents. Inviolability shall not apply to contraband contained in letter post.

The inviolability of postal correspondence (except parcels) and the captor's duty to forward it if the ship is detained follow from Article 1 HC XI.¹⁷² In view of the practice of the two World Wars and of modern military manuals, the continuing validity of (p. 547) HC XI is open to severe doubt. Still, for practical reasons its provisions should be maintained.¹⁷³

17.31

The following objects shall not be confiscated:

- **objects belonging to the passengers or crew of a captured ship and intended for their personal use;**
- **material exclusively intended for the treatment of the wounded and sick, the prevention of disease, or religious purposes, provided that the transport of such materiel has been approved by the capturing party (Article 35 GC I; Article 38 GC II);**
- **instruments and other material belonging to relief societies;**
- **cultural property;**
- **postal correspondence of the national Prisoner of War Information Bureaux (Article 122 GC III) and the Central Prisoners of War Information Agency (Article 123 GC III);**
- **postal consignments and relief shipments destined for prisoners of war and civilian internees as well as postal consignments dispatched by these persons;**
- **relief shipments intended for the population of occupied territory, provided that the conditions attached by the capturing party to the conveyance of such shipments are observed (Article 59 GC IV); and**
- **relief shipments intended for the population of any territory under the control of a party to the conflict other than occupied territory (Article 70 AP I).**

1. Personal effects. According to customary international law, personal effects of the passengers and crew of captured vessels are not liable to seizure. Such personal effects are objects, including money, of the type usually taken on a voyage. Other objects or large amounts of money that do not serve personal needs may be seized.

2. Medical and religious equipment. Equipment intended exclusively for the treatment of wounded and sick, for the prevention of disease, or for religious purposes are exempt from seizure if their shipment has been approved by the belligerents. It should be noted that such equipment is regularly shipped on ships specially chartered for that purpose.¹⁷⁴ If their voyage has been approved by the belligerents then their cargo has the same protected status as the ship in question.

3. Equipment of relief societies. Instruments and other equipment of recognized relief societies are also exempt from capture. Otherwise such societies would be unable to fulfil their tasks.

4. Cultural property. The specially protected status of cultural property follows from CultPropConv and Article 53 AP I.¹⁷⁵

5. *Postal correspondence* of the national Prisoner of War Information Bureaux and the Central Prisoners of War Information Agency are specially protected under Articles 122 and 123 GC III. Such postal correspondence continues to be exempt from capture even if it contains goods covered by a belligerent's contraband list. It is irrelevant whether the sender is a relative, a third person, or an organization.

(p. 548) 6. *Relief shipments intended for the population of occupied territory or intended for the population of any territory under the control of a party to the conflict other than occupied territory.* The exemption from capture of relief shipments intended for the population of occupied territory follows from Article 59 GC IV. As regards relief shipments intended for the population of any territory under the control of a party to the conflict other than occupied territory, their protected status follows from Article 70 AP I. The AP I contains no provisions on contraband. However, in view of its applicability to acts of naval warfare affecting the civilian population on land, such relief shipments may neither be declared contraband nor seized.¹⁷⁶

c. Crews and passengers of enemy merchant ships

17.32

The masters, officers, and crews of enemy merchant ships, if they are nationals of the enemy state, become prisoners of war (Article 4 A, No. 5, GC III) unless they promise in writing not to undertake, while hostilities last, any service connected with the armed conflict (Article 6 HC XI). If they prove that they are nationals of a neutral state, they do not become prisoners of war (Article 5 HC XI). The provisions on releasing crew members do not apply if the ship has been engaging in any activity bringing it within the definition of a military objective.

In principle, members of crews, including masters, pilots, and apprentices of a merchant navy, according to Article 4 A, No. 5, GC III, become prisoners of war if they fall into the power of the enemy. Article 4 A, No. 5, GC III, however, prevents such persons from becoming prisoners of war if they would 'benefit by more favourable treatment under any other provisions of international law'. This is a clear reference to Article 6 HC XI.¹⁷⁷ Since release of those persons on the high seas will in most cases not be feasible they will normally be released in the port to which their vessel has been diverted or taken. It may, however, be doubted whether Article 6 HC XI can still be considered as according with the realities of modern armed conflicts. Hence, this provision will prevail over Article 4 A, No. 5, GC III only if reciprocity is guaranteed. In any event, release must in fact result in 'more favourable treatment'.

If, however, a merchant vessel has been engaged in acts rendering it a legitimate military objective, those members of the crew responsible for such acts may be considered to have directly taken part in the hostilities. For example, in 1916 Charles Fryatt, master of the unarmed British merchant vessel *Brussels*, tried to ram the German submarine *U 23*. Captain Fryatt was sentenced to death and executed.¹⁷⁸ The British Government protested against Fryatt's execution qualifying it a flagrant violation of the law of armed conflict. Arguably, other than the masters and crews of neutral merchant vessels the crews and masters of enemy merchant vessels are not obliged to comply with the enemy's orders. Then, the concept of direct participation in hostilities would not apply in the naval context.¹⁷⁹ Accordingly, members of the crews of enemy merchant vessels could not be held criminally accountable under the domestic law of the enemy belligerent. It may, however, not be forgotten, that engaging in (p. 549) attacks or in the exercise of other belligerent rights may be considered acts of privateering which could be punishable under domestic law. Hence, while maintaining the status of prisoner of war, the crews of enemy merchant

vessels may be subjected to criminal prosecution under the domestic law of the capturing state.

17.33

Passengers of enemy merchant ships shall, in general, be released. Passengers who have taken part in hostilities or are travelling to join the enemy armed forces may be detained. They become prisoners of war if they belong to one of the categories enumerated in Article 4 of the Third Geneva Convention. Should any doubt arise as to whether they belong to any of these categories, they enjoy the protection of prisoners of war until such time as their status has been determined by the competent tribunal (Article 5 GC III). Passengers who are members of enemy armed forces shall become prisoners of war.

Passengers on board enemy merchant vessels may only be made prisoners of war if they meet the conditions in Article 4 A GC III. This is the case if they are members of the enemy's armed forces.¹⁸⁰ If they belong to none of the categories enumerated in that provision they must, in principle, be released. The practical relevance of this rule is of minor interest since passengers of enemy nationality may be interned after they have been taken to an enemy port.¹⁸¹

3. Protected Enemy Vessels (Except Hospital Ships and Ships Under Similar Protection)

17.34

The following enemy ships enjoying special protection may neither be attacked nor seized:

- **vessels carrying material intended exclusively for the treatment of wounded and sick or for the prevention of disease, provided that the particulars regarding the consignment have been approved (Article 38 GC II);**
- **vessels carrying relief goods for the civilian population of an occupied territory, provided that the conditions connected with the transport are fulfilled (Article 23 GC IV);**
- **vessels that, with the consent of the belligerent parties, are carrying relief consignments for the civilian population of territory under the control of a party to the conflict other than occupied territory (Article 70 AP I);**
- **vessels used exclusively for fishing along the coast or small boats employed in local trade (Article 3 HC XI);**
- **vessels charged with religious, non-military scientific, or philanthropic missions (Article 4 HC XI);**
- **vessels engaged exclusively in the transfer of cultural property (Article 14 CultPropConv);**
- **vessels used exclusively for the transport of parlementaires or exchanging prisoners of war (cartel ships);**
- **vessels furnished with an acknowledged letter of safe conduct, provided that they observe the restrictions imposed on them; and**

— **without prejudice to the right of capture, passenger ships on the high seas used exclusively for the transport of civilians while engaged in such transport.**

The right to stop and search such ships remains unaffected.

(p. 550) **1. *Transport of certain material and goods.*** A precondition for the special protection accorded to the first three categories of vessels enumerated in Section 17.34 is that the material and goods they carry must exclusively serve humanitarian purposes. However, the particulars regarding their voyage must either be notified to and approved by the enemy or there must be an agreement to this effect.¹⁸²

2. *Coastal fishing vessels and small boats engaged in local trade.* The exemption from capture of such vessels and boats, including their appliances, rigging, tackle, and cargo,¹⁸³ was codified in Art. 3 HC XI. According to customary international law they are exempt not only from capture but also from attack.¹⁸⁴ High seas fishing vessels are not protected by this provision.¹⁸⁵ The object and purpose of exemption is to guarantee sufficient supply of fish for the population.¹⁸⁶ This does not, however, mean that the activities of coastal fishing boats have to be limited to the enemy's territorial sea. Fishing may also take place off the coasts of a third state.¹⁸⁷ As regards small boats engaged in local trade, it is widely agreed that it is not the boats' size but the extent of the economic factors involved, that is the trade, which determines their right to protection.¹⁸⁸ Hence, vessels engaged in general coastal trade are not exempt from attack and capture.¹⁸⁹

3. *Vessels charged with religious, scientific, or philanthropic missions.* According to Article 4 HC XI and customary law, these are likewise exempt from capture and attack.¹⁹⁰ In contrast to the wording of Article 4 HC XI, today vessels charged with scientific missions are (p. 551) specially protected only if those missions do not serve military purposes.¹⁹¹ It will not always be easy to distinguish between military and non-military scientific research. Hence, in practice, such vessels should commence their voyage only after notifying and obtaining approval from the adversary.¹⁹² Vessels charged with philanthropic missions will usually already be protected by GC II and AP I or as one of the other categories enumerated in the present section. Today, this category is, therefore, of minor practical relevance.¹⁹³ This also holds true for vessels on religious missions. Formerly, missionary vessels would have fallen into that category.¹⁹⁴ Vessels transporting pilgrims will be classified as passenger ships, but they could also be considered as vessels on a religious mission. Moreover, providing religious comfort to fishermen or marine communities could also qualify.

4. *Transfer of cultural property.* Vessels engaged in this task are protected in accordance with Articles 12, 13, and 14 CultPropConv.¹⁹⁵ This presupposes that the transfer has been approved by the adversary in advance. In the absence of such approval, vessels may carry the protective emblem only if the transfer of cultural property takes place within the territory of one single state.

5. *Cartel vessels and vessels granted safe conduct.* Cartel vessels are usually designated for and engaged in the exchange of prisoners of war, or in the transport of parlementaires and of certain messages. As the term 'cartel' implies, agreement between the parties to the conflict is a precondition for their special protection. In the majority of cases they are then granted safe conduct. Hence, the difference between cartel vessels and vessels granted safe conduct is in the special mission for which those ships are designated.¹⁹⁶ The document granting safe conduct may always be examined. In case of falsification the special protection ceases, according to Section 17.35.

6. *Passenger vessels.* According to Section 17.04, these are merchant vessels. Hence, they are subject to visit, search, and capture. However, if such vessels are exclusively engaged in carrying civilian passengers a warship will only in rare cases be in a position to take passengers to a place of safety. They may, therefore, neither be attacked nor destroyed as prize in accordance with Section 17.26 unless they lose their protected status because not innocently employed in their normal role.¹⁹⁷

7. *Visit and search.* It is made clear in the last sentence of Section 17.34 that the vessels enumerated are only exempt from attack and capture. Outside of neutral waters they may therefore be visited and searched any time. This follows from the restricted scope of protection. Especially, belligerents must be able to verify whether the vessels concerned (p. 552) are innocently employed in their normal role and that they comply with the conditions for exemption. Belligerents should, however, refrain from exercising the right of visit and search if it is provided for otherwise that such vessels are not abused (e.g. by the presence of neutral observers on board).

17.35

The special protection ends if such vessels do not comply with conditions lawfully imposed upon them, if they abuse their mission, or engage in any other activity bringing them within the definition of a military objective.

According to Article 3 HC XI, the vessels protected 'cease to be exempt as soon as they take any part whatever in hostilities'. Under customary international law the same applies to the other vessels enumerated in Section 17.34.¹⁹⁸ They are all protected because of the special functions they serve. Hence, as soon as they are no longer innocently employed in their normal role, or if they are in some other way employed for purposes unrelated with their original function, they may be subject to measures of naval warfare. This is also the case if they do not submit to identification and inspection or to orders to stop or move out of the way. After loss of exemption they may be captured and confiscated. Moreover, if they make a direct contribution to military action, for example by participating in hostilities, they may be attacked on sight and sunk, provided that destruction offers a definite military advantage. In any event, the abuse must be clearly established before attack. Passenger vessels engaged in carrying civilian passengers as well as members of the enemy armed forces, contraband, or war material lose exemption and may be captured. Destruction is permissible only if the safety of passengers, crews, and ship's papers is ensured. If that is impossible the ship must be diverted to an appropriate port. The special protection of passenger vessels is, however, restricted to those cases in which they are carrying civilian passengers. In other cases they may be attacked and sunk if they meet the criteria laid down in the definition of military objectives.

4. Protected Enemy Aircraft (Except Medical Aircraft)

17.36

The provisions of Sections 17.34 and 17.35 are also relevant for enemy aircraft serving the enumerated purposes and operating exclusively in established corridors. Such aircraft may be requested to put down on land or water to be searched.

1. *General.* The special status of the vessels listed in Section 17.34 results from the functions they serve. Aircraft serving the same functions are similarly exempted from attack and capture. In view of the manifold difficulties involved in the identification of aircraft they are, however, obliged to operate exclusively in established corridors. In order to verify whether such aircraft are innocently employed in their normal role and whether they comply with conditions legitimately imposed upon them they may be requested to put down on land or water for the purpose of inspection.¹⁹⁹ If it is clearly established that exempt

aircraft do not comply with the conditions imposed upon them or that they are not innocently employed in their normal role, they lose their special status and may be captured. Also, if they commit acts rendering them legitimate military objectives they may be attacked.

(p. 553) **2. Civil airliners.** These are civil aircraft, clearly marked, and engaged in carrying civilian passengers in scheduled or non-scheduled services along air traffic routes.²⁰⁰ Civil airliners are exempt from attack only if they are innocently employed in their normal role, do not intentionally hamper the movements of combatants, and operate exclusively along air traffic routes. The fact that a clearly identifiable civil airliner does not operate within a designated corridor does not in itself justify an attack. It may, however, be intercepted and forced to land. The prohibition of destruction does not apply to civil airliners on the ground, unless there is good reason to believe that there are civilian passengers on board. They are even then liable to capture, and may be intercepted and forced to land. As regards crews and passengers Sections 1032 and 1033 apply. Identification is one of the major problems involved in the implementation of the rules protecting civil airliners. The *Vincennes* incident during the Gulf War between Iran and Iraq made that evident. Even the use of transponders identifying an aircraft as a civil airliner does not guarantee absolute protection. It is therefore crucial that the parties to the conflict promulgate and adhere to safe procedures for identifying and intercepting civil aircraft. The Recommendations issued by the ICAO can in this regard prove helpful.²⁰¹ According to the *San Remo Manual* 'civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification codes and modes, updates en route, and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service Route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, for example, safety or distress, in which case, appropriate notification should be made immediately.'²⁰² Moreover, 'belligerents and neutrals concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are continuously aware of designated routes assigned and flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers, and cargo'.²⁰³

5. Other Protected Objects

17.37

Submarine cables and pipelines connecting occupied territory with neutral territory shall not be seized or destroyed. Submarine cables and pipelines connecting different parts of the territory of one party to the conflict, or connecting the territories of parties to the conflict and neutrals, may be interrupted within the law of naval warfare in case of military necessity.

Submarine cables were internationally protected by the Convention on the Protection of Submarine Telegraph Cables of 14 March 1884.²⁰⁴ Today, the laying of submarine cables and pipelines, according to Article 2 HSC 1958 and Article 87, para. 1, lit. c, UNCLOS, is one of the freedoms of the high seas generally recognized as customary law. Hence, submarine cables and pipelines connecting neutral states may not be interfered with in naval armed conflict, unless they make an effective contribution to the enemy's military action by use. The 1884 Convention, in Article XV, expressly stated that its stipulations did not restrict the freedom of action of belligerents. As regards (p. 554) the laws of armed conflict at sea, there is no express prohibition on the destruction of submarine cables and pipelines.²⁰⁵ Therefore, in case of ('absolute') military necessity submarine cables

connecting occupied territory with neutral territory may be cut outside of neutral territorial waters.²⁰⁶ Submarine cables exclusively serving the belligerents are not protected.²⁰⁷

It is, however, doubtful whether the traditional rules on submarine communication cables are still adequate. Submarine communication (fibre-optic) cables are no longer bi-polar like telegraph and telephone (copper) cables but rather multi-polar because they are integral parts of a transnational interconnected infrastructure. They carry more than 95 per cent of international data traffic and are the backbone of cyberspace. Accordingly, the disruption of a cable physically connecting two states may have a severe impact on third states. For the purposes of effectively protecting the interests of neutral States it is, therefore, insufficient to merely oblige the belligerents to 'take care to avoid damage to cables', by at the same time excluding submarine cables exclusively connecting the belligerents.²⁰⁸ Unfortunately, the protection of submarine communication cables in times of war and peace continues to be a neglected issue.²⁰⁹ Accordingly, the traditional rules continue to apply despite of their inadequacy.

6. Targets on Land

17.38

The following rules apply to targets on land subject to the provisions on the protection of the civilian population and the general principles of the law of naval warfare:

- a) The bombardment of defended localities, ports, and buildings situated on hostile coasts is permitted.**
- b) The mining of ports and coastal installations alone does not justify bombardment (Article 1 HC IX).**
- c) Military objectives located within undefended localities or ports may be bombarded if there are no other means available to destroy these objectives and when the local authorities have not complied with a summons within a reasonable period of time (Article 2 HC IX). The absence of such summons may be justified by urgent military reasons. If there is a possibility that these objectives could be destroyed by landing forces, bombardment shall not be permissible.**

1. *The relevance of the 1907 Hague Convention IX.*²¹⁰ In view of the progressive development and the reaffirmation of international humanitarian law by AP I, the provisions of HC IX concerning bombardment by naval forces in time of war have become largely obsolete. The obligations in the latter can easily be derived from the provisions of Part (p. 555) IV, Section I of AP I.²¹¹ It should be kept in mind, however, that not all states are bound by the Protocol. Then the question arises whether the provisions of the HC IX constitute customary international law. Even if that question is answered in the affirmative,²¹² it remains unsettled how to deal with aircraft launched from warships attacking targets on land. According to Article XLI HRAW 1923 'aircraft on board vessels of war, including aircraft-carriers, shall be regarded as part of such vessels'. This could imply that the rules applicable to warships engaged in naval bombardment also apply to aircraft launched from them. Then, however, such aircraft would be allowed to attack military objectives in non-defended localities.²¹³ While Article 59, para. 1, AP I prohibits attacks of such localities 'by any means whatsoever', that is including aircraft, that would not be prohibited under Articles 1 and 2 of HC IX. *Castrén* states that HC IX 'must probably be understood to concern warships only, and not aircraft even when collaborating with them'.²¹⁴ If, however, Article XLI HRAW 1923 is a correct statement of customary law warships and military aircraft launched from warships would be bound by the same rules. Apart from the wording of the provisions mentioned a further argument in favour of that

view is the ability of modern aircraft to discriminate and to conduct surgical strikes by means of high precision ammunition. Still, it should not be left out of consideration that for a locality to be entitled to protection against attacks Article 59, para. 2, AP I, and the probably corresponding rule of customary law, provides that four conditions must be met. Accordingly, even if fixed military installations or establishments remain in the respective port or town this would not justify an attack 'by any means whatsoever' if no hostile use is made of them. Then, regardless of the binding force of AP I, an attack would probably be contrary to the law of armed conflict because the object in question would not make an effective contribution to military action and its neutralization would not offer a definite military advantage. Be that as it may. A clarification of the rules applicable to naval bombardment including the use of aircraft and missiles launched from warships should be taken into consideration.

2. Specific obligations. The introductory sentence clarifies that, when attacking targets on land, naval forces are obliged to ensure the protection of the civilian population as laid down in AP I.²¹⁵ Accordingly, 'without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in Event of Armed Conflict of 14 May 1954 . . . it is prohibited . . . to commit any acts of hostility directed against historic monuments, works of art or places of worship'.²¹⁶ Moreover, when attacking land targets, naval forces shall take care 'to protect the natural environment against widespread, long-term, and severe damage'.²¹⁷ 'Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release (p. 556) of dangerous forces and consequent severe losses among the civilian population.'²¹⁸ Also worth mentioning are the provisions of Article 59 (non-defended localities) and of Article 60 (demilitarized zones) AP I.²¹⁹

III. Special Provisions Concerning Means and Methods of Naval Warfare

1. Mine Warfare

Introductory remarks

1. Hague Convention VIII as the basis for legal evaluation of mine warfare at sea. The extensive use of mines during the Russo-Japanese War (1904–1905) and the damage caused to innocent shipping even after the end of hostilities led to the inclusion of naval mines in the agenda of the Second Hague Peace Conference.²²⁰ Even by HC VIII, which resulted from the Conference's deliberations, was considered a meagre compromise between the interests of the great sea powers on one hand, and of states with only small naval forces on the other.²²¹ Great Britain had urged the prohibition of automatic contact mines in sea areas beyond the belligerents' territorial seas.²²² The reason was that it considered their use in the high seas as prejudicial to its naval supremacy. The majority of states represented at the Hague, however, were unwilling to refrain from the use of this most effective means of naval warfare.²²³

Hence, HC VIII contains neither a general prohibition nor a specific geographical limitation of the use of automatic contact mines. Especially, it lacks a rule on mining of international straits which are overlapped by the territorial seas of the belligerents. Despite several proposals on the prohibition of mining such straits submitted by the Netherlands,²²⁴ the majority held that questions related to straits were not covered by (p. 557) the mandates of either the Committee or of the Conference.²²⁵ The existing treaty regimes for certain straits was not to be jeopardized by general rules on mining. Hence, the Netherlands' proposals were rejected.²²⁶ The only provision referring to the area of minelaying is Article 2, which prohibits the laying of automatic contact mines 'off the coast and ports of the enemy, with the sole object of intercepting commercial shipping'.²²⁷ The material scope of HC VIII is

limited to automatic submarine contact mines (and torpedoes).²²⁸ To this effect the Convention differentiates between anchored and unanchored mines. According to Article 1, para. 1, the latter may not be laid 'except when they are so constructed as to become harmless one hour after the person who laid them ceases to control them'. The one-hour limit is designed to enable warships to escape pursuing enemy units by planting mines.²²⁹ According to Article 1, para. 2, anchored mines must 'become harmless as soon as they have broken loose from their moorings'. Furthermore, the belligerents must take 'every possible precaution . . . for the security of peaceful', that is neutral,²³⁰ shipping (Article 3, para. 1). Finally, they should 'undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel' (Article 3, para. 2).

(p. 558) In view of the unrestricted mine warfare of the two World Wars and of the technical development of naval mines,²³¹ the continued legal relevance of HC VIII has become a matter of dispute.²³² Indeed, it is open to doubt whether its provisions are applicable to bottom mines, modern anchored mines,²³³ or to remote-controlled minefields activated by means of, for example, VLF transmissions. These sophisticated and highly accurate mines are not covered by the wording of the Convention because they react to magnetic and acoustic signals or to changes in water pressure, not to mere physical contact.²³⁴ However, it should not be overlooked that the old automatic contact mine is still used by most of the world's navies.²³⁵ During armed conflicts since 1945, the belligerents only in rare cases employed modern sophisticated mines.²³⁶ Hence, apart from the problem of whether HC VIII is of significance for modern mines, it seems to be the correct view that HC VIII *qua* customary law remains a valid legal yardstick for the use of automatic contact mines.²³⁷

HC VIII has, therefore, acquired the status of customary international law governing the use of automatic contact mines. However, its provisions are not applicable as such to other modern mines. These are, it is submitted, governed by rules and principles of customary international law, which also provide norms regulating the area where naval mines—whether antiquated or sophisticated—may be employed. These principles are elaborated in Sections 1040 and 1043.

2. 'Mines'. International law still lacks a generally agreed definition of naval mines. The Hague Conference at first used the term 'torpedo' to include mines. In the course of the deliberations, mines were distinguished from torpedoes.²³⁸ Still, the delegates did not agree on a definition. It merely follows from the wording that HC VIII is applicable to 'submarine automatic contact mines', which explode on physical contact. Hence, its provisions on mining are applicable to contact mines as well as to more modern mines. Thus, the difficulties involved with regard to the applicability of HC VIII to modern mines are avoided. For a better understanding it is, however, useful to refer to NATO practice according to which naval mines are defined as 'an explosive device laid in the water, on the seabed or in the subsoil thereof, with the intention of damaging or sinking ships or of deterring shipping from entering an area'.²³⁹

(p. 559) Since that definition is also employed in Article 2 of the Swedish proposal for amending the 1980 Inhumane Weapons Conv,²⁴⁰ it can be taken as a basis for the present Handbook. Hence, the following means of naval warfare are not, or not exclusively, covered by the provisions on mining:

- anti-aircraft systems launched from submarines, such as the French *SM Polyphem*;

- devices attached to the bottom of ships or to harbour installations by personnel operating underwater;²⁴¹ and
- devices like the ‘encapsulated torpedo’ (CAPTOR) that are usually designated as mines²⁴² but are in fact torpedoes.

3. *Special treaty provisions.* Before elaborating the rules and principles of international law governing modern conventional mines, brief reference to two important treaties is necessary. The use of nuclear mines is subject to the 1971 Sea-bed Treaty.²⁴³ Although an arms control treaty, its provisions are binding not only in peacetime but also in times of armed conflict.²⁴⁴ Accordingly, a belligerent may not, in sea areas beyond its own 12 nautical miles territorial sea,²⁴⁵ ‘emplant or emplace on the sea bed and the ocean floor and in the subsoil thereof ... any nuclear weapons’, including nuclear mines.²⁴⁶ This prohibition also covers tethered²⁴⁷ tactical low-yield nuclear mines used for anti-submarine purposes.²⁴⁸ The contrary view taken by Professor O’Connell²⁴⁹ is incompatible with the wording (‘nuclear weapons’) as well as with the object and purpose of the Sea-bed Treaty.²⁵⁰ Article 1 Protocol II of the 1980 Inhumane Weapons Conv²⁵¹ refers *inter alia* to ‘mines laid to interdict beaches’. In some cases such mines are laid in waters less than 5 metres deep. However, Protocol II does not apply to naval warfare. The scope of that Protocol is restricted to anti-personnel mines and to land warfare.²⁵²

4. *Minelaying in times of crisis prior to the outbreak of hostilities.* The provisions of the present section are not restricted to the employment of naval mines in times of armed conflict. Sections 1041 and 1042 deal with minelaying prior to the outbreak of an (p. 560) international armed conflict. This is justified by the following consideration. In view of a possible escalation of a given situation it may become necessary to secure one’s territorial sea and ports in times of crisis. However, the minelaying state must respect a number of legal restrictions stricter than the rules applicable in times of armed conflict.

a. Types of mine warfare: principles

17.39

In laying mines the following purposes are distinguished:

- **protective mining, that is in friendly territorial and internal waters;**
- **defensive mining, that is in international waters for the protection of passages, ports, and their entrances; and**
- **offensive mining, that is in hostile territorial and internal waters or in waters predominantly controlled by the adversary.**

The distinction between different types of minelaying laid down in Section 17.39 is not reflective of customary international law. It does, however, reflect the practice of NATO member states.²⁵³

17.40

Any mode of minelaying, whether before or after the beginning of an armed conflict, shall be subject to the principles of effective surveillance, risk control, and warning (HC VIII). In particular, all feasible measures of precaution shall be observed for the safety of peaceful navigation.

1. Legal basis. As stated above, the provisions of HC VIII are applicable neither as such nor by analogy to mines other than automatic contact mines. Nevertheless, there is a general consensus, in practice as well as in the literature, that the customary principles derived from Articles 1, 2, 3, and 5 of the Convention must be taken into account when laying modern naval mines.²⁵⁴ The duties derived from these principles may vary according to the circumstances of each case.

2. Legal obligations of minelaying states.

a) Basic considerations. The provisions of Section 17.40 should not be considered an exhaustive enumeration of the duties incumbent on the minelaying state. The general principles of the (maritime) *jus in bello* also apply;²⁵⁵ in particular, the principle of distinction.²⁵⁶ Any indiscriminate use of mines, that is that are not or cannot be directed against a military objective, is contrary to international law. Moreover, naval mines may in principle only be employed against military objectives.

b) The principle of effective surveillance. This is designed to secure the principle of warning and the duty of clearing mined areas after the cessation of hostilities. It can therefore be deduced from Articles 3 and 5 HC VIII. In particular, it implies that the minelaying (p. 561) belligerent is obliged carefully to record the location of minefields.²⁵⁷ Otherwise, the duties on warning and mine-clearance would be rendered obsolete. Moreover, belligerents are obliged to ensure, for example by random tests, that their mines are programmed correctly and will not react to other than the anticipated stimuli.

c) Risk control. Closely related to the foregoing is the principle of risk control, which can be deduced from Articles 1 and 3 HC VIII. Risk control does not mean that the minelaying party is obliged permanently to exercise surveillance over a minefield; it is sufficient if that party is able effectively to manage the dangers which minefields constitute for peaceful shipping. The concrete duties resulting from the principle of risk control may, therefore, vary according to the type of mine used. Controlled mines, and especially remote-controlled minefields designed for anti-submarine warfare purposes, do not generally pose much threat to peaceful surface shipping.²⁵⁸ Therefore, the minelaying state will normally comply with the principle of risk control by equipping the minefield with a remote control device. It needs to be stressed that in practice remotely controlled minefields will only be laid if the control system is nearly infallible. Otherwise, the military advantage envisaged (long duration, flexibility) cannot be achieved. The control systems depending on VLF transmissions from land require a considerable amount of energy and will probably not be absolutely immune from failure.²⁵⁹ Hence, additionally, the mines must be equipped with a deactivation device. If the control system breaks down the belligerent is, of course, obliged to issue an appropriate warning. If other than (remotely) controlled mines are used, anchored mines must become harmless as soon as they break loose from their moorings.²⁶⁰ They must be equipped with a self-destruction or deactivation device.²⁶¹ If Article 1, para. 1, HC VIII applied to bottom mines, designed to explode upon magnetic, acoustic signatures and/or changes in water pressure, then they would have to become harmless 'one hour at most after the person who laid them ceases to control them'.²⁶² Customary international law, however, has not developed in that direction. Modern bottom mines are highly sophisticated weapons systems that can be programmed to react to specific types of ships or even to one single ship only if sufficient data are available.²⁶³ Hence, these mines need not become harmless within one hour after (p. 562) they have reached their position on the ocean floor. Only when it is not possible to ensure by programming that the mine will be directed at military objectives alone must it be equipped with some kind of deactivation device.²⁶⁴ However, if drifting or floating mines are used the dangers which they pose to

peaceful shipping (sometimes overestimated)²⁶⁵ mean that they still have to be made harmless within one hour.²⁶⁶

d) Warning. The duty to warn arises as soon as effective control of the risk involved is lost. The duty to issue warnings of armed or dangerous minefields is not, however, absolute. The belligerent is obligated to notify danger zones or the position of a minefield only if 'military exigencies permit'.²⁶⁷ This does not mean that the belligerent may refrain from issuing effective warnings only because there is still a potential military advantage. Rather, according to the general principles of the (maritime) *jus in bello*, the military advantage anticipated must, in the circumstances ruling at the time, be definite.²⁶⁸ In case of doubt, the limits of the mined areas must be notified at least roughly. Judge Schwebel in his dissenting opinion to the *Nicaragua* judgment has summarized these duties in a way that may also be applied in times of armed conflict: 'However, as against third states whose shipping was damaged or whose nationals were injured by mines laid by or on behalf of the United States, the international responsibility of the United States may arise. Third States were and are entitled to carry on commerce with Nicaragua and their ships are entitled to make use of Nicaraguan ports. If the United States were to be justified in taking blockade-like measures against Nicaraguan ports, as by mining, it could only be so if its mining of Nicaraguan ports were publicly and officially announced by it and if international shipping were duly warned by it about the fact that mines would be or had been laid in specified waters; international shipping was not duly warned by it in a (p. 563) timely, official manner.'²⁶⁹ The form in which these warnings must be issued depends on the circumstances of each case. In general, it will suffice to inform international shipping by the usual means, for example the 'Notices to Mariners'. If, however, a vessel that may not legitimately be considered a military objective is about to enter a mined sea area, the belligerent must use all means to prevent it from proceeding, *inter alia* by making use of internationally recognized emergency frequencies. Article 3, para. 2, HC VIII obliges the belligerents also to communicate danger zones to the 'Governments through the diplomatic channel'. In view of the technical state of modern means of communication it is, however, doubtful whether such formal notification is still necessary.²⁷⁰

e) Precautionary measures. In principle, a belligerent is required to allow peaceful shipping to leave the sea area that is, or is about to be, mined.²⁷¹ Since this is not an absolute duty the belligerent may refrain from granting such a period of grace if the military advantage anticipated would thereby be jeopardized. If the safety of peaceful shipping cannot be ensured by any of the means described above the belligerent is obliged to take additional precautionary measures.²⁷² This may include the duty to designate safe passages or to provide piloting.

b. Minelaying prior to the beginning of an armed conflict

17.41

Protective mining is permissible even in times of crisis, subject to the right of innocent passage of foreign ships through territorial waters. If it is indispensable for the protection of its security and if the ships have been appropriately warned, the coastal state may temporarily prohibit innocent passage through specific parts of its territorial waters. In the case of straits serving international navigation there is no right of protective mining in times of crisis.

1. Prior to the outbreak of an international armed conflict. Only protective minelaying is permissible. It is self-evident that prior to the outbreak of an international armed conflict it is prohibited to lay mines in the territorial waters of a foreign state.²⁷³ Rights and duties of states are governed by the law of peace. They are, therefore, obliged to respect the freedom of navigation beyond their territorial sea²⁷⁴ and to use the high seas (including EEZs) for

peaceful purposes only.²⁷⁵ Violation of these obligations by the use of mines may be justified as self-defence, according to Article 51 UN Charter.²⁷⁶ This presupposes an armed attack. If, however, an armed attack occurs then Section 17.42 on wartime mining comes into operation. In such cases the question of mining prior to (p. 564) the outbreak of an international armed conflict is no longer of relevance. The question remains whether it is also prohibited to lay mines in sea areas beyond the outer limit of the territorial sea. The laying of mines in international waters, whether armed or remotely controlled, is contrary to international law. According to the *US Manual*, mining of international waters is considered legitimate under the following conditions: 'Controlled mines . . . may be emplaced in international waters beyond the territorial sea if they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controlled mines do not constitute a hazard to navigation, international notice of their emplacement is not required. Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense. Should armed mines be emplaced in international waters under such circumstances, prior notification of their location must be provided and the anticipated date of their complete removal must be clearly stated. The nation emplacing armed mines in international waters during peacetime also assumes the responsibility to maintain an on-scene presence in the area sufficient to ensure that appropriate warning is provided to ships approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.'²⁷⁷ Even though there is some support in the literature for the US position, especially by those who acknowledge a right of preventive self-defence,²⁷⁸ the rules laid down in the *US Naval Manual* (2007) are not covered by existing international law. Prior to the outbreak of an international armed conflict, the rights and duties of states are exclusively governed by the law of peace: in the present context, by the international law of the sea. Hence, the freedom of navigation as well as the duty of peaceful use of the high seas have to be observed. An infringement of these rules and principles is only justified if an armed attack occurs. It may be that according to the *US Naval Manual* the scope of self-defence is broader. Even then it is open to doubt whether a case of 'most demanding requirements of individual or collective self-defence' is still governed by the law of peace.²⁷⁹

2. Minelaying in one's own territorial waters. In times of crisis the laying of mines is permissible in the territorial sea, in the internal waters, and in the archipelagic waters of the minelaying state. The question arises whether and to what extent these rules are compatible with the international law of the sea, as far as the territorial sea is concerned. Even though the coastal state's sovereignty extends to the territorial sea it is not free to suspend the right of innocent passage.²⁸⁰ Innocent passage may—temporarily—be suspended in exceptional cases only.²⁸¹ The ICJ in the *Nicaragua* case emphasized that 'if a State lays (p. 565) mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907'.²⁸² Hence, if mines are laid in the territorial sea peaceful shipping must be effectively warned if the mines form a threat. The rules laid down in the *US Naval Manual* do, however, comply with these principles. Mining of one's own territorial waters is said to be permissible only when either peaceful shipping remains unaffected or when it is demanded by fundamental security considerations.²⁸³ If states, like Sweden, lay controlled minefields in their territorial waters in peacetime, they are not obliged to give notice of the minefield, nor are

they obliged to issue warnings.²⁸⁴ Only when the minefield is activated does the right temporarily to suspend innocent passage presuppose a prior warning.²⁸⁵

3. International straits. Prior to the outbreak of an international armed conflict the coastal state is not entitled to suspend the right of transit passage through international straits. In the *Corfu Channel* case, the ICJ held that ‘unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such passage through straits in time of peace’.²⁸⁶ Since controlled minefields do not interfere with transit passage there is no reason for denying the coastal state the right to employ them within international straits. The foregoing commentary applies *mutatis mutandis* to archipelagic shipping lanes.

c. Minelaying during armed conflicts

17.42

During an armed conflict protective mining is permissible without the limitations applicable before it begins. As a matter of principle, defensive mining is permissible only after the beginning of the armed conflict; the shipping lanes of neutral and non-belligerent states shall be kept open to an appropriate extent, if military circumstances so permit. Acts of aggression not amounting to armed attacks do not suffice as a motive. Offensive mining may not be undertaken solely to interdict merchant shipping.

1. Protective mining. In the course of an international armed conflict this is a generally acknowledged belligerent right.²⁸⁷ With the outbreak of hostilities the relationship between the belligerents is no longer governed by the rules of the international law of the sea concerning innocent passage, transit passage, or archipelagic shipping lane passage. The relationship of the parties to the conflict with neutral states or those not parties to the conflict must be differentiated. Whereas, for security reasons, the right of innocent passage may be denied to neutral shipping at least temporarily, this is not the case with regard to transit (and archipelagic shipping lanes) passage. In view of the provisions of UNCLOS III guaranteeing an inalienable right of transit passage, such mining constitutes a violation of international law if the belligerents do not provide for safe alternative (p. 566) routes of similar convenience.²⁸⁸ It may be added in this context that at least in the first months of World War II free passage through international straits as well as piloting services were provided by the belligerents.²⁸⁹ The conditions under which the right of transit passage may be exercised will depend on the circumstances ruling at the time. Probably, vital security interests will entitle a belligerent temporarily to close an international strait. This question is, however, far from settled. In any event such closure will only be legitimate in exceptional cases and may not last indefinitely.

2. Defensive mining. This presupposes the existence of an international armed conflict. The admissibility of mining international waters follows from the fact that the high seas belong to the areas of naval warfare. Mines may only be laid within the general area of naval operations.²⁹⁰ Accordingly, the territorial seas²⁹¹ and internal waters of states not parties to the conflict are exempt. This is also true of archipelagic waters²⁹² since they are covered by the sovereignty of the archipelagic state. In addition, mining must not have the practical effect of preventing passage between neutral waters and international waters. In principle, the EEZs and continental shelf areas of neutral states are part of the general area of naval operations.²⁹³ However, the belligerents shall have due regard for the rights of the coastal state concerning the exploration and exploitation of the natural resources in such sea areas. In particular, artificial islands, installations, structures, and safety zones may not be

interfered with. In any event, if mines are laid within the EEZ or on the continental shelf of a neutral state the belligerent is obliged to give notice of the mined areas.²⁹⁴

As regards the mining of high seas areas there seem to exist no significant restrictions. Especially, Article 3 HC VIII suggests that 'belligerents may sow anchored automatic contact mines anywhere upon the high seas'.²⁹⁵ It should, however, not be overlooked that according to the Preamble the contracting states were '[i]nspired by the principle of the freedom of sea routes, the common highway of all nations'. The generally accepted (p. 567) rules on treaty interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties would allow the Preamble to be taken into consideration. It would, therefore, be possible to deduce a prohibition of unrestricted mining in the high seas. On the other hand, this result may be doubted in view of the practice of the two World Wars.²⁹⁶ If, however, recent statements on the law of naval warfare are taken into account it becomes obvious that even though international law still lacks a general and comprehensive prohibition, the right of belligerents to lay mines in the high seas is not unlimited.²⁹⁷ The *US Naval Manual* (2017), for example, expressly states: 'Mining of areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.'²⁹⁸ Hence, unless free and safe passages for peaceful shipping are provided for, the mining of the high seas is contrary to international law.²⁹⁹ Of course, during an international armed conflict at sea the freedom of navigation is not absolute.³⁰⁰ Still, the parties to the conflict are not entitled to treat it as obsolete.

3. Offensive mining. During an international armed conflict this is also legitimate as long as the principles laid down in Section 17.40 are observed. Its admissibility also follows from the provisions on the areas of naval warfare. Still, as is shown by paragraphs 3–5 of the present section, the mere existence of (armed) hostilities is not considered sufficient to justify the mining of enemy territorial waters. In accordance with the right of individual or collective self-defence of Article 51 UN Charter it is made subject to an 'armed attack'.³⁰¹ These provisions are, however, of minor relevance for the naval commander. They are rather addressed to political and high military decision-makers. On the justification of mining enemy territorial waters as an act of collective self-defence, the judgment of the ICJ in the *Nicaragua* case is of considerable significance. The ICJ ruled that the use of force, including the mining of another state's territorial waters, is to be considered a (p. 568) legitimate act of collective self-defence only if the following criteria are met: 'At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.'³⁰² If there is no such declaration and request offensive mining is not justified by the right of collective self-defence.

4. The prohibition against laying mines with the sole object of intercepting commercial shipping. According to a widely held view the prohibition of Article 2 HC VIII also applies to modern mines.³⁰³ It is thus forbidden to lay mines 'off the coast and ports of the enemy, with the sole object of intercepting commercial shipping'. In practice, a violation of this prohibition is unlikely to be established. In any event, mining activities will only in exceptional cases be exclusively motivated by considerations of economic warfare.³⁰⁴ However, even under conditions of modern naval warfare this prohibition is not meaningless. It implies that the offensive use of mines for the sole object of conducting economic warfare at sea is strictly forbidden.³⁰⁵ Of course, mines may be employed for establishing and enforcing a naval blockade. Mines may not, however, be the only means employed for that purpose. If mines are used for blockade purposes the belligerent is obliged to deploy warships or other units of its armed forces near the blockaded area. The

rationale behind that obligation is to ensure that ships in distress can reach a place of safety.

d. Duties after the cessation of hostilities

17.43

At the close of hostilities the conflicting parties must do their utmost to remove, for the sake of safe shipping, the mines they have laid (Article 5 HC VIII).

1. Removal of mines by the former belligerents. At the close of the armed conflict the former belligerents must make every effort to remove the mines which they have laid.³⁰⁶ This duty is generally accepted as a rule of customary international law.³⁰⁷ Accordingly, each (p. 569) belligerent is obliged to remove the mines it has laid in its own territorial waters and in the high seas. As regards those mines laid in a belligerent's own territorial waters, it is sufficient merely to render them harmless. Remotely controlled minefields must only be switched off. Mines laid in the territorial waters of the (former) adversary may be removed only with the latter's express consent. A mine-clearing operation within the territorial sea without permission by the coastal state is a violation of its territorial sovereignty.³⁰⁸ If the coastal state is unwilling to permit mine-clearing operations by the other state the latter is, in principle, obliged to notify the former of the position of the mines.³⁰⁹ In practice, the performance of this duty may cause considerable difficulties. The minelaying state may, for security reasons, not be willing to provide its former adversary with information on the construction of the mines it uses. International law provides no rules for such cases except for the general duty to resolve international disputes by peaceful means. Finally, if a state is unable to remove the mines it has laid because it does not have the necessary technical means it shall ask other states for assistance.³¹⁰

2. Removal of mines by neutrals. The parties to an ongoing international armed conflict at sea do not, of course, always comply with the above requirements. Drifting mines are laid in sea areas with a high traffic density. In many cases, the mines used can neither be directed at military objectives nor are they equipped with effective deactivation devices. In such cases the question arises whether neutral states are entitled to protect their shipping by removing the illegally laid mines. The practice of states during the Iran-Iraq War has, it is submitted, contributed to the emergence of a confirmatory rule of international law. On 24 July 1987, the reflagged tanker *Bridgeton* hit a mine 18 nautical miles off the Iranian island of Farsi. Almost immediately the US sent mine experts to assist Saudi Arabia and Kuwait in removing the mines off their respective coasts and ports. It soon became clear, however, that the mines could be removed only if the necessary equipment was available. Therefore, the US started deploying its 'airborne mine countermeasure units' (AMCM) in the area.³¹¹ At the request of the US, Great Britain and France also deployed naval units in the Gulf region to protect peaceful shipping and to remove mines in international shipping lanes.³¹² On 21 September 1987, two US helicopters detected (p. 570) an Iranian landing craft, the *Iran Ajr*, approximately fifty nautical miles to the north-east of Bahrain. After they had verified that the *Iran Ajr* was engaged in mining activities they opened fire. Five members of the Iranian crew were killed, the other twenty-six were captured.³¹³ While the Iranian government accused the US of having killed innocent seamen, the Legal Adviser of the Department of State, Judge A. Sofaer, justified the attack on the *Iran Ajr* as follows: 'Where, as here, a government engages in manifestly illegal use of armed force, international law entitles the victim to act in self-defense. The response must be necessary and proportionate. The United States' action plainly comported with these requirements. The United States acted to stop the unlawful act itself, and an imminent threat to US shipping was thereby avoided. The US immediately reported this action to the Security Council pursuant to

Article 51 of the UN Charter and stated its hope and intention that the incident not be followed by additional hostilities.³¹⁴

As regards the removal of mines in areas beyond the territorial seas of the belligerents, there is unanimous agreement in the literature that the activities were in compliance with international law.³¹⁵ State practice supports this view since even the parties to the conflict in the Gulf War acquiesced in the removal of mines by neutral states.³¹⁶ Possible justifications are either the inherent right of self-defence³¹⁷ or the right to enforce the freedom of navigation against illegal interference by belligerent mining.³¹⁸

A far more difficult question is whether neutral states are entitled to remove mines illegally laid in international straits. So far the only precedent is the *Corfu Channel* case.³¹⁹ The facts are well known. On 13 November 1946 Great Britain removed twenty-two mines from the Corfu Channel because Albania had refused to clear the mines itself or give permission to Great Britain. The ICJ held Albania responsible for damage caused to two British warships that struck mines when passing through the Corfu Channel.³²⁰ The British action, however, was also considered illegal because it constituted a violation of Albania's sovereignty. The Court was not prepared to accept any justification for the British action. If the *Corfu Channel* decision were still considered as valid law the removal of mines in international straits overlapped by the territorial sea of a coastal state would be contrary to international law. Whether the mines were laid in accordance with the maritime *jus in bello* would make no difference. In view of the new rules on non-suspendable transit passage and of the importance of international straits for international commerce it is open to doubt whether the mere reference to the sovereignty of the belligerent coastal state suffices to render the removal of illegally laid mines by neutral states a violation of international law. The right of transit passage may only be infringed by measures that comply with the maritime *jus in bello*. Therefore, if the belligerents are not willing to observe these rules and if there exist no alternative routes of similar (p. 571) convenience, third states are entitled to remove mines in international straits in order to enforce their right of transit passage.³²¹

2. Torpedoes

17.44

Torpedoes which have missed their mark must become harmless (Article 1 HC VIII). When using torpedoes, action shall be taken in accordance with the principles of naval warfare to ensure that only military objectives and not other ships and objects are damaged.

This provision stems from Article 1, para. 3, HC VIII³²² and is today generally accepted as part of customary international law.³²³ In general, torpedoes presently in use by naval armed forces meet the requirements laid down in the first sentence. The provisions of the second sentence, in view of the accuracy of modern torpedoes,³²⁴ pose no serious problems either. In this regard it makes no difference whether torpedoes are employed against surface or against subsurface vessels. However, torpedoes guided by wire during the initial phase seek their target independently during the final phase of their run. Hence they may hit other targets than those originally aimed at. It is the object and purpose of the second sentence to remind naval commanders of their duty to ensure that only military objectives are attacked.

3. Missiles

17.45

For the use of missiles at sea, including cruise missiles, the general principles of the law of naval warfare apply.

The inclusion of a special provision on missiles is meant to take account of modern naval warfare. Short-range missiles were successfully employed during the 1967 Arab-Israeli conflict,³²⁵ the Falklands/Malvinas conflict,³²⁶ and during the two Gulf Wars.³²⁷ No specific rules on the use of cruise or other missiles have yet been included in the law of naval armed conflict. Hence, Section 17.45 clarifies that when belligerents employ missiles (cruise or other) they are obliged to ensure that they are directed exclusively at military objectives.³²⁸ In general, the technical state of modern missiles enables belligerents to conform with the fundamental principles of the laws of naval armed conflicts, especially with the principle of distinction. However, there still exist problems with regard to identification and targeting.³²⁹ If the use of missiles (p. 572) and projectiles depends upon over-the-horizon targeting, belligerents are obliged to take precautionary measures to ensure that anything other than military objectives is spared.³³⁰ Provided that, if necessary, such measures are taken the legality of the use of missiles cannot be doubted.³³¹ Modern missiles are highly discriminate weapons that will not usually miss their targets. In the light of the fundamental principles of naval armed conflict, it is, therefore, not necessary to equip them with self-destruction or similar devices.³³²

4. Submarine Warfare

Preliminary remarks. The rules on submarine warfare result from a development beginning in 1899. This development was to a considerable extent influenced by Great Britain's endeavours to outlaw the submarine as a legitimate means of naval warfare.³³³ These endeavours (made during international codification and disarmament conferences) failed in the face of resistance by other states, especially of France.³³⁴ Already during World War I the principal legitimacy of the submarine as a means of naval warfare was not seriously doubted. It became evident, however, that it would be at least difficult to reconcile the use of submarines with the rules of naval warfare. Despite allegations to the contrary, submarines, because of their poor speed, could only be employed to a limited extent against enemy warships. Hence, from the very beginning their importance lay with measures against enemy merchant shipping. However, if submarines were to capture a merchant vessel they had to comply with the regular procedure of visit and search. This exposed them to serious dangers since, once surfaced, they could be rammed or otherwise attacked. Moreover, during World War I, for example Great Britain had armed its merchant shipping and ordered it to fly false flags and to ram German submarines if possible. Hence, after initial compliance with the rule on visit, search, and capture, Germany turned to a policy of 'unrestricted submarine warfare'. Vessels encountered within the limits of a predeclared so-called 'war zone' were sunk without prior warning.³³⁵ A further difficulty resulting from compliance with the rules of naval warfare was the lack of space on board submarines. They were unable to take crews, passengers, and ship's papers to a place of safety if a captured merchant vessel had to be destroyed. It was also nearly impossible to take shipwrecked and wounded on board. In addition, rescue operations, in view of the vulnerability of surfaced submarines, caused severe problems. Still, it was agreed at the 1922 Washington Conference that submarines were subject to the same rules of naval warfare as surface vessels and that non-compliance constituted an act of piracy. The Washington Treaty never entered into force but the same rules concerning the (p. 573) use of submarines were laid down in the 1930 London Agreement on Naval Armaments. When that Treaty expired the same rules were reaffirmed in the London Prot 1936³³⁶ that became binding law for the majority of the belligerent states of World War II. State practice during World War II, however, did not differ from that of World War I.³³⁷ From the beginning all belligerents,

including the US, conducted unrestricted submarine warfare directed at enemy merchant shipping and caused tremendous losses.

Shortly after its adoption the provisions of the LondonProt 1936 were criticized on the ground that they disregarded the differences between surface and subsurface vessels, and overlooked the impossibility for submarines to comply with the rules on visit and search.³³⁸ Still, in its judgment on Admiral Dönitz, the Nuremberg Tribunal affirmed the continuing validity of the Protocol. The Tribunal did not, however, find Dönitz guilty of unrestricted submarine warfare against British merchant shipping.³³⁹ In its reasoning the Tribunal did not refer to the dangers involved in the compliance with the procedure of visit and search. Rather, it considered British merchant vessels that had been incorporated into Britain's war efforts to have lost the protection of the LondonProt 1936.³⁴⁰ Neither was Dönitz sentenced for having ordered attacks on neutral merchant vessels, especially within 'war zones'. The Tribunal qualified those attacks as violations of the LondonProt 1936 but refrained from a sentence in view of the similar practice of the Allies, especially of the US in the Pacific.

International lawyers have drawn quite different conclusions from practice during World War II and from the Nuremberg judgment. Whereas some consider the LondonProt 1936 to have been abrogated on grounds of desuetude,³⁴¹ others emphasize its continuing and unmodified validity.³⁴² The view according to which the LondonProt 1936 has been abrogated, according to the position taken here is not tenable. The conduct of states during World War II can hardly be considered a practice based upon an *opinio iuris* that has contributed to the development of a new rule of customary international law. In the vast majority of cases states justified their conduct by reference to reprisals.³⁴³ Hence, they were convinced of the basic illegality of their measures. Therefore, state practice and the fact that measures of unrestricted submarine warfare were characterized as violations of the law are evidence of the *opinio iuris* of states that they have continuously been bound by the LondonProt 1936. Of course, post-World War II practice gives less testimony. The only known case of an employment of submarines during an international armed conflict was the attack by the British submarine HMS *Conqueror* on the Argentine *General Belgrano* that is of no relevance as regards the continuing validity of the 1936 Protocol. However, the provisions of the Protocol are referred to in recent military manuals³⁴⁴ (even (p. 574) though the rules on submarine warfare sometimes differ from those on surface warfare).³⁴⁵ Neither is the Nuremberg judgment authority for the abrogation of the LondonProt 1936. Rather, it has contributed to a clarification of the law in so far as enemy merchant vessels participating in hostilities are not covered by the Protocol's protective scope and may therefore be attacked and sunk without prior warning or prior exercise of visit and search. It needs to be emphasized in this context that, according to the Nuremberg judgment, an attack may not take place in cases of doubt as to the qualification of a merchant vessel as a legitimate military objective. The Nuremberg judgment merely lacks clarification of the status of neutral merchant vessels. According to the Tribunal, all neutral merchant vessels are protected by the Protocol regardless of the fact that under certain circumstances they become legitimate military objectives (e.g. if they are transporting enemy troops or if they are integrated into the enemy's intelligence system).³⁴⁶ Attacks on neutral merchant vessels are, however, not the subject of the present chapter.

Finally, the continuing validity of the LondonProt 1936 is questioned because it allegedly does not meet the practical requirements of naval armed forces engaged in active hostilities. Its provisions would, therefore, not be observed during armed conflict. Submarines, by using their sonar equipment, could distinguish between different types of vessels but could not verify their respective functions. (One may add that communication with operational control is almost impossible because of the danger of detection.) A naval commander would not expose his submarine to the dangers involved in visit and search merely to realize after surfacing that the supposed merchant vessel is really a warship in disguise.³⁴⁷ Such practical difficulties, however, are not sufficient proof for the validity of

the allegation that, under international law, there are only two types of ships: submarines and targets. On one hand, the effective employment of submarines in modern armed conflict is not jeopardized by the continuing validity and applicability of the Protocol. Its protective scope only covers merchant vessels proper. It does not cover warships and merchant vessels that are legitimate military objectives. Today, submarines are neither exclusively nor predominantly employed against merchant shipping. Because of the technological development since the end of World War II their velocity and operability have increased considerably. They can thus be entrusted with specific military tasks, like protective mining for coastal defence purposes, and attacks on enemy warships and enemy territory.³⁴⁸ In view of the fundamental principles of naval armed conflict and the overall principle of humanity, it would, on the other hand, be difficult to justify the existence of different sets of rules for surface and subsurface forces by mere reference to practical considerations. In any event, attacks by submarines as well as by surface vessels must be restricted to military objectives. Only if an object is clearly identified as of military character may it be attacked. In cases of doubt there is a presumption of the non-military character of an object and attacks must be terminated. If, in such cases, the commander is unwilling to expose his submarine to the dangers involved in visit and search he can only (p. 575) leave the vessel concerned to pass unmolested above his periscope. It may be added that many of the concerns raised against the continuing validity of the LondonProt 1936 lose much of their weight in view of the endorsement of maritime exclusion zones.³⁴⁹

17.46

Submarines are subject to the same rules of international law as surface vessels (Article 1 LondonProt 1936).

As stated in the preliminary remarks, in view of the continuing validity of the LondonProt 1936 and since no rule of customary law to the contrary has developed, submarines are subject to the same rules as surface ships.³⁵⁰ Apart from measures against enemy merchant vessels (dealt with in the commentary on Section 17.47) this implies that when a submarine launches attacks on targets at sea, in the air, or on land, the fundamental principles of the law of naval armed conflict, as well as the rules on specific methods of naval warfare, must be strictly observed. Hence, despite their restricted technical capabilities, submarines are also subject to the rules on target discrimination. In principle, submarines are equally obliged to rescue shipwrecked and wounded. As already mentioned,³⁵¹ this obligation is subject to considerations of military necessity and to the circumstances prevailing at the time.³⁵² Hence, a submarine may refrain from rescue operations if the risks involved are too high. This will be the case, for example, if the submarine, after surfacing, could be attacked by aircraft. Nor will rescue be feasible if there is not sufficient space available to take shipwrecked and wounded on board. However, the commander is obliged to transmit the position of those who need help as long as this is possible without exposing his ship to attacks.

17.47

Merchant ships which meet the requirements of a military objective may also be attacked and sunk by submarines without prior warning. A submarine intending to capture a hostile merchant ship which does not meet the requirements of a military objective must first surface. It may not sink a merchant ship without having first brought the passengers, crew, and ship's papers to a safe place (Article 2 LondonProt 1936). If the merchant ship refuses to stop on being duly summoned or puts up active resistance to visit or search, the submarine shall be allowed to attack without warning.

1. Merchant vessels meeting the requirements of the definition of military objectives.

These may be attacked anywhere within the areas of naval warfare, without prior warning. This is reaffirmed in the first sentence of the present section. Still, submarines are bound by the same rules as surface ships. Hence, they may not attack if under the prevailing circumstances the sinking of an enemy merchant vessel offers no definite military advantage, if less severe means are available, or if the military character of the vessel concerned cannot be clearly established.³⁵³

2. Capture and destruction of other enemy merchant vessels. The dangers connected with surfacing do not release a submarine from compliance with the obligations laid down in the LondonProt 1936. Enemy merchant vessels not qualifying as legitimate military objectives may therefore only be destroyed if after capture passengers, crews, and ship's papers have been taken to a place of safety. If this is not feasible, destruction is illegal.

(p. 576) 5. Maritime Exclusion Zones

1. Preliminary remarks. The validity of the term 'exclusion zone' as well as the particular rules laid down in the present section can only to a limited extent be based upon state practice. On the one hand, there is neither a uniform usage of that term nor a general consensus as to the details of the concept. On the other hand, the majority of 'zones' established and enforced during armed conflicts at sea have been considered illegal by both, international courts and the legal literature. Still, in view of the growing recognition of 'exclusion' or 'operational zones' in military manuals, including the *San Remo Manual*, today such zones may be considered a generally recognized method under customary international law. However, there still is no consensus on either the such zones are to serve or on the specific rules that have to be observed if a belligerent makes use of an 'exclusion zone'. Therefore, the provisions of Sections 1048 *et seq.* still have to be considered a contribution to the progressive development of international law. It will be seen whether they will meet the general acceptance of the community of states necessary for a rule of customary international law to come into existence.

2. State practice.

a) State practice until 1945.³⁵⁴ Before and during the two World Wars, exclusion/war zones were established primarily to attack any vehicle encountered there, without prior warning. Exclusion zones for merely defensive purposes were for the first time proclaimed during the Russo-Japanese War of 1904/1905.³⁵⁵ As regards World War I, Great Britain established a war/exclusion zone on 2 November 1914;³⁵⁶ followed by Germany on 4 February 1915.³⁵⁷ Because of the inferiority of its surface forces, Germany felt compelled steadily to increase the areas covered by its war zones.³⁵⁸ Great Britain could confine itself to the originally proclaimed areas because it had already conducted a very successful economic war by means of a long-distance blockade.³⁵⁹ In view of the fact that the belligerents justified their zones as reprisals and of the severe impact upon neutral merchant shipping, international lawyers in the aftermath of World War I almost unanimously agreed on the illegality of such war/exclusion zones.³⁶⁰ During World War II, Great Britain established a war/exclusion zone in the Skagerrak: by day all German vessels and by night all vessels regardless of their nationality were liable to attack on sight.³⁶¹ At the beginning of hostilities the German naval forces were obliged to comply with the rules of the LondonProt 1936, as implemented in the Prize Ordinance of 28 August 1939. Soon, however, they were released from those restrictions. Consequently, a comprehensive war (p. 577) zone around the British Isles was proclaimed. It was gradually increased in the course of the war.³⁶² In the Pacific Ocean, the US also made use of the exclusion zone device and conducted unrestricted submarine warfare against Japan.³⁶³ After the end of World War II, the Nuremberg Tribunal characterized the establishment of war/exclusion zones as a violation of the LondonProt 1936. The Tribunal held that the Treaty had been ratified in knowledge of the practice of World War I. However, there were no exceptions on war/exclusion zones in the Protocol.³⁶⁴

In this context, it is emphasized that the Tribunal reached its decision merely upon the ground that, within the German war zones, neutral merchant vessels had been sunk without prior warning. The Tribunal did not base its judgment upon attacks on enemy merchant vessels that had lost the protection of the Protocol by having been integrated into Great Britain's war efforts. Nevertheless, Admiral Dönitz was not sentenced for that violation of the Protocol, because Great Britain (in the Skagerrak) and the US (in the Pacific) had also established war zones in which neutral merchant vessels had been attacked on sight. It therefore remained an open question whether and to what extent neutral merchant vessels—whether within or outside exclusion zones—could be attacked. Obviously, the Nuremberg Tribunal did not take that possibility into consideration in order not to divest itself of the only legal yardstick available: the LondonProt 1936.³⁶⁵ Hence, from the reasons given one may draw the conclusion that maritime exclusion zones are probably not illegal if measures taken there either serve purely defensive purposes or are directed solely at enemy military objectives. Still, state practice of the two World Wars is without prejudice to the legality of exclusion zones as laid down in the present Section. The World War zones had a quite different object and purpose.

b) State practice since 1945. This also does not justify the conclusion that, under customary international law, maritime exclusion zones are a legitimate method of naval warfare. The number of precedents—the Falklands/Malvinas conflict³⁶⁶ and the first Gulf War³⁶⁷—is far from sufficient.³⁶⁸ Moreover, there are considerable differences between the exclusion zones established in the South Atlantic and those established in the Persian Gulf. However, the reactions of third states as well as statements in the legal literature justify the conclusion that the exclusion zone device may become a generally accepted method of naval warfare if certain criteria are met. On 28 April 1982, Great Britain proclaimed a 'Total Exclusion Zone' (TEZ) in the South Atlantic.³⁶⁹ Beside deterring (p. 578) the Argentine naval forces from leaving their ports, its main purpose was to facilitate the early identification of military objectives and to prevent vessels flying neutral flags from conveying information to Argentina. Argentina, on 11 May 1982, proclaimed a war zone covering the whole South Atlantic and announced that any British vessel would be attacked. On one hand, the British TEZ covered an area of 200 nautical miles measured from the centre of the main island.³⁷⁰ On the other hand, the TEZ was situated far from any main shipping lanes. Moreover, its duration was comparatively short. It did not serve economic warfare purposes but was aimed at facilitating military operations, including identification. Vessels and aircraft flying flags of states not parties to the conflict suffered no damage whatsoever.³⁷¹ For these reasons, only the former USSR officially protested against the British TEZ. During the 1980–1988 Gulf conflict, neither Iran nor Iraq seem to have been led by legal considerations when establishing their respective exclusion zones.³⁷² Iraq mainly concentrated on shipping (largely neutral) serving Kharg Island. It made no difference whether those tankers were travelling in convoy, armed or unarmed. Iraq's measures were generally condemned, as were similar measures taken by Iran against neutral merchant vessels travelling to and from other coastal states of the Persian Gulf.³⁷³ During the recent Operation Iraqi Freedom, the US established 'zones' or 'exclusion zones' in order either to restrict sea and air traffic in a given area or to protect certain high value targets, like oil platforms, against possible (terrorist) attacks. That practice reveals that, according to the US position, the establishment of an exclusion zone for the said purposes is legal, especially if the area affected is limited in space. Of course, it should not be left out of consideration that if such zones are established for the purpose of countering terrorist threats the legal basis is not to be found in the law of armed conflict but rather in the law governing the right of self-defence.

c) Military manuals. A growing number of states, according to their military manuals, consider exclusion zones to be in conformity with the law of armed conflict. Thus, the *UK Manual* provides: 'Maritime exclusion zones and total exclusion zones are legitimate means of exercising the right of self-defence and other rights enjoyed under international law. However, in declaring the zones, the exact extent, location, duration and risks associated should be made clear . . . Should a belligerent, as an exceptional measure, establish such a zone: a. the same body of law applies both inside and outside the zone; b. the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principle of proportionality; c. due regard shall be given to the rights of neutral states to legitimate uses of the seas; necessary safe passage through the zone for neutral vessels and aircraft shall be provided: (1) where the (p. 579) geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral state; (2) in other cases where normal navigation routes are affected, except where military requirements do not permit; and d. the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.'³⁷⁴ The *US Naval Manual* also considers the establishment of an exclusion zone in accordance with the law of naval warfare: '... To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury. . . , and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful. However, the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft which do not constitute lawful targets . . . an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.'³⁷⁵ Similar rules are recognized in the *Canadian Manual*.³⁷⁶

The *San Remo Manual* provides: '(105) A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea. (106) Should a belligerent, as an exceptional measure, establish such a zone: (a) the same body of law applies both inside and outside the zone; (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality; (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas; (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided: (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State; (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.'

The 'Helsinki Principles of the Law of Neutrality in Relation to Warfare at Sea' adopted by the 67th Conference of the International Law Association in 1996, have acknowledged this practice: '3.3 *Special Zones*. Subject to Principle 5.2.9 [visit and search vis-à-vis neutral commercial ships] and without prejudice to the rights of commanders in the zone of immediate naval operations, the establishment by a belligerent of special zones does not confer upon that belligerent rights in relation to neutral shipping which it would not otherwise possess. In particular, the establishment of a special zone cannot confer upon a belligerent the right to attack neutral shipping merely on account of its presence in the zone. However, a belligerent may, as an exceptional measure, declare zones where neutral shipping would be particularly exposed to risks caused by the hostilities. The extent, location and duration must be made public and may not go beyond what is required by military necessity, regard being paid to the principle of proportionality. Due regard shall also be given to the rights of all states to legitimate uses of the seas. Where such a zone

significantly impedes free and safe access to the ports of a neutral state and the use of normal navigation routes, measures to facilitate safe passage shall be taken.³⁷⁷

(p. 580) **d) Statements in the legal literature.** In the post-World War II era, the issue of the legality of exclusion zones is addressed in a far more differentiated way than in the post-World War I period.³⁷⁸ There seems to be a tendency to acknowledge the legality of exclusion zones in principle if the interests of neutral shipping are duly taken into account and if they are not intended to serve as 'free-fire zones', where vessels are attacked indiscriminately, regardless of the fundamental principles of the law of naval warfare, and without prior warning.³⁷⁹

3. Conclusions. In some respects the provisions of the *San Remo Manual* on 'zones' lack the necessary clarity. On the one hand, there is no statement on the legitimate purpose a 'zone' may serve. On the other hand, it is difficult to distinguish such 'zones' from similar concepts, like warning zones/areas, security zones/areas, defensive zones, or the 'immediate vicinity of naval operations'. A comparison between paras 105-8 and paragraph 75 of the *San Remo Manual* makes it possible to distinguish a 'zone' from the 'immediate vicinity of naval operations' or from an 'area of military activities potentially hazardous to civil aircraft'. Obviously, a belligerent is entitled to temporarily impose air traffic restrictions in the latter areas, including an absolute prohibition of overflight for neutral civil aircraft.³⁸⁰ In view of the hazards a merchant vessel or a civil aircraft will be exposed to if they approach or enter an area of military activities a belligerent is (or rather: should be) entitled to temporarily establish and enforce a 'zone'. Moreover, as laid down in Article 34 HRAW 1923, enemy civil aircraft are liable to be fired upon in the immediate vicinity of military operations. All this, however, presupposes that military operations/activities in fact occur in the area in question. Similar considerations apply with regard to 'safety zones' that serve the sole purpose of protecting high value or extremely hazardous targets, like oil platforms or nuclear reactors.³⁸¹ The space affected would, of course, be rather limited. Still, the legitimate purpose of 'zones' remains unclear. Neither the *San Remo Manual* nor recent military manuals (e.g. of the UK) provide an answer to that question.³⁸² Thus, it is rather difficult to establish which measures a belligerent will be allowed to take against merchant vessels or civil aircraft. Probably, an answer can be deduced from the *US Naval Manual* (2007). While there is general agreement that a 'zone' may never be a 'free-fire zone' and while it would be in accordance with the law to establish a zone for the purpose of limiting the geographic area of naval warfare a 'zone', according to the *US Naval Manual*, could also serve the protection of neutral aviation and shipping. Then, (p. 581) however, the question arises as to the distinction of a 'zone' from the 'area of military activities'/'immediate vicinity of naval operations'.

4. Distinction from other concepts. Accordingly, before establishing the legitimate purposes a belligerent may pursue with the establishment of an exclusion zone, such zones have to be distinguished from related concepts under the law of armed conflict.³⁸³

a) Naval mining. Although some of the zones established and enforced during the World Wars were nothing but extensive (and probably excessive) minefields, there is today general agreement that mine areas are to be distinguished from exclusion zones because the use of naval mines is governed by a specific legal regime.

b) Blockade. The latter also holds true with regard to blockades. According to the well-established rules and principles of the law of armed conflict on blockades, a blockade is a belligerent operation aimed at preventing vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation. The purpose of establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. If effective and if properly declared the legality of a blockade is beyond any doubt. In short, the difference between a zone and a

blockade can be described as follows: 'With blockades, the focus lies on the line (or "curtain") marking the outer limit of the blockaded area. The area/space within that line is of minor interest. By contrast, the focal point of "exclusion zones" . . . is the three dimensional area/space within the declared borderline'.³⁸⁴

c) No-fly zones. A no-fly zone is the 'three dimensional airspace by which [a] Belligerent Party restricts or prohibits aviation in its own or in enemy national' airspace.³⁸⁵ In contrast, an exclusion zone, while applicable to ships and aircraft, is established in areas beyond the territorial sovereignty of the parties to the conflict.

d) Immediate vicinity of naval operations. Special rules also apply within the immediate vicinity of operations.³⁸⁶ Accordingly, the *US Naval Manual* (2007), para. 7.8, provides: 'Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.' Similar or identical rules are contained in the *UK Manual* (para. 13.82) and the concept is also recognized in the *San Remo Manual* (para. 108) and in the *ILA Helsinki Principles* (para. 3.3). The recognition of special belligerent rights in the immediate vicinity of operations is due to the fact that the presence of vessels and aircraft in that area will legitimately be considered a high threat, both for the vehicles concerned and for the belligerent units operating in the area in question. They therefore serve a twofold protective purpose and, if not excessive in character, are considered in accordance with the law of armed conflict.

(p. 582) **e) 'Defensive bubbles' and other warning zones.** Closely related to the former concept are 'defensive bubbles' and other warning zones that are designed to warn others of certain dangers caused by lawful uses of the seas (e.g. weapons exercises), by measures of force protection (e.g., defensive bubbles and a 'cordon sanitaire'³⁸⁷), or by actions to be taken in order to accomplish a particular mission or objective. Their legality seems to be undisputed, regardless of whether they are being made use of in time of peace or in times of international armed conflict.³⁸⁸

f) Neutral defensive zones. Of course, neutral states are entitled to deny belligerent warships the use of their territorial sea areas on a non-discriminatory basis. Since neutral territory, including neutral airspace, may never be used by belligerent warships and military aircraft such defensive zones established by a neutral state and aimed at the protection against the negative effects of an ongoing international armed conflict, will always be in accordance with the applicable law.

g) Safety zones. Safety zones will regularly be established around high-value installations or around installations containing dangerous material. If situated in high seas areas, both belligerent and neutral states are entitled to enforce such safety zones. Of course, the respective enemy will not be obliged to respect a safety zone, especially if the object concerned qualifies as a legitimate military objective.

h) Spatial self-restrictions. Spatial restrictions a belligerent may observe during an armed conflict may not be mistaken for an exclusion zone. For instance, if prize measures are taken in specified sea and air spaces only, this by no means implies the establishment of a zone. Such measures will remain legal everywhere within the area of aerial and naval

operations as soon as the belligerent concerned decides to enlarge the area of such operations.

i) Humanitarian zones. The *San Remo Manual*, in para. 160, provides that the belligerents 'may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted'. This paragraph is inspired by the so-called 'Red Cross Box' established during the 1982 Falklands/Malvinas conflict. The details of such a 'humanitarian zone'—location, extent, duration, and permissible measures—are subject to an agreement between the belligerents. Therefore, one may be inclined not to elaborate on this issue in great depth. It would, however, according to the position taken here, be helpful if reasonable measures of protection were addressed. As already stated there is a realistic probability of illegal attacks against protected platforms. If gathered in a relatively limited sea area they would be exposed to an even higher risk.

j) Flight information regions and air defence identification zones, while genuinely peacetime concepts, may continue to play a role during an international armed conflict. Their legality cannot be doubted under either the law of peace or the law of war.

17.48

A belligerent may establish an exclusion zone as an exceptional measure in pursuance of one of the following aims, or a combination thereof:

- **to identify the geographic area of military operations;**
- **to subject civil navigation and aviation to restrictions, especially in the immediate vicinity of military operations; or**
- **to enhance the protection of:** (p. 583)

(i) works and installations containing dangerous forces;

(ii) objects indispensable for the survival of the civilian population;

(iii) objects and installations for the medical treatment of wounded and sick civilians or combatants;

(iv) persons and objects protected under international humanitarian law; or

(v) other objects and installations of high value.

1. Exceptional right. The wording of Section 17.48, especially the emphasis on the exceptional character of the right to establish an exclusion zone, makes it clear that belligerents are not entitled to use such zones as they will. Rather, an exclusion zone may only be established if necessary for legitimate reasons of national security and of military necessity. Its geographical scope, its duration, and the restrictions imposed upon neutral shipping and air traffic must be kept within the limits of proportionality. It is, therefore, not possible to state in advance and in the abstract the legal limitations which the belligerents will have to observe. It will depend upon the circumstances of each case whether an exclusion zone is acceptable under international law.³⁸⁹ Accordingly, a zone established in remote sea areas may be legal; a zone in areas of high marine traffic density may not, because of its greater interference with neutral shipping. Subject to the prevailing circumstances, the interests of neutral shipping and air traffic must be taken into due consideration by providing safe passage through the zone. Reasons of military convenience alone do not justify the establishment of an exclusion zone. In any event they may not be made 'free-fire zones' where all objects are indiscriminately attacked. The proclaiming belligerent is obliged to take all militarily feasible precautions to ensure that the use of

weapons is confined to the minimum necessary for self-defence. For example, if prize measures can be expected to be equally effective, the use of weapons is prohibited. Moreover, naval armed forces are not released from the duty to ensure proper target identification. Within exclusion zones, too, only legitimate military objectives may be attacked. However, the demands resulting from the principle of distinction are less strict than outside an exclusion zone. In sum, exclusion zones exclusively serving economic warfare purposes or where the proclaiming belligerent disregards the principle of distinction are illegal.

2. Purpose. The use of the exclusion zone device in twentieth-century armed conflicts has often be misinterpreted as having contributed to the emergence of an exceptional right allowing the respective belligerent to target any object encountered in a given area ('free-fire zone'). However, as emphasized in Sections 1049 and 1050, by the establishment of an exclusion zone a belligerent is not absolved of its obligations under the law of naval warfare and of neutrality at sea. Accordingly, if the concept is to have a meaning of its own, the purpose an exclusion zone may serve needs to be specified.

a) Identification of the area of military operations. At least in theory a belligerent may wish to limit its military operations to a given geographical area and therefore declare that it will not make use of the full spectrum of methods and means of naval warfare outside that area. For example, it may continue to target enemy military objectives everywhere in the legitimate 'region of operations' but may limit its exercise of prize measures to the close vicinity of the enemy's and its own coast lines. The shipping and aviation of third states would thus remain unmolested outside the exclusion zone. This, however, (p. 584) presupposes a clear commitment on behalf of the belligerent. The mere fact that a zone is limited to a certain geographical area is not sufficient.³⁹⁰

b) Restrictions for civil navigation and aviation. Closely related to the former is the purpose of subjecting civil navigation and aviation to special restrictions. Especially in the vicinity of military operations belligerents have a legitimate right to limit the movement of merchant vessels and of aircraft. However, this may not be confused with the establishment of a warning zone for force protection purposes which is always in accordance with international law both in peacetime and in wartime. Rather, the restrictions covered by the present section aim at protecting a military operation or the overall military mission. If justified by considerations of military necessity they may include the prohibition of entering the zone. This does not mean that any vessel or aircraft encountered within the zone would be liable to attack on sight. However, they may ordered to leave the area, they may be subjected to extensive control measures and they would, in any event, navigate at their own risk.

c) Enhancing protection. From an operational perspective the protection of the high value targets enumerated in lit. c is of overall importance. The fact that those objects and persons are in principle already protected by other rules of the law of naval warfare should not distract from the threats posed by all forms of asymmetric warfare. While asymmetries are not a new phenomenon of war today non-state actors dispose of highly effective capabilities outreaching those of the past. Moreover, transnational terrorists will not confine their attacks on military objectives or combatants. Rather, they will target persons and objects with a view to destabilizing the political situation. Therefore, the principle of reciprocity that guarantees respect for protected persons and objects in the relation between belligerent states can no longer be relied upon. The means by which the enhancement of protection could be achieved will therefore depend upon the threat posed by non-state actors. This may result in attacks against any vessel or aircraft that approaches one of the high value targets without clearly indicating its intentions. Such attacks will regularly be

justified in view of the special protection such persons and objects enjoy under the law of naval warfare.

3. Effectiveness. Since the establishment of an exclusion zone is an exceptional belligerent right, it has to meet strict legal requirements. It cannot be expected that so-called 'paper exclusion zones', not enforced by a sufficient number of naval and air forces, will be accepted by the international community.³⁹¹ This, however, does not mean that a large number of armed forces must be present in the area concerned. It is sufficient if the area is surveyed by radar and if naval and air forces units are able to reach any point situated within the zone quickly.

4. Time limits and notification. A grace period sufficient for all interested vessels and aircraft to leave the area covered by a proclamation is as essential for a zone's legality as (p. 585) the official notification of its commencement, duration, location, and extent, and the restrictions imposed. Restrictions on neutral air and sea traffic must be confined to what is necessary to serve the proclaiming state's security interests.

17.49

Should a belligerent establish an exclusion zone, both inside and outside the zone the same legal norms would apply.

Section 17.49 is an emphasis of the prohibition to establish a 'free-fire zone' by clarifying that the establishment of an exclusion zone does not imply the applicability of a special set of rules. Rather, the respective belligerent remains bound by the law of naval warfare and of neutrality at sea. Section 17.50 restates that obligation in a more specific way.

17.50

(a) A belligerent is not absolved of its duties under the international law of armed conflict by establishing exclusion zones.

(b) The establishment of an exclusion ('no-fly') zone does not diminish the obligation to respect within the zone the protection of civilians and civilian objects.

(c) Nothing in Sections 17.48-17.49 should be deemed to derogate from the right of a party to an armed conflict to control navigation and civil aviation in the immediate vicinity of military operation.

1. No modification of the applicable law. The first paragraph of Section 17.50 restates the prohibition in Section 17.49 of establishing a 'free-fire zone'. Accordingly, the belligerent establishing an exclusion zone remains bound by the rules of the law of naval warfare on the conduct of hostilities at sea and on specially protected persons and objects. Attacks must be limited to military targets, that is enemy combatants, persons directly taking part in the hostilities, and objects contributing to the enemy's military action and whose neutralization offers a definite military advantage. Moreover, the rules on proper target identification as well as on precautions in attack remain applicable inside an exclusion zone. Specially protected vessels and aircraft may not be attacked as long as they are engaged in their innocent role.

2. Protection of civilians and of civilian objects. Civilians and civilian objects, even when encountered within an exclusion zone continue to be protected under the law of naval warfare and neutrality at sea. Therefore, in principle any direct attack against these persons and objects is illegal. However, this presupposes that they are engaged in their innocent role. If an exclusion zone has been established with a view to protecting high-value targets an attack against a merchant vessel or civilian aircraft will therefore be in accordance with the law if there are reasonable grounds for suspicion that it intends to

attack or otherwise jeopardize the protected persons or objects. Such reasonable grounds will regularly exist if the vessel or aircraft remains on its course although it has been warned and ordered to change its course.

3. Immediate vicinity of naval operations. Paragraph (c) emphasizes that the provisions on exclusion zones are without prejudice to the well-established belligerent right to subject merchant navigation and civil aviation to control measures if they enter the immediate vicinity of naval operations. Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The (p. 586) immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.

Moreover, belligerent vessels continue to enjoy the right to take all measures necessary for effective force protection. During the Falklands/Malvinas conflict, Great Britain established 'defence bubbles' around its naval units.³⁹² Defensive measures were to be restricted to cases in which the approach of vessels or aircraft constituted a threat.³⁹³ There were no protests by third states. Legal commentators apparently did not question their legality.³⁹⁴ It is self-evident that in the case of the proclamation of a 'defence bubble' the belligerent is not obliged publicly to notify the unit's course and/or destination. Otherwise, the units concerned would be too easy a target for, for example, over-the-horizon attacks by the enemy. It is, therefore, sufficient if the declaration contains information about the extent of the zone and about what will be perceived as hostile intent. The permissible extent will depend upon the defence needs in the prevailing circumstances. It may be up to 5 nautical miles³⁹⁵ but may also exceed that limit if otherwise the approach of vessels or aircraft would constitute an unbearable risk. The restrictions imposed and measures to be taken must be limited to that degree of force necessary to ensure effective self-defence. The use of weapons will be permissible if an approaching vessel or aircraft qualifies as a legitimate military objective and if less severe means are not available.

6. Blockade

17.51

A blockade is a method of naval warfare that aims at preventing all vessels or aircraft from entering or exiting enemy coastal areas or ports. The purpose of blockades is to block supplies to the adversary without directly meaning to occupy territory. Starvation of the civilian population as a method of warfare is prohibited (Article 49, para. 3 in connection with Article 54, para. 1, AP I). It is also prohibited to hinder relief shipments for the civilian population (Article 70 AP I).

1. Introduction. Blockade is one of the oldest methods of naval warfare. In the nineteenth and in the first half of the twentieth century it was regarded a method of economic warfare at sea. In recent state practice, for example in the Israel-Lebanon conflict (2006), such economic blockades have been the exception. Today the establishment of a blockade is very often an integral part of a military operation that is not directed against the enemy's economy but against its armed forces.³⁹⁶ But even if an economic blockade in the strict sense were established, there would always be a strategic element: cutting off the enemy's trade links and weakening its economy will also weaken its military power of resistance. No matter which purpose is pursued by the establishment of a blockade, it always involves the use of military force directed against the enemy's coastline and ports. (p. 587) Accordingly,

a blockade is a method of naval warfare to which the general principles and rules of the law of naval warfare apply.

The conditions for its legality were laid down in the ParisDecl 1856. The fact that none of the 1907 Hague Conventions contains provisions on blockade is due to the fact that the time then available was limited. In 1909, blockade was regulated in the LondonDecl.³⁹⁷ Although it never entered into force, the main features of its provisions on blockade are today generally recognized as customary in character.³⁹⁸ However, the practice of the two World Wars made evident that only in exceptional cases can naval armed forces maintain a blockade in accordance with the relatively strict preconditions of the traditional law. Today, the maintenance of a naval blockade in accordance with the traditional law will only be feasible if the sea area in question is almost completely under the control of the blockading power.³⁹⁹ Often the blockaded state will have intermediate or long-range missiles and will, thus, be able to keep its enemy forces far away from its coastline.⁴⁰⁰ Hence, today the preconditions for a legal blockade are less strict, as will be shown in the commentary on Section 17.53.

2. No limitation to vessels. There is today general agreement that a blockade need not be enforced exclusively against seagoing vessels but that it may also be enforced against aircraft.⁴⁰¹ Moreover, and in view of the importance of aerial reconnaissance, a blockade may be maintained and enforced 'by a combination of legitimate methods and means of warfare',⁴⁰² including military aircraft.⁴⁰³ The *San Remo Manual's* provisions on blockade, however, lack any express reference to aircraft. Of course, an interpretation of paras 96⁴⁰⁴ and 97 justifies the conclusion that a blockade may be enforced and maintained by military aircraft, too. In most cases will these aircraft belong to a warship that will serve as their base.⁴⁰⁵ It is, however, also possible that the aircraft entrusted with the enforcement of a blockade are deployed on airfields on land. Still, while there seems to be general agreement on the lawfulness of the enforcement of a blockade by military aircraft, two questions remain unanswered: (1) Is the presence of a warship or its operational control of the military aircraft necessary for a blockade to be lawful or may a blockade be enforced by aircraft (and mines) alone? (2) What criteria have to be met in order for the blockade to be effective if it is maintained and enforced by aircraft?

(p. 588) In most cases the aircraft entrusted with the enforcement of a blockade need not be dependent upon a warship, that is they are not necessarily under the operational control of a warship. However, the answer to the first question becomes a little complicated if one takes into consideration the following scenario: a merchant vessel or a neutral warship may be damaged or in another distress situation. Therefore it will have to access the blockaded coast or port but the blockade is maintained by mines and aircraft only. How will the blockading power be able to comply with its obligation to allow ships in distress entry into the blockaded coastline if no warship is in the near vicinity?⁴⁰⁶ Accordingly, there is at least one argument against the legality of a blockade that is enforced and maintained without any surface warship present in, or in the vicinity of, the blockaded area.

As regards the second question, one may be inclined to point at the well-established rule according to which the 'question whether a blockade is effective is a question of fact'.⁴⁰⁷ While it is clear that 'effectiveness' can no longer be judged in the light of the state of technology of the nineteenth century⁴⁰⁸ and while the view is widely held that effectiveness continues to be a constitutive element of a legal blockade⁴⁰⁹ it may not be left out of consideration that there are no criteria that would make possible an abstract determination of the effectiveness of all blockades. In this context, *Castrén* postulates: 'Aircraft in the blockaded area may leave the area when there are other aircraft on patrol duty so that the blockade remains in force the whole time. The activities of aircraft even in connexion with a naval blockade are effective only to the extent that they do in fact dominate the air.'⁴¹⁰ It is maintained here that this position is correct. In any event, aircraft will be used for the

enforcement of a blockade only if the respective belligerent has gained air superiority. Otherwise the use of aircraft would be too dangerous.

A further aspect regarding blockade as dealt with in the *San Remo Manual* is whether this method of naval warfare is necessarily restricted to vessels or whether it may also be enforced vis-à-vis aircraft. Again, the provisions of the *San Remo Manual* are silent on this issue. The 'explanations' reveal that the legal and naval experts, in the context of the effectiveness of a blockade, considered that question only indirectly.⁴¹¹ While it may be correct that a (purely) naval blockade may not be considered to have lost its effectiveness for the sole reason that a very small number of aircraft continue to land within the blockaded area this is but one aspect. Although traditionally blockades have been viewed upon as a method of naval warfare proper there is no reason why it may not be extended (or even (p. 589) restricted) to aircraft. In this context the argument that 'transport by air only constitutes a very small percentage of bulk traffic'⁴¹² is not absolutely convincing. The blockaded belligerent state, either alone or together with its allies, may dispose of a considerable air fleet. As the example of the 'blockade of Berlin' shows—although the cargoes only served humanitarian purposes—a considerable percentage of bulk traffic can be transported by air over a considerable period of time.

3. Impartiality. In principle, a blockade must be applied impartially to the vessels and aircraft of all nations.⁴¹³ This duty also applies to vessels flying the flag of the blockading power. Apart from relief shipments, only in exceptional cases is it permissible to exempt neutral warships and military aircraft by permitting them to enter and leave a blockaded port or coastline.⁴¹⁴ Neutral merchant vessels and civil aircraft in distress may also be allowed to enter and leave the blockade area, provided they have neither discharged nor loaded any cargo there.⁴¹⁵

4. Free access to neutral ports and coastlines. A blockade must not extend beyond the ports and coasts belonging to or controlled or occupied by the enemy.⁴¹⁶ It must not prevent access to ports or coasts of neutral states since this would violate their neutrality.⁴¹⁷

5. 'Starvation blockade' and relief actions. If a blockade has the effect of starving the civilian population it becomes illegal according to Article 49, para. 3, and Article 54, para. 1, AP I. During the Diplomatic Conference the Third Committee took the view that Article 54 AP I had no impact on naval blockades.⁴¹⁸ That view, it is argued here, is untenable. Article 54 AP I applies to naval blockades if they 'may affect the civilian population, individual civilians, or civilian objects on land' (Article 49, para. 3, AP I).⁴¹⁹ If the establishment of a blockade causes the civilian population to be inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage for such essential supplies.⁴²⁰ It is questionable in this context whether the blockading power is to be considered a 'party concerned' whose permission is necessary. In any event, the blockading power is under an obligation to provide for and permit free passage of goods essential for the survival of the civilian population.⁴²¹ That permission may be denied only temporarily for the reason of overwhelming security concerns.⁴²² Of course, the obligation to provide for and to permit free passage of relief shipments is subject to the right to prescribe the technical arrangements, including search, under which such passage is permitted.⁴²³

17.52

(p. 590)

A blockade shall be declared and notified by the government of the party to the conflict concerned or by a commander authorized by that government (Article 8 LondonDecl 1909). It shall also be notified to the neutral powers (Article 11 LondonDecl 1909). Any extension and lifting of the blockade shall be declared and announced in the same manner (Article 12 LondonDecl 1909). A declaration of blockade shall contain the following details:

- **the date on which the blockade begins;**
- **geographical boundaries of the blockaded coastal strip;**
- **the period granted to neutral ships for departure (Article 9 LondonDecl 1909).**

The provisions on notification, competences, content, and announcement follow from Articles 8, 9, 11, 12, and 13 LondonDecl 1909, which are generally recognized as customary law.⁴²⁴ The requirement to inform neutral powers, that is states not parties to the conflict, is justified by the fact that, according to the principle of impartiality, a blockade must be applied to all vessels and aircraft regardless of their nationality. The declaration must contain the details enumerated in order to enable vessels of neutral states to leave the blockaded coastline in time or to refrain from entering it.

17.53

A blockade, in order to be binding, must be effective (Article 4 ParisDecl 1856). It must be maintained by armed forces sufficient to prevent access to the blockaded coast. Long-distance blockades are also permissible, that is the obstruction and control of the blockaded coast or ports by armed forces keeping a longer distance from the coastline. A naval blockade shall be considered to be effective if ship-to-shore supplies are cut off. Air transport need not be stopped. A barricade achieved by other means, for example by ships scuttled in the entrance, does not constitute a blockade. Neither will the mining of coasts and ports compensate for the absence of warships even if all movements are temporarily stopped by mines. The effectiveness of a blockade is not suspended if the blockading force is temporarily withdrawn on account of bad weather (Article 4 LondonDecl 1909) or in pursuit of a blockade-runner. A blockade which ceases to be effective is no longer binding. The blockade shall end with the repulse of the blockading forces by the enemy or with their complete or partial destruction, even if new forces are charged with this task without delay. In this case the blockade must be declared and notified anew (Article 12 LondonDecl 1909).

1. Traditional law. Originally, blockades were applied to coastal forts, never to a coastline as a whole. Hence, the former rules on blockade were taken from the law of siege. During the Dutch-Spanish War the purpose of a blockade changed for the first time from siege to obstruction of traffic to and from the enemy's coastline.⁴²⁵ Since then blockades, in order to be legal, have to be effective. This means, according to the 1856 Paris Declaration, they must be maintained by a force sufficient to prevent access to the enemy coastline.⁴²⁶ Hence, naval forces had to be stationed within sight of the blockaded port or coastline.

2. Effectiveness.

a) Shortly after the adoption of the London Decl 1909 many realized that, in view of the probable employment of submarines, mines, and aircraft, the establishment of an effective blockade was nearly impossible. This is one of the reasons why Great Britain was not prepared to ratify the Declaration. During the two World Wars the principle of (p. 591) effectiveness was generally disregarded. Instead of effective blockades in the traditional sense, Great Britain proclaimed so-called 'long-distances blockades'. Germany declared a number of 'war zones'. However, the principle of effectiveness was never officially declared void. Rather, the belligerents justified their excessive methods as reprisals.⁴²⁷

b) In view of the practice of the World Wars and of the technological development of modern weapons systems the principle of effectiveness has been modified. It is, therefore, now sufficient that within the area specified in the declaration any import of goods is cut off. It makes no difference if the blockade is maintained by air or by naval forces stationed at a distance determined by military requirements or by both.⁴²⁸ It must, however, be sufficiently probable that vessels (and aircraft) will be prevented from entering or leaving the blockaded area.⁴²⁹ A blockade may be restricted to vessels. Its effectiveness is not negated on the sole ground that it does not apply to aircraft.

c) It is a matter of dispute whether during the maintenance of a blockade the presence of surface naval forces or other units of the armed forces is an indispensable condition for its legality. The US, in particular, has taken the view that a blockade may also be established merely by mining the enemy's ports and coasts,⁴³⁰ as was done in the case of Haiphong. The following considerations, however, speak against that approach: on one hand, it is still forbidden to lay mines off the coast and ports of the enemy with the sole object of attacking commercial shipping.⁴³¹ The mining of Haiphong can hardly be considered a sufficient practice to give rise to the development of a rule of customary law to the contrary. On the other hand, it must be recalled that certain vessels may or even must be exempted from the restrictions imposed by a blockade.⁴³² That is especially true for vessels in distress. The provisions on the protected status of such vessels would not make much sense if the rule on the compulsory presence of surface naval forces or other units were renounced. Hence, it is not forbidden to enforce and maintain a blockade *also* by naval mines. In any event, units of naval or other forces must be present in the vicinity of the blockaded areas in order to ensure that protected vessels and aircraft, especially those in distress, can reach a place of safety.

d) In spite of many technological improvements naval forces may still be forced to leave the blockade area temporarily because of bad weather. Since vessels intending to enter the blockade area will also be affected, the temporary withdrawal of the blockading force does not prejudice the blockade's effectiveness.⁴³³ The same holds true with regard to a temporary absence due to pursuit of a blockade-runner. If, however, entry and exit are no longer generally prevented the blockade becomes ineffective. Measures connected with the enforcement of a blockade then automatically become illegal. In particular, neutral merchant vessels entering the area may no longer be captured or attacked. The blockading party must confine itself to visit and search.

(p. 592) IV. Hospital Ships

1. General

17.54

The following ships and boats enjoy special protection in naval warfare in accordance with the following provisions, so that they shall not be attacked, sunk, or captured under any circumstances:

- **military hospital ships (Article 22 GC II);**
- **hospital ships operated by national Red Cross and Red Crescent societies, officially recognized relief societies, or private persons, whether or not they are members of a party to the conflict, or citizens of a state not party to the conflict (Articles 24, 26 GC II);**
- **coastal rescue craft operated by a state or by officially recognized relief societies, as far as military necessity permits (Articles 22, 24 GC II); and**
- **ships specially designed to transport wounded and sick civilians (Article 21 GC IV; Article 22).**

1. Legal basis. Hospital ships were dealt with at the Hague Peace Conferences of 1899 and 1907. The results of these conferences, the provisions of HC X, were last revised in 1949.⁴³⁴ The treaty law forming the basis of the present section is to be found in Chapter III of the Second Geneva Convention of 1949, as amended by Articles 21 *et seq.* AP I.

2. Protected vessels.

a) Military hospital ships. The protected status of military hospital ships is closely linked to the protection of wounded, sick, and shipwrecked according to Article 12 GC II. However, their special status remains unchanged whether or not such persons are in fact on board. It is not the transport of wounded, sick, and shipwrecked that is decisive but the ship's function, whose fulfilment must be guaranteed. The protection of military hospital ships, including their lifeboats,⁴³⁵ does not cease simply because they are transporting wounded, sick, and shipwrecked civilians.⁴³⁶ Protected status means that such vessels 'may in no circumstances be attacked or captured'. In view of their special functions, however, that alone would not suffice. They must at all times be respected and protected. Hence, hospital ships may not be hampered in fulfilling their tasks. This may amount to an obligation on the part of belligerents actively to support hospital ships.⁴³⁷

b) Other hospital ships. Hospital ships utilized by national Red Cross societies, officially recognized relief societies, or private persons, and their lifeboats,⁴³⁸ are accorded the same protection as military hospital ships by Article 24 GC II. This presupposes that 'the Party to the conflict on which they depend has given them an official commission',⁴³⁹ that they are 'provided with certificates from the responsible authorities, stating that the vessels have been under their control while fitting out and on departure',⁴⁴⁰ and that 'their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed'.⁴⁴¹ Subject to those requirements, the protection provided by Articles 22 and 24 GC II also extends to hospital ships made available for humanitarian purposes (p. 593) to a party to the conflict by either a neutral state or other state not party to the conflict⁴⁴² or by an impartial international humanitarian organization.⁴⁴³

c) Tonnage. In principle, the specially protected status of all hospital ships, including military hospital ships, is not dependent upon the ships' tonnage.⁴⁴⁴ However, during the Second World War smaller vessels were not recognized as legitimate hospital ships.⁴⁴⁵ The delegates of the 1949 Geneva Conference, while unable to agree upon a minimum tonnage, therefore laid down in the second sentence of Article 26 GC II that the parties to the conflict 'shall endeavour to utilize . . . only hospital ships of over 2,000 tons gross'.⁴⁴⁶

d) Coastal rescue craft. Under the conditions laid down in Articles 22 and 24 GC II, small coastal rescue craft employed by the state or by officially recognized lifeboat institutions enjoy the same protection as hospital ships.⁴⁴⁷ The notification envisaged in Articles 27 and 22 GC II is not necessary for their protection. Article 22, para. 3, AP I now provides that they 'shall be protected even if the notification . . . has not been made'. Nevertheless, the parties to the conflict are 'invited to inform each other of any details of such craft which will facilitate their identification and recognition'. The area of operation of small coastal rescue craft need not be confined to waters near the coast.⁴⁴⁸ The special status of such craft is subject to 'operational requirements'. This restriction is due to the fact that such craft are comparatively small, travel at high speed, cannot easily be identified, and are often perceived as dangerous. It is important to note that coastal rescue operations and the necessary equipment of neutral States is governed also by the peacetime rules of the law of the sea. With regard to enemy coastal rescue craft, however, Article 27 GC II prevails over the peacetime rules.

e) Other medical ships and craft. The protection of vessels designed for the transport of wounded, sick, and shipwrecked civilians can be derived from Article 21 GC IV. It is now made clear in Article 22, para. 1, AP I that the protected status of hospital ships is not prejudiced if they carry 'civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention'. A well-known example of such a hospital ship is the case of the *Helgoland* which operated in the waters off Vietnam from August 1966 until January 1972. The German Red Cross sent the *Helgoland* to Vietnamese waters in order to care for wounded and sick civilians after the Federal Republic of Germany and Vietnam, on 28 March 1966, concluded an agreement⁴⁴⁹ to this effect.⁴⁵⁰ Medical ships and craft other than those referred to in Article 22 AP I and Article 38 GC II now enjoy special protection under Article 23 AP I. This provision covers all means of transportation by water fulfilling the following conditions:⁴⁵¹

- they must be exclusively assigned, for the duration of their assignment (which may be short), to medical transportation;

- (p. 594) — they must be placed under the control of a party to the conflict.

They do, however, remain subject to the laws of war, which means that they are subject to capture unless one of the exceptions of Article 23, para. 2, applies.

3. 'In accordance with the following provisions'. The following provisions of Sections 1055 to 1064, according to their wording, refer to hospital ships. Unless there is an express reservation, those provisions also apply to the other vessels referred to above.

2. Conditions for Protection and Identification

17.55

Hospital ships are ships exclusively designed to assist, treat, and transport the wounded, sick, and shipwrecked. Their names and descriptions shall be notified to the parties to the conflict not later than ten days before they are employed for the first time (Article 22 GC II).

1. Function. The function of hospital ships and the other vessels dealt with in the present section is the essential condition of their protected status. This does not mean that they must have been specially built solely for the purpose of assisting the wounded, sick, and shipwrecked.⁴⁵² All vessels solely and definitely assigned to service as hospital ships or to serve one of the other functions mentioned above are protected. Thus, it is permissible to

transform a merchant vessel or a passenger vessel into a hospital ship. Transformed vessels may not, however, be put to any other use throughout the duration of hostilities.⁴⁵³

2. Notification. The notification shall include details of registered gross tonnage, length from stem to stern, and numbers of masts and funnels.⁴⁵⁴ The parties to the conflict are, of course, free to notify further details. According to Article 23, para. 4, AP I a party to the conflict 'may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide other information which would facilitate identification and recognition'. The notification according to Article 22 GC II must be made ten days before those ships are employed.⁴⁵⁵ The object and purpose of that time limit is to increase the safety of hospital ships (and of small coastal rescue craft) by enabling the adverse party to pass the information to armed forces. In peacetime the notification will normally be transmitted directly. After the outbreak of hostilities, the parties to the conflict may make use of the assistance of protecting powers if possible.

17.56

Hospital ships shall be distinctively marked as follows:

- **all exterior surfaces shall be white;**
- **the distinctive emblem of the Red Cross shall be painted once or several times on each side of the hull and on the horizontal surfaces, as large as possible, so as to be clearly visible from sea and air;**
- **a white flag with a red cross shall be flown as high as possible, visible from all sides.**
- **In addition, all hospital ships shall fly their national flags; neutral ships shall further hoist the flag of the party to the conflict whose direction they have accepted (Article 43 GC II). As far as possible, their painting and distinctive (p. 595) emblems shall be rendered visible at night. Other identification systems, for example internationally recognized light, radio, and electronic signals, are also permissible (Articles 5-6, Annex I, AP I). Lifeboats of hospital ships, coastal rescue boats, and all small craft used by the medical service shall be marked in the same manner as hospital ships (Article 43, paras 3 and 4, GC II; Article 23, para. 1, AP I).**

1. Visual marking. For hospital ships and small coastal rescue craft these are not an essential condition of their special protection. Such markings do not, of themselves, confer protected status but are intended only to facilitate identification.⁴⁵⁶ In place of the red cross on a white ground the parties to the conflict can use the red crescent or the red lion and sun on a white ground.⁴⁵⁷ In principle, the distinctive emblem as well as the national flag must be hoisted permanently.⁴⁵⁸ Only hospital ships temporarily detained in accordance with Section 17.61 lower the flag of the state in whose service they are employed or under whose control they have placed themselves. The obligation to fly the distinctive emblem at the mainmast as high as possible⁴⁵⁹ is because that part of the ship will first be visible on the horizon. There are no specific obligations as to visual marking at night. Hence, all means appropriate to facilitate identification, especially lights, are permissible. Visual means of identification also include flashing lights.

2. *Other kinds of identification.* Already in 1949 the delegates of the 1949 Geneva Conference were aware of the insufficiency of visual signs and markings in modern naval wars. Hence, Article 43, para. 8, GC II provides that ‘parties to the conflict shall at all times endeavour to conclude mutual agreements, in order to use the most modern methods available to facilitate the identification of hospital ships’. There was, however, no agreement on specific and universally binding methods. A first improvement was then brought about by the regulations concerning identification in Annex I to AP I. Now the parties to the conflict can, by agreement, supplement visual methods of identification of hospital ships and other medical transports by light signals,⁴⁶⁰ radio signals,⁴⁶¹ or electronic identification.⁴⁶² In modern warfare, which is characterized by the use of electronic means of warfare, these additional technical means of identification are essential for minimizing the danger of mistaken attacks.⁴⁶³ Provisions on special means of underwater acoustic identification of hospital ships⁴⁶⁴ have now been included in the revised Annex I to AP I. In 1990, the ICRC tried to optimize the provisions of Annex I by publishing its *Manual for the Use of Technical Means of Identification*.⁴⁶⁵ In view of modern weapons technology the methods recommended therein are, however, only a first step in the right direction.⁴⁶⁶

(p. 596) 3. Rights and Obligations

17.57

Hospital ships shall afford assistance to all wounded, sick, and shipwrecked without distinction of nationality (Article 30 GC II). They shall by no means be employed for any military purposes.

1. *Obligation to afford relief and assistance impartially.* This is laid down in Article 30, para. 1, GC II, but also follows from Articles 12 and 22 GC II. Nationality is not the only unlawful criterion for discrimination. Others are sex, race, religion, and political opinion.⁴⁶⁷

2. *The prohibition against using these vessels for any military purpose.* (Article 30, para. 2, GC II.) Prohibited purposes include intelligence activities and transport of troops, weapons, and ammunition.⁴⁶⁸ This provision is closely linked to Section 17.62 concerning loss of protection. It is self-explanatory, and was inspired by the experience of the World Wars.⁴⁶⁹ Unless the use for military purposes qualifies as an ‘act harmful to the enemy’, such use merely renders hospital ships liable to be captured.⁴⁷⁰

17.58

Hospital ships may be equipped with radio systems. They may not, however, possess or use a secret code for their wireless or other means of communication (Article 34 GC II). Also permissible is (Article 35 GC II):

- the use of apparatus designed to facilitate navigation or communication;
- the transport of medical supplies and personnel over and above the ship’s requirements (Article 35 GC II);
- the use of portable arms by the personnel of a hospital ship for the maintenance of order, for their own defence, or for that of the wounded and sick;
- the carrying of portable arms and ammunitions taken from the wounded, sick, or shipwrecked and not yet handed over to the proper service; and

**— the taking on board of wounded, sick, or shipwrecked civilians
(Article 22, para. 1, AP I).**

1. Radio and communications systems. In contrast to some delegates of the 1907 Hague Conference, the delegates of the 1949 Geneva Conference considered the equipment of hospital ships necessarily to include a radio. This is made evident by Article 35, para. 2, GC II. According to Article 34, para. 2, GC II hospital ships may not, however, ‘possess or use a secret code for their wireless or other means of communication’. Despite the differences between the French (*pour leurs émissions*) and the English wordings of that provision it is a widely held view that hospital ships may neither send nor receive messages in other than generally known codes. In view of the fact that equally authentic texts are to be taken into consideration when interpreting a treaty provision this view is untenable. Therefore, according to the wording of Article 34, para. 2, GC II, hospital ships are allowed to use encryption for receiving messages.⁴⁷¹ This is, moreover, in accordance with the object and purpose of the provisions on hospital ships. If prohibited to receive encrypted messages they would be unable to fulfil their humanitarian mission (p. 597) because the respective belligerent would refrain from informing its hospital ships of possible areas of operation.⁴⁷² Moreover, Article 34, para. 2, GC II can be considered to have become obsolete by the subsequent practice of the states parties.⁴⁷³ Today, hospital ships, like all warships and the majority of merchant vessels, communicate via satellite. The use of satellite communications implies encryption for both sending and receiving messages. The only remaining hospital ships—the USNS *Comfort*, the USNS *Mercy* and the *Chinese Peace Arch* (and probably some Russian and other hospital ships)—do not dispose of traditional radio equipment but communicate over satellite communications only. This fact is known to the states parties to GC II. Still, there have been no protests so far. Hence, there are good reasons to believe that the other states parties have acquiesced in the practice of the US and other states. Again, it should not be left out of consideration that abandoning the prohibition of using encryption for emissions would better serve the humanitarian purposes hospital ships are to serve. In order to fulfil their humanitarian mission most effectively, hospital ships should—it is maintained here—be permitted to use cryptographic equipment. Otherwise, neither belligerents nor neutrals will any longer make use of hospital ships but rather follow the British example of designating a warship as a ‘fighting hospital ship’ or ‘casualty receiving ship’ that, of course, does not enjoy any special protection under the law.

2. Other permissible equipment and actions. Apparatus intended exclusively to facilitate navigation is nowadays part of the essential equipment of modern vessels. Hence, its presence on board will not prejudice the protected status of hospital and other ships.⁴⁷⁴ Also permissible is the transport of equipment and personnel intended exclusively for medical duties above the normal requirements.⁴⁷⁵ This helps avoid the difficulties arising from the transport of equipment and personnel that do not belong to the usual equipment and personnel of a hospital ship but are intended for a specific area of operations. Finally, as stated above, the mere fact that a hospital ship is carrying wounded, sick, and shipwrecked civilians does not deprive it of its special protection.⁴⁷⁶

3. Arms on board hospital ships. The crews of hospital ships, according to Article 35, No. 1, GC II, are entitled to carry small (‘portable’) arms and to use them either for the maintenance of order, for their own defence, or for that of the sick and wounded. Military hospital ships and infirmaries are usually subject to military discipline. Guards are necessary to prevent patients from leaving without permission. They must also be in a position to hinder unauthorized persons from entering. For these purposes small-arms are necessary. Moreover, it is not uncommon that wounded, sick, and shipwrecked at the time of their rescue still possess weapons and ammunition. Such weapons and ammunitions must be taken away and delivered to the competent authority. Delivery, however, will take some

time because the competent authority is situated on land. Therefore, the presence of such weapons and ammunition on board a hospital ship does not jeopardize its protected status. According to GC II, weapons and weapons systems with the capability of repulsing a military attack may not be placed on board the vessels protected under the present (p. 598) section. If such an (illegal!) attack occurs, the crews of a hospital ship would be limited to warning the attacking ship or aircraft.

These rules are based on the assumption that an attack on a hospital ship will in most cases be rather accidental than intentional. Indeed, in a traditional international armed conflict the principle of reciprocity will regularly guarantee observance of the protected status. In such a conflict there is no necessity of equipping a warships with offensive weapons. In view of the probability of an unintentional attack, especially by a misguided missile, there is, however, general agreement that hospital ships may be equipped with deflective means like chaff and flares.⁴⁷⁷

However, in an asymmetric conflict situation—either because of the participation of non-state actors or because of a simultaneous threat by non-state actors unrelated to an ongoing conflict—reciprocity will hardly work. Therefore the question remains whether the prohibition of arming a hospital ship with, for example, larger guns is absolute in character or whether it depends upon the threat a hospital ship is exposed to in a given situation. According to the position taken here, such arming is in accordance with the law if there are reasonable grounds for suspicion that non-state actors may intentionally attack a hospital ship. Accordingly, the recent US practice of arming hospital ships with large calibre guns for defence against terrorist attacks seems to be no violation of the law.⁴⁷⁸

17.59

Any hospital ship in a port which falls into the hands of the adversary shall be authorized to leave the said port (Article 29 GC II). During and after an engagement, hospital ships will act at their own risk. Hospital ships shall not hamper the movements of the combatants (Article 30 GC II).

1. *The right to leave a port.* The ability to leave a port which is in the hands of the enemy (Article 29 GC II) is a consequence of the general protection of hospital ships. It also follows indirectly from the provisions on the exceptional and temporary detention of hospital ships. However, it was considered necessary to restate that principle in a separate provision.

2. *Acting at their own risk.* This refers to the entering of areas of operation in order to assist the victims of armed conflict. Hospital ships may not be attacked. However, belligerents cannot be held responsible for accidentally hitting a hospital ship. This also holds true for damage suffered during entrance to the area of naval operations shortly after the cessation of active hostilities.⁴⁷⁹

3. *The prohibition against hampering the movements of combatants.* (Article 30, para. 3, GC II.) This corresponds with the basic rule that hospital ships may not be employed for any military purpose (Article 30, para. 2, GC II). The exemption from attack ceases according to Section 17.62 if a hospital ship breaches these conditions. Otherwise, a party to the conflict could position its hospital ships in such a way as to render impossible any self-defence measures by the enemy.

(p. 599) 17.60

While hospital ships are not liable to capture, they are subject to the right of control and visit accorded to the parties to the conflict (Article 31 GC II). Any warship may request the handing over of the wounded, sick, and shipwrecked by hospital or other ships, no matter which nationality such ships have, provided that the state of health of the wounded and sick allows

such action and that the receiving warship can provide the facilities necessary for medical treatment (Article 14 GC II; Article 30 AP I).

1. Control and search. According to Article 31, para. 1, GC II the parties to the conflict are entitled to control the vessels protected under this section. Control and search serve to verify whether the adverse party is complying with its duty not to use hospital and other vessels for military purposes. Control and search may also be conducted in order to examine the condition of the wounded on board. This right comprises search of the whole ship, its equipment, and cargo, as well as control of the list of patients and the establishment of the identity of the members of the crew.

2. Handing over. All warships of a belligerent are entitled to demand that wounded, sick, or shipwrecked persons on board hospital and other ships shall be surrendered, whatever their nationality.⁴⁸⁰ This right is conferred on the belligerents to meet their interest in preventing those persons from joining the hostilities after recovery. If they are members of the armed forces or if they belong to any of the categories of Article 4 A GC III they become prisoners of war as soon as they fall into the enemy's hands.⁴⁸¹ If they are not in a fit state to be moved and if the warship cannot provide adequate facilities for necessary medical treatment, surrender of those persons may not be demanded. Surrender of merchant vessel crew members who have promised in writing not to undertake any service connected with the armed conflict while hostilities last may not be required.

17.61

The belligerents are not obliged to accept assistance from hospital ships. They may order them off, make them follow a certain course, control the use of their means of communication, and, if the gravity of the circumstances requires, detain them for a period of up to seven days (Article 31, para. 1, GC II). A commissioner may temporarily be put on board to monitor the execution of such orders (Article 31, para. 2, GC II). For the purpose of control, the parties to the conflict may also send neutral observers on board (Article 31, para. 4, GC II).

1. Orders of belligerents to hospital ships. For reasons of military security the parties to the conflict may refuse assistance from hospital ships, order them off, or make them take a certain course.⁴⁸² The right to control the use of their radio or of other means of communication is to ensure that a hospital ship is not abused for military purposes.

2. Detention of hospital ships. According to Article 31 para. 1, GC II this is an exceptional right. It may be exercised only if necessary, for example to ensure the secrecy of important military operations that have come to the knowledge of the hospital ship.⁴⁸³ The time limit of seven days runs from the detention order. Even if the reasons for detention continue to exist, that time limit may not be extended. This is meant to prevent belligerents from effectively capturing hospital ships. If the reasons for detention cease to exist before seven days have passed, the hospital ship must be released immediately.

(p. 600) **3. Commissioners and neutral observers.** The sole task of commissioners temporarily put on board a hospital ship is to see that legitimate orders are carried out. If the commissioner is a naval officer he may be captured by enemy armed forces, not by the hospital ship's crew and personnel. If he is also a member of the medical or hospital personnel he continues to be protected.⁴⁸⁴ The sending of a non-neutral commissioner has often led to problems. According to Article 31, para. 4, GC II it is, therefore, also possible to

place (either unilaterally or by particular agreements) neutral observers on board hospital ships who shall verify the strict observation of the provisions of GC II.

4. Discontinuance of Protection

17.62

If such ships are misused for military purposes or act in any other way contrary to their obligations, in particular by clearly resisting an order to stop, to turn away, or to follow a distinct course, they lose their protected status, after due warning has been given (Article 34 GC II).

Article 34 GC II provides that the ‘protection to which hospital ships . . . are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy’. The following acts, *inter alia*, constitute an abuse for military purposes: transmission of military/intelligence information to the enemy,⁴⁸⁵ transport of military material or enemy troops, intentionally hampering the movements of naval forces, or any of the acts rendering a vessel a legitimate military objective.⁴⁸⁶ It is emphasized in the present context that, in view of modern weapons technology, hospital ships may be equipped with purely deflective means of defence, such as chaff and flares. The presence of such equipment should, however, be notified.⁴⁸⁷ Abuse does not automatically lead to loss of exemption. In view of the humanitarian function of such vessels their protection may cease only after due warning has been given, allowing in all appropriate cases a reasonable time limit, and after such warning has remained unheeded. The extent of the time limit will depend upon the circumstances prevailing at the time. The aggrieved belligerent is not obliged to name a time limit if that would be inappropriate, for example if the hospital ship participates in the hostilities or if its crew fires at the warship. If after due warning a hospital ship persists in breaking a condition of its exemption, it renders itself liable to capture or other necessary measures to enforce compliance.⁴⁸⁸ It may only be attacked as a last resort if: (a) diversion or capture is not feasible; (b) no other method is available for exercising military control; (c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may reasonably be assumed to be, a military objective; and (d) collateral casualties or damage will be proportionate to the military advantage gained or expected.⁴⁸⁹ If feasible, before destruction the wounded, sick, and shipwrecked shall be taken to a place of safety.

5. Personnel and Crew

17.63

The religious, medical, and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in (p. 601) the service of the hospital ship, whether there are wounded and sick on board or not (Article 36 GC II; see above, Sections 12.13-12.19 and 15.18-15.26).

This provision guarantees a far-reaching protection because it also covers crew members. This is justified because hospital ships will only be able to fulfil their humanitarian function if they are equipped with a crew able to handle the ship. ‘During the time they are in service’ does not mean that the personnel must be actively engaged in the assistance and care of wounded, sick, and shipwrecked. It is sufficient if they are assigned such duties. Therefore, it makes no difference whether there are wounded and sick on board or not. A temporary absence of patients from the ship does not prejudice their protected status. It is

emphasized that personnel and crew on board coastal rescue craft, according to Article 37 GC II, are protected only while engaged in rescue operations.⁴⁹⁰

17.64

The personnel of hospital ships, including the crew, shall wear a white armlet bearing the distinctive emblem. Their armlets or identity cards may not be taken away from them (Article 42 GC II).

The obligation of personnel on board hospital ships to wear an armlet bearing the distinctive emblem follows from Article 42, para. 1, GC II. According to Article 42, para. 2, GC II the identity card shall be worded in the national language, shall mention at least the full name, date of birth, rank, and service number of the bearer, and shall state in what capacity he is entitled to the protection of GC II. The card shall bear the photograph of the owner and also his signature or fingerprints or both. The prohibition in Article 42, para. 4, GC II of depriving said personnel of their insignia, identity cards, or armlets is intended to guarantee permanent protection for such personnel. In case of loss the owner is entitled to receive duplicate or replacement cards and insignia.

Footnotes:

¹ United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter referred to as 'UNCLOS'), 1833 *UNTS* 3. See also the Agreement relating to the Implementation of Part XI of the Convention, UN Doc. A/RES/48/263 of 17 August 1994.

² See W. Heintschel von Heinegg, 'Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality' (2004) 34 *IsrYHR* 151-78.

³ See W. Heintschel von Heinegg, 'The Proliferation Security Initiative—Security vs. Freedom of Navigation?' (2005) 35 *IsrYHR* 181-203.

⁴ In that case the legal basis is the respective Security Council's decision based on Chapter VII of the Charter. While some navies, in their rules of engagement, also refer to rules and principles of the law of naval warfare this is due to the fact that there exist no specific rules on the conduct of enforcement measures authorized by the Security Council. Therefore, they rely on the law of naval warfare as a general guidance only. This practice does not give evidence of an *opinio juris* that the respective states consider the law of naval warfare to be applicable in a formal sense.

⁵ See L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge, 1995), para. 1.

⁶ See also the Explanations to the *San Remo Manual* at 73: '[...] although the provisions of this Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated [...] in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.'

⁷ Cf. W. Heintschel von Heinegg, 'Methods and Means of Naval Warfare in Non-International Armed Conflicts' (2011) 42 *IsrYHR* 55-81.

⁸ Cf. D. Guilfoyle, 'The Mavi Marmara Incident and Blockade in Armed Conflict' (2011) 81 *BYIL* 171-223; A. Sanger, 'The Contemporary Law of Blockade and the Gaza Freedom Flotilla' (2010) 13 *YIHL* 397-446; R. Buchan, 'The International Law of Naval Blockade and Israel's Interception of the Mavi Marmara' (2011) 58 *Netherlands International Law Review* 209-41.

- ⁹ Report of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011), UN Doc. A/HRC/1521, para. 73.
- ¹⁰ See Heintschel von Heinegg, 'Warships', *MPEPIL*. The same definition is used in the *San Remo Manual*, para. 13(g).
- ¹¹ Signed on 29 April 1958, UN Doc. A/CONF.13/L.53 (hereinafter: HSC 1958). This Convention will, however, become obsolete in so far as states parties to UNCLOS are concerned.
- ¹² Cf. C. J. Colombos, *The International Law of the Sea*, 5th edn (London: Longmans, 1962), paras 530 *et seq.*; D. P. O'Connell, *The International Law of the Sea*, 2 vols edited by I. A. Shearer (OUP, 1984), Vol. II, 1106 *et seq.*
- ¹³ See Section 17.05.
- ¹⁴ Cf. Colombos, above (n. 12), paras 531 *et seq.*; O'Connell, above (n. 12), Vol. II, 1131 *et seq.*; W. S. Anderson, 'Submarines and Disarmament Conferences' (1927) 53 *USNIP* 50 *et seq.*
- ¹⁵ Cf. W. Heintschel von Heinegg, 'The International Legal Framework of Submarine Operations' (2009) 39 *IsrYHR* 331–56.
- ¹⁶ For a long time, the Royal Navy has used civilian personnel to provide ship's services including food service, cleaning, and laundry. The US Navy also experimented with the concept of augmenting warship crews with civilian mariner supplied by Military Sealift Command (MSC). Three years ago MSC identified fleet command and control ships as platforms that can be transferred to MSC and staffed with civilian mariners. The *USS Coronado* had been chosen as the 'pilot program' for this initiative. In addition, there is very often a considerable number of private contractors on board warships who are maintaining and/or operating electronic and weapons systems.
- ¹⁷ *UK Manual* (2004), paras. 13.5 and 13.91. See also *NWP 1–14M*, paras. 2.2.1 and 7.6.
- ¹⁸ See A. Norris, *Legal Issues Relating to Unmanned Maritime Systems*, <http://www.iqpc.com/media/1002182/50661.pdf>.
- ¹⁹ See *NWP 1–14M*, para. 2.3.6.
- ²⁰ For an in-depth assessment see N. Klein, 'Maritime Autonomous Vehicles in the International Law Framework to Enhance Maritime Security' (2019) 95 *International Law Studies* 244.
- ²¹ For an assessment of the use of UMVs under the law of armed conflict see M.N. Schmitt and D. S. Goddard, 'International Law and the Military Use of Unmanned Maritime Systems' (August 2016) 98 *IRRC* 1–26; W. Heintschel von Heinegg, 'Naval Technologies', in W.H. Boothby (ed.), *New Technologies and the Law in War and Peace* (Cambridge University Press, 2019), 315–36, at 317 *et seq.*
- ²² See *inter alia* G. C. Rodriguez Iglesias, 'State Ships', *MPEPIL*.
- ²³ This Convention never entered into force but, on 24 May 1934, was amended by an additional protocol. See E. Beckett and G. Breuer, *Öffentliches Seerecht* (Berlin, New York: de Gruyter, 1991), para. 428.
- ²⁴ Rodriguez Iglesias, above (n. 22).
- ²⁵ Cf. R. Lagoni, 'Merchant Ships', *MPEPIL*. See also *San Remo Manual*, para. 13(i) defining merchant vessel as 'a vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service'.

- ²⁶ See Section 17.34 and the accompanying commentary.
- ²⁷ Cf. K. Zemanek, 'Armed Attack', *MPEPIL*.
- ²⁸ Colombos, above (n. 12), para. 548.
- ²⁹ NWP 1-14M, para. 8.6.2.2; *Canadian Manual, Law of Armed Conflict at the Operational and Tactical Level* (Ottawa: National Defence Headquarters, Office of the Judge Advocate General, 2001), < https://www.fichl.org/fileadmin/_migrated/content_uploads/Canadian_LOAC_Manual_2001_English.pdf >, para. 834(2f).
- ³⁰ See below, Section 17.25.
- ³¹ For an overview, see G. Venturini, 'Commentary on the 1907 Hague Convention VII', in N. Ronzitti (ed.), *The Law of Naval Warfare* (Dordrecht: Nijhoff, 1988), 120-8, at 120 *et seq.*
- ³² See, *inter alia*, G. Schramm, 'Die Umwandlung von Kauffahrteischiffen in Kriegsschiffe auf hoher See während eines Krieges' (1911) 22 *Marine Rundschau* 1255 *et seq.*, 1539 *et seq.*
- ³³ See only Venturini, above (n. 31), 122 *et seq.*
- ³⁴ Note, however, that inland merchant vessels and maritime fishing vessels may not be required so to act.
- ³⁵ Cf. H. G. Helm, 'Die rechtliche Stellung der Troßschiffe einer Kriegsmarine' (1957) 54 *Marine Rundschau* 152-6.
- ³⁶ Order in Council of 4 April 1982, reprinted in Villar, 8.
- ³⁷ R. Lagoni, 'The Work of the Gladisch Committee in Today's Perspective', in D. Fleck (ed.), *The Gladisch Committee on the Law of Naval Warfare, 5 Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht* (Bochum: Brockmeyer, 1990), 63-76, at 66.
- ³⁸ *San Remo Manual*, para. 13(h).
- ³⁹ See Section 17.25.
- ⁴⁰ A similar definition of military aircraft is given in the *Canadian Manual*, above (n. 29), Section 704; and in the *San Remo Manual*, para. 13(j).
- ⁴¹ *HPCR Manual*, Rules 1(x), (dd), and (ee).
- ⁴² See, however, Art. 3(b) of the 1944 Chicago Convention on Civil Aviation (15 UNTS 295).
- ⁴³ See also *HPCR Manual*, Rule 1(cc).
- ⁴⁴ See also the *Canadian Manual*, above (n. 29), Section 704; *San Remo Manual*, para. 13(1). The 1944 Chicago Convention also negatively distinguishes civil aircraft from state aircraft.
- ⁴⁵ For an overview, see O'Connell, above (n. 12). In the context of naval warfare, see E. Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare* (Berlin: Duncker & Humblot, 1984), 31 *et seq.*; *San Remo Manual*, paras 10, 14, *et seq.*
- ⁴⁶ Text in 31 *AJIL* (1937), Suppl., 1-18; see also Vignes, 'Commentary on the 1936 Montreux Convention', in Ronzitti, above (n. 31), 468-82.
- ⁴⁷ Cf. O'Connell, above (n. 12) Vol. I, 171 *et seq.* For (allegedly) excessive baseline claims, see US Department of State, *Limits in the Seas No. 112, United States Responses to Excessive National Maritime Claims*, 17 *et seq.* (Washington, DC, 9 March 1992); J. A.

Roach and R. W. Smith, *Excessive Maritime Claims*, 66 *International Law Studies* (Newport, RI: Naval War College, 1994).

48 Art. 5 TSC 1958; Art. 8 UNCLOS.

49 Art. 9 UNCLOS.

50 Art. 7 TSC 1958; Art. 10 UNCLOS. Note, however, that the following rules do not apply to so-called 'historic' bays.

51 For a general overview, see O'Connell, above (n. 12), Vol. I, 353 *et seq.*, 389 *et seq.* With regard to the Gulf of Sidra, see F. Francioni, 'The Gulf of Sidra Incident (*United States v. Libya*) and International Law' (1980/1981) 5 *ItalyIL* 85 *et seq.*, and 'The Status of the Gulf of Sirte in International Law' (1984) 11 *Syracuse Journal of International Law & Commerce* 311 *et seq.*

52 Art. 8 TSC 1958; Art. 11 UNCLOS.

53 See the references in United Nations, *Law of the Sea Bulletin* No. 54 (2004), 132 *et seq.*

54 O'Connell, above (n. 12), Vol. 1, 165 *et seq.*

55 Art. 9 TSC 1958; Art. 12 UNCLOS.

56 As regards the right of peaceful passage in general, see Arts. 17 *et seq.* UNCLOS; O'Connell, above (n. 12), Vol. II, 867 *et seq.*, 959 *et seq.* In times of armed conflict, the right of passage of belligerent warships and prizes through a neutral territorial sea is restricted to twenty-four hours. It may even, on a non-discriminatory basis, be restricted or suspended. With regard to the right of peaceful passage in cases where a belligerent mines its territorial sea, see Section 17.41 and accompanying para. 2.

57 *San Remo Manual*, paras 27 *et seq.* See also *Canadian Manual*, above (n. 29), para. 818; *NWP 1-14M*, para. 7.3.6.

58 Art. 24 TSC 1958; Art. 33 UNCLOS.

59 For the exclusion of neutral archipelagic waters from the area of naval warfare see *San Remo Manual*, paras 14 *et seq.* Special rules apply where third states enjoy the right of archipelagic sea passage. See *ibid.*, paras 23 *et seq.*

60 UNCLOS Arts. 46 *et seq.* See also O'Connell, above (n. 12), Vol. I, 237 *et seq.*; H. P. Rajan, 'The Legal Regime of Archipelagos' (1986) 29 *GYIL* 137-53.

61 This holds true in peacetime and in wartime. Moreover, the prohibition of suspending archipelagic sea lanes passage applies equally to neutral and belligerent states. See *San Remo Manual*, para. 27 *et seq.*

62 See the references in United Nations, *Table of Claims to Maritime Jurisdiction* (as at 15 July 2011), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf.

63 D. J. Attard, *The Exclusive Economic Zone in International Law* (OUP, 1987); R. Wolfrum, 'The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea' (1987) *NethYIL* 121 *et seq.* See also O'Connell, above (n. 12), Vol. I, 553 *et seq.*

64 Art. 56 UNCLOS. For a general overview, see O'Connell, above (n. 12), Vol. I, 553 *et seq.*

65 See above Introductory Remarks referring to Art. 58(2) UNCLOS.

66 See Heintschel von Heinegg, 'The United Nations Convention on the Law of the Sea and Maritime Security Operations' (2005) 48 *GYIL* 151-85, at 158 *et seq.* See also *Canadian Manual*, above (n. 29), para. 821; *NWP 1-14M*, para. 7.3.8.

- ⁶⁷ For a provision to the same effect, *see* para. 34 of the *San Remo Manual*. The *San Remo Manual*, in para. 35, provides for the laying of mines in a neutral EEZ: 'If a belligerent considers it necessary to lay mines in the exclusive economic zone . . . of a neutral state, the belligerent shall notify that state, and shall ensure, *inter alia*, that the size of the minefield and the type of mines used do not endanger artificial islands, installations, and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral state. Due regard shall also be given to the protection of the marine environment.'
- ⁶⁸ *See, inter alia*, Colombos, above (n. 12), para. 558.
- ⁶⁹ D.P. O'Connell, 'International Law and Contemporary Naval Operations' (1970) XLIV *BYIL* 28 *et seq.*
- ⁷⁰ With regard to state practice since the end of World War II, *see* R. Ottmüller, *Die Anwendung von Seekriegsrecht in militärischen Konflikten seit 1945* (Hamburg: Forschungsstelle für Völkerrecht, 1978), 47 *et seq.*
- ⁷¹ W. A. Fenrick 'The Exclusion Zone Device in the Law of Naval Warfare' (1986) XXIV *CYIL* 91-126, at 115.
- ⁷² Art. 1, para. 1(1) UNCLOS.
- ⁷³ Rauch, above (n. 45), 53 *et seq.*
- ⁷⁴ To the same effect: *San Remo Manual*, para. 36.
- ⁷⁵ Heintschel von Heinegg, above (n. 66).
- ⁷⁶ Geneva Convention on the Continental Shelf of 29 April 1958 (hereinafter: CSC 1958); Arts. 76 *et seq.*, UNCLOS. *See also* O'Connell, above (n. 12), Vol. I, 467 *et seq.*
- ⁷⁷ Art. 1, lit. a, CSC 1958.
- ⁷⁸ Art. 76, para. 1 UNCLOS. According to Art. 76, paras 5 and 6, UNCLOS, under certain conditions the breadth of the continental shelf may extend to 350 nautical miles.
- ⁷⁹ Those methods and means comprise blockades even though a blockade is generally considered a measure of economic warfare at sea.
- ⁸⁰ With respect to economic warfare at sea, *see* R. Tucker, *The Law of War and Neutrality at Sea* (Washington, DC: US Government Printing Office, 1957), 74 *et seq.*; Colombos, above (n. 12), paras 635 *et seq.*; J. Kraska, 'Prize Law', *MPEPIL*; W. Heintschel von Heinegg and M. Donner 'New Developments in the Protection of the Natural Environment in Naval Armed Conflicts' (1994) XXXVII *GYIL* 281-314.
- ⁸¹ *See* M.N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017), Rule 92 and accompanying commentary.
- ⁸² *Prisenordnung* vom 28 August 1939, Reichsgesetzblatt 1939 I, 1585.
- ⁸³ Blockade is dealt with in Sections 1051 *et seq.*
- ⁸⁴ *See also* J. Kraska, 'Prize Law', *MPEPIL*.
- ⁸⁵ *Ibid.*
- ⁸⁶ *See also* U. Scheuner, II *Wörterbuch des Völkerrechts* (Berlin: de Gruyter, 1962), 385.
- ⁸⁷ *See also* C. G. Phillips, 'Capture at Sea in Perspective' (1965) 91 *USNIP* 60 *et seq.*
- ⁸⁸ For a general overview, *see* H. Fujita, 'Commentary on the 1856 Paris Declaration', in Ronzitti, above (n. 31), 68.

- ⁸⁹ Colombos, above (n. 12), paras 536 *et seq.*
- ⁹⁰ O'Connell, above (n. 12), Vol. II, 1108; Colombos, above (n. 12), para. 553.
- ⁹¹ Evidence of the respective legal basis will be given in the commentaries to the individual principles. For a first overview, see G. J. F. van Hegelsom, 'Methods and Means of Combat in Naval Warfare', in W. Heintschel von Heinegg (ed.), *Methods and Means of Combat in Naval Warfare*, 8 *Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht* (Bochum: Brockmeyer, 1992), 1–59, at 11 *et seq.*; H. B. Robertson, 'Modern Technology and the Law of Armed Conflict at Sea', in Robertson (ed.), *The Law of Naval Operations*, 64 *International Law Studies* (Newport, RI: Naval War College, 1991), 362–83, at 363 *et seq.*; NWP 1–14M, chapter 8; *Canadian Manual*, above (n. 29) para. 825.
- ⁹² Cf. G. I. A. D. Draper, 'Military Necessity and Humanitarian Imperatives' (1973) XII *RDMilG* 129 *et seq.*
- ⁹³ O'Connell, above (n. 12), Vol. II, 1105 *et seq.*; Colombos, above (n. 12), paras 524 *et seq.*
- ⁹⁴ Rauch, above (n. 45), 57 *et seq.*; H. Meyrowitz 'Le Protocole Additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime' (1985) 89 *RGDIP* 243 *et seq.*
- ⁹⁵ For the applicability of AP I to naval warfare and for further references, see M. Bothe, 'Commentary on the 1977 Geneva Protocol I', in Ronzitti, above (n. 31), 761 *et seq.*
- ⁹⁶ W. A. Solf, in M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts* (The Hague/Boston/London: Nijhoff, 1982), 193 *et seq.*; Robertson, above (n. 91), at 363. See also *San Remo Manual*, para. 38.
- ⁹⁷ Hegelsom, above (n. 91), 11.
- ⁹⁸ Solf, in Bothe/Partsch/Solf, above (n. 96), 299 *et seq.*
- ⁹⁹ NWP 1–14M, para. 8.1; *San Remo Manual*, para. 39.
- ¹⁰⁰ For the commentaries, the discussions, and the Bochum results see W. Heintschel von Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare. Report, Commentaries and Proceedings of the Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea*, Ruhr-Universität Bochum, 10–14 November 1989, 7 *Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht* (Bochum: Brockmeyer, 1991), 45 *et seq.*, 141 *et seq.*, 170 *et seq.* The 1994 *San Remo Manual*, in para. 40, now states: 'In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'
- ¹⁰¹ *Canadian Manual*, above (n. 29), para. 825.
- ¹⁰² NWP 1–14M, para. 8.2.
- ¹⁰³ Ibid. See also US Department of Defense, *Law of War Manual* (updated December 2916), para. 5.6.6.2.
- ¹⁰⁴ It may be noted that neutral vessels making an effective contribution to the war-sustaining effort, for instance by exporting goods, such as oil, may not be captured under prize law either. Interference with enemy exports is lawful only in the context of enforcing a naval blockade.
- ¹⁰⁵ For this and the preceding commentaries, see Solf, in Bothe/Partsch/Solf, above (n. 96), 323 *et seq.* For lawful military objectives in naval warfare, see Sections 1021 *et seq.*

- 106** See also *Canadian Manual*, above (n. 29), para. 825; *NWP 1-14M*, para. 8.1; *San Remo Manual*, para. 46.
- 107** The standard is defined in Art. 3(4) of Protocol II to the 1980 Inhumane Weapons Conv: 'Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.'
- 108** See US DoD, *Law of War Manual*, above (n. 103), para. 5.2.3.1.
- 109** See also *San Remo Manual*, para. 46.
- 110** See, *inter alia*, Colombos, above (n. 12), para. 519.
- 111** Note in this context, that special rules apply for the destruction of captured merchant vessels.
- 112** For further references, see W. T. Mallison, *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars*, *International Law Studies* Vol. LVIII (Washington, DC: US Government Printing Office, 1968), 134 *et seq.*
- 113** This is the wording of Art. 15, para. 1, GC I.
- 114** *Ibid.*
- 115** J. S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary* Vol. II (Geneva: ICRC, 1960), GC II, 132. See also ICRC, *Commentary on the Second Geneva Convention* (Cambridge, 2017), paras 1640 *et seq.*
- 116** *Ibid.*, para. 1637.
- 117** For further cases that occurred during the World Wars, see Colombos, above (n. 12), paras 520 *et seq.*
- 118** Cf. Colombos, above (n. 12), para. 522.
- 119** See Section 17.22.
- 120** Art. 37, para. 2, AP I. See also *San Remo Manual*, paras 109 *et seq.* For an overview of ruses and perfidy in naval warfare, see M. Gimmerthal, *Kriegslist und Perfidieverbot im Zusatzprotokoll vom 10. Juni 1977 zu den vier Genfer Rotkreuz-Abkommen von 1949*, 4 *Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht* (Bochum: Brockmeyer, 1990), 54 *et seq.*, 173 *et seq.*; G. P. Politakis, 'Stratagems and the Prohibition of Perfidy with a Special Reference to the Law of War at Sea' (1993) 45 *Austrian Journal of Public International Law* 253 *et seq.* For a general overview, see D. Fleck, 'Ruses of War and Prohibition of Perfidy' (1974) XIII *RDMilG* 269 *et seq.*
- 121** *San Remo Manual*, para. 110.
- 122** *UK Manual*, para. 13.83; *NWP 1-14M*, para. 12.1.
- 123** Reprinted in 238 *IRRC* (1984), 58 *et seq.*
- 124** W. J. Fenrick, 'Military Objectives in the Law of Naval Warfare', in Heintschel von Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, 7 *Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht* (Bochum: Universitätsverlag N. Brockmeyer, 1991), 1-44, at 40.
- 125** For example, those agreed upon in the International Telecommunication Convention of 25 October 1973; see also Solf, in Bothe/Partsch/Solf, above (n. 96), 207 *et seq.*; Gimmerthal, above (n. 121), 173 *et seq.*

126 Iraq had set fire to oil wells in Kuwait, and parts of the Persian Gulf had been polluted by oil. See US Department of Defense, *Conduct of the Persian Gulf War*—Appendix on the Role of the Law of War; N. A. Robinson, 'International Law and the Destruction of Nature in the Gulf War' (1991) 21 *Environmental Policy & Law* 216 *et seq.*

127 It should be noted in this context that the reports and articles published either during the conflict or in its aftermath were highly exaggerated and, in many cases, based on deliberate misinformation. For a recent legal evaluation of the law applicable to the protection of the environment in naval armed conflicts, see Heintschel von Heinegg/Donner, above (n. 80), 281–314.

128 For an evaluation of the ENMOD Convention, see Sanchez Rodriguez, 'Commentary to the ENMOD Convention', in Ronzitti, above (n. 31), 661 *et seq.*

129 It is questionable whether there already exists a corresponding duty in customary international law, especially because some states have expressly excluded the applicability of Art. 35, para. 3, AP I. Note, however, that para. 44 of the *San Remo Manual* states: 'Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law.'

130 This follows from the fundamental principles of the laws of war.

131 See also *San Remo Manual*, para. 44.

132 One possible way of protecting the natural environment is an agreement of the parties to the conflict to this effect. Accordingly, para. 11 of the *San Remo Manual* encourages them 'to agree that no hostile actions will be conducted in marine areas containing . . . rare or fragile ecosystems or . . . the habitat of depleted, threatened or endangered species or other forms of marine life'.

133 See only Fenrick, above (n. 71), 91 *et seq.*

134 H. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II: *Disputes, War and Neutrality*, 7th edn (New York: David McKay, 1952), 474 *et seq.*; W. G. Downey Jr, 'Captured Enemy Property, Booty of War and Seized Enemy Property' (1950) *AJIL* 488 *et seq.*; A. P. Higgins, 'Ships of War as Prize' (1925) *BYIL* 103 *et seq.*

135 See the provisions on capture and seizure of enemy and neutral cargoes in Sections 1027 *et seq.*

136 W. Heintschel von Heinegg, 'Visit, Search, Diversion and Capture: Conditions of Applicability' (1991) *XXIX CYIL* 283–329, at 300. See also *San Remo Manual*, para. 112.

137 Heintschel von Heinegg, above (n. 136), 301; *San Remo Manual*, para. 113.

138 Art. 55 of the—unratified—London Declaration of 1909. According to this provision there is, however, a rebuttable 'presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than six days before outbreak of hostilities, that the transfer is void. . . . Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of the vessel remain in the same hands as before the transfer.' According to Art. 56 of the 1909 London Declaration the 'transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, an absolute presumption that a transfer is void: (1) if the transfer has been made during a voyage or in a blockaded port; (2) if a right to repurchase or recover the vessel is

reserved to the vendor; (3) if the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.'

139 That was the case when, during the Iran-Iraq conflict Kuwaiti tankers were reflagged by the US. See M. H. Nordquist and M. G. Wachenfeld, 'Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf' (1988) XXXI *GYIL* 138-64.

140 For further details, see Heintschel von Heinegg, above (n. 136), at 301. The fact that a merchant vessel is flying a flag of convenience is as such no sufficient reason for suspicion.

141 During the nineteenth and early twentieth centuries, the US persistently endeavoured to exempt, with the exception of contraband and breach of blockade, private property from capture. Although they were supported by a number of other states, proposals to this effect were rejected by the respective majorities. See Arts. 33 *et seq.* of the *Oxford Manual*; O'Connell, above (n. 12), Vol. II, 1112 *et seq.*; Heintschel von Heinegg, above (n. 136), at 305 *et seq.*

142 See commentary to Section 17.21, para. 2. According to para. 135 of the *San Remo Manual*, 'enemy vessels, whether merchant or otherwise, and goods on board such vessels may be captured outside neutral waters', unless they are exempt from capture.

143 According to the traditional law this also applies to wrecks. See J. A. Roach, 'Sunken warships and military aircraft' (July 1996) 20(4) *Marine Policy* 351-4.

144 Colombos, above (n. 12), para. 925; Lauterpacht, above (n. 134), 474 *et seq.*; F. Berber, *Lehrbuch des Völkerrechts*, Vol. II (Munich: C. H. Beck, 1962), 195 *et seq.*

145 Capture is permissible and legal if there are sufficient reasons for suspecting that the vessel concerned is either enemy or has committed acts rendering it a legitimate military objective. Confiscation is legal only if the facts justifying such confiscation have been proved in prize court proceedings.

146 O'Connell, above (n. 12), Vol. II, 1124 *et seq.*

147 A. de Guttry, 'Commentary on the 1907 Hague Convention VI', in Ronzitti, above (n. 31), 108; A. P. Higgins, 'Enemy Ships in Port at the Outbreak of War' (1922/23) *BYIL* 55 *et seq.*

148 As regards the continuing validity of the 1936 London Protocol, see the preliminary remarks in the commentary on Sections 1046 *et seq.*

149 For details, see the commentary on Section 17.47.

150 Note that mere arming is not a sufficient reason for rendering a merchant vessel a military objective. See para. 2 of the commentary on Section 17.04.

151 Cf. Fenrick, above (n. 71), at 105 *et seq.*; Mallison, above (n. 112), 106 *et seq.*

152 For example, breach of blockade. See also *San Remo Manual*, para. 60, but note that, according to the position taken here, mere arming does not render an enemy merchant vessel a military objective.

153 See also NWP 1-14M, para. 8.6.2.2; *Canadian Manual*, above (n. 29), para. 834; *San Remo Manual*, para. 60(b).

154 Cf. Mallison, above (n. 112), 122 *et seq.*

155 See commentary on Section 17.47, including the references given. Further: Mallison, above (n. 112), 122 *et seq.*; NWP 1-14M, para. 8.6.2.2; *Canadian Manual*, above (n. 29), paras 834 and 835; *San Remo Manual*, para. 60(c). In the *San Remo Manual*, the following

examples are given: engaging in reconnaissance, early warning, surveillance, or command, control, and communications missions.

156 NWP 1-14M, para. 8.6.2.2; *Canadian Manual*, above (n. 29), para. 835(1e); *San Remo Manual*, para. 60(d).

157 Cf. W. Schönborn, 'Der Widerstand feindlicher Handelsschiffe gegen Visitationen und Aufbringung' (1918) *Archiv für öffentliches Recht* 161 *et seq.*

158 For its continuing validity and for further details *see* the preliminary remarks to Sections 17.46 *et seq.*

159 *See*, however, para. 139 of the *San Remo Manual* which is more specific.

160 It is interesting to note in this context that para. 138 of the *San Remo Manual* provides that 'as an alternative to capture, an enemy merchant vessel may be diverted from its declared destination'.

161 *San Remo Manual*, para. 140. *See* also commentary on Section 17.34.

162 Note that the ship's equipment does not belong to its cargo but is an integral part of and shares the same destiny as the ship. Personal belongings of passengers and crews are also not part of the cargo.

163 Nationality is, however, only one criterion. Anglo-American prize courts always based their decisions on the owner's residence. Thus, even British or US nationals could be characterized as enemies if their residence was in enemy or enemy occupied territory. *See* Heintschel von Heinegg, above (n. 136), at 305 *et seq.*

164 According to the 'control test' a corporation not based in enemy or enemy-controlled territory may be deemed enemy in character if it is controlled by individuals who are enemy subjects. *See* Berber, above (n. 144), 200.

165 This is the well-known maxim '*robe d'ennemi confisque robe d'ami*'. It can be traced back to Hugo Grotius (*De jure belli ac pacis*, Lib. III, Ch. VI, para. VI) and was acknowledged in Art. 59 LondonDecl 1909. During the World Wars it was the basis of a significant number of prize court decisions. *See* Colombos, above (n. 12), para. 616.

166 Art. 60, para. 1, LondonDecl 1909. *See* also Tucker, above (n. 80), 86.

167 Tucker, above (n. 80), 74 *et seq.*; Lauterpacht, above (n. 134), 462 *et seq.*; Y. Dinstein, 'The Laws of War at Sea' (1980) 10 *IsrYHR* 38-69, at 40.

168 *See, inter alia*, Heintschel von Heinegg, above (n. 136), at 306 *et seq.*

169 Arts. 21 and 63 LondonDecl 1909.

170 *San Remo Manual*, para. 148, defines contraband as 'goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict'. Note that under the present law of prize, contraband lists may vary according to the particular circumstances of the armed conflict.

171 *See, inter alia*, F. Kalshoven, 'Commentary on the 1909 London Declaration', in Ronzitti, above (n. 31), 262, 269 *et seq.*

172 Cf. I. A. Shearer, 'Commentary on the 1907 Hague Convention XI', in Ronzitti, above (n. 31), 183 *et seq.*

173 *Ibid.*, 189.

174 *See* Art. 38 GC II.

175 *See* the commentary in Chapter 9.

176 Bothe, above (n. 95), 764 *et seq.*

177 Cf. Shearer, above (n. 172), 187.

178 The sentence of the German War Tribunal of 27 July 1916 was considered in conformity with the law by a commission chaired by Schücking. Others characterized it as ‘simple murder, bare of any military necessity’, as a ‘violation of the fundamental right of self-defence’, and as ‘inconsistent with the rules of the laws of war’. *See, inter alia*, J W. Garner, *International Law and the World War* (London: Longmans, 1920), Vol. 1, 413; Colombos, above (n. 12), para. 557. For the *Fryatt* case generally, *see* I. Dischler, *Wörterbuch des Völkerrechts*, above (n. 87), 606 *et seq.*

179 *See* W. Heintschel von Heinegg, ‘The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century – Some Select Issues’ (2014) 17 *YBIHL* 69–93, at 85 *et seq.*

180 Art. 4 A, No. 1, GC III.

181 Cf., *inter alia*, O’Connell, above (n. 12), Vol. II, 1117.

182 *See* Art. 38 GC II; Art. 23 GC IV; Arts. 69 and 70 AP I; *San Remo Manual*, paras. 47(c) (ii) and 136(c)(ii). With regard to the famous case of the Japanese ship *Awa Maru*, *see* the references in M. Whiteman, *Digest of International Law* 10 (Washington, DC: US Government Printing Office, 1962), 628 *et seq.*; Mallison, above (n. 112), 126. In the case of relief shipments for the civilian population according to Art. 70 AP I the adversary is not free to deny approval. *See* Bothe, in Bothe/Partsch/Solf, above (n. 96), 434 *et seq.*

183 Cf. O’Connell, above (n. 11), Vol. II, 1122 *et seq.*

184 For the famous case of the *Paquete Habana*, *see* I. v. Münch, II *Wörterbuch des Völkerrechts*, above (n. 86), 736 *et seq.* For state practice during the World Wars, *see* Lauterpacht, above (n. 134), 478; C. Rousseau, *Le droit des Conflits Armés* (Paris: Pedone, 1983), 291. With regard to the Korean conflict, *see* the references in M. Cagle and F. Manson, *Sea War in Korea* (Tiptree/Essex: Barbarossa Books, 1957), 296 *et seq.*; Mallison, above (n. 112), 127. During the Vietnam conflict the US Navy respected Vietnamese coastal fishing boats although Vietnam was not bound by HC XI. The US attitude only changed after those boats had been abused for the transport of ammunition and so on. Still, naval commanders were obliged to verify such abuse before taking measures. *See* D. P. O’Connell, *The Influence of Law on Sea Power* (Manchester and New York: Manchester University Press, 1975), 177. For the general protection of coastal fishing boats, *see also* NWP 1–14M, para. 8.6.3.2; *Canadian Manual*, above (n. 29), para. 828(1g); *San Remo Manual*, paras. 47, lit. g, and 136, lit. f; Colombos, above (n. 12), paras 656, 658; Shearer, above (n. 172), 185 *et seq.*; Tucker, above (n. 80), 96.

185 Cf. Shearer, above (n. 172), 186; Lauterpacht, above (n. 134), 477; Colombos, above (n. 12), para. 657.

186 At the 1907 Hague Conference the Fourth Committee gave the following explanation in its report: ‘La raison d’être de cette exemption est, et a toujours été, une raison d’humanité. Le régime de faveur est fait non pas à l’industrie de la pêche, mais aux pauvres gens qui s’y adonnent; il n’a pas pour but de protéger un commerce maritime particulier, plus qu’un autre, mais seulement d’éviter de causer à des individus pauvres, spécialement dignes d’intérêt, un dommage sans utilité pour le belligérant.’

187 Cf. Colombos, above (n. 12), para. 657; E. Castrén, *The Present Law of War and Neutrality* (Helsinki: Suomalaisen Kirjallisuuden Seuran Kirjapainon Oy, 1954), 339.

- 188** Colombos, above (n. 12), para. 658; Shearer, above (n. 172), 186 *et seq.*; J. Stone, *Legal Controls of International Conflict* (London: Stevens, 1954), 586; Castrén, above (n. 187), 340 *et seq.* For the opposing view, see Lauterpacht, above (n. 134), 478, who regards the boats' size as relevant. Rousseau, above (n. 184), 292, merely states: 'Quant à la notion de petite navigation locale, c'est une question d'espèce à déterminer dans chaque cas.'
- 189** See references given by Whiteman, above (n. 182), Vol. 10, 642 *et seq.*
- 190** NWP 1-14M, para. 8.6.3; *Canadian Manual*, above (n. 29), para. 828(1f); *San Remo Manual*, paras 47(f) and 136(e); Shearer, above (n. 172), 189 *et seq.*
- 191** NWP 1-14M, para. 8.6.3; *San Remo Manual*, paras 47(f) and 136(e).
- 192** Cf. Mallison, above (n. 112), 128; Tucker, above (n. 80), 97.
- 193** As regards state practice during World War I, see Rousseau, above (n. 184), 292 *et seq.*; Lauterpacht, above (n. 134) 476; Tucker, above (n. 80), 96 *et seq.*
- 194** With regard to the Prussian missionary ship *Palme* captured during the Franco-Prussian War of 1870/71, see references in Lauterpacht, above (n. 134), 476 (n. 2); Rousseau, above (n. 184), 292.
- 195** Cf. *San Remo Manual*, paras 47(d) and 136(d).
- 196** Cf. Colombos, above (n. 12), para. 660; Lauterpacht, above (n. 134), 542; Tucker, above (n. 80), 97 *et seq.*; Castrén, above (n. 187), 339; NWP 1-14M, para. 8.6.3; *Canadian Manual*, above (n. 29), para. 828(1c); *San Remo Manual*, paras 47(c) and 136(c).
- 197** Besides the well-known but still disputed case of the *Lusitania*, the case of the *Athenia* is worth mentioning. The Nuremberg Tribunal characterized the sinking of the unarmed *Athenia* by the German submarine *U30* on 3 September 1939 as a war crime; see NWP 1-14M, para. 8.6.3.2(6); *San Remo Manual*, para. 47(e).
- 198** See, *inter alia*, *San Remo Manual*, para. 48: 'Vessels listed in Section 47 are exempt from attack only if they: (a) are innocently employed in their normal role; (b) submit to identification and inspection when required; and (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.' A rule to the same effect (para. 137) applies to vessels exempt from capture.
- 199** See also *San Remo Manual*, paras. 53 *et seq.*
- 200** This definition is taken from para. 13(m), *San Remo Manual*.
- 201** Printed in *AJIL* (1989), 335.
- 202** *San Remo Manual*, para. 129.
- 203** *Ibid.*, para. 130.
- 204** Text in Australian Treaty Series, <<http://www.austlii.edu.au/au/other/dfat/treaties/1901/1.html>>.
- 205** According to Art. 54 HagueReg, submarine cables connecting occupied territories with neutral territories 'shall not be seized or destroyed except in the case of absolute necessity'. If such cables are seized or destroyed, the 'must restored and compensation fixed when peace is made'. The scope of this provision is, however, restricted to land warfare.
- 206** R. Lagoni, 'Cables, Submarine', *Encyclopedia of Public International Law I* (Amsterdam: Elsevier, 1992), 516-9.
- 207** *San Remo Manual*, para. 37.
- 208** *Ibid.*

- 209** For an assessment and further references see W. Heintschel von Heinegg, 'Protecting Critical Submarine Cyber Infrastructure: Legal Status and Protection of Submarine Communications Cables under International Law', in K. Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace*, p. 291- 318 (NATO CCD COE Publication, Tallinn 2013).
- 210** Cf. Robertson, in Ronzitti, above (n. 31), 161 *et seq.*
- 211** Cf. K. Ipsen, 'Die "offene Stadt" und die Schutzzonen des Genfer Rechts', in D. Fleck (ed.), *Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte* (Hamburg: Hanseatischer Gildenverlag, 1973), 149-210.
- 212** See, *inter alia*, E. Spetzler, *Luftkrieg und Menschlichkeit* (Göttingen: Musterschmidt, 1956) at 127 *et seq.*
- 213** This is the position taken by J. M. Spaight, *Air Power and War Rights*, 3rd edn (London: Longmans, 1947) at 221 *et seq.* For an early criticism, see M. W. Royse, *Aerial Bombardment* (New York: Hoover, 1928) at 162 *et seq.*
- 214** Castrén, above (n. 187), at 402.
- 215** Other conventions of relevance are: the GasProt, ENMOD, and Protocols I to III of the Inhumane WeaponsConv.
- 216** For further details, see Art. 53 AP I.
- 217** Art. 55, para. 1, AP I.
- 218** Ibid.
- 219** As regards the so-called 'hunger blockade' and relief shipments for the civilian population, see para. 5 of the commentary on Section 17.51.
- 220** See J. Verzijl, *International Law in Historical Perspective*, Vol. IX (Sijthoff, 1978), 297.
- 221** Hence, in the Preamble, the contracting parties deplored that 'the existing state of affairs makes it impossible to forbid the employment of automatic submarine contact mines'. They also expressed their hope that, in the future, it would be possible 'to formulate rules on the subject which shall ensure to the interests involved all the guarantees desirable'.
- 222** Art. 4 of the British proposal which served as a basis for discussion, (Annex 9) provided: '*Les belligérants ne pourront se servir de mines sous-marines automatiques de contact que dans leurs eaux territoriales ou celles de leurs ennemis.*'
- 223** Especially, the US and Germany were in favour of an explicit rule on the use of mines in the high seas. Hence, Germany proposed the following amendment to Art. 4 of the British proposal: '*La pose des mines automatiques de contact sera aussi permise sur le théâtre de la guerre; sera considéré comme théâtre de la guerre l'espace de mer sur lequel se fait ou vient de se faire une opération de guerre ou sur lequel une pareille opération pourra avoir lieu par suite de la présence ou de l'approche des forces armées des deux belligérants.*' At first, the *Comité d'Examen*, in Art. 2 of its draft, had been in favour of the British proposal. After the US delegate Sperry had made clear the US standpoint, the Third Committee dispensed with any spatial limitation of the use of mines. In its report of 9 October 1907, the Third Committee explained this as follows: '*Cette solution n'a pas obtenu, devant la Commission, la majorité absolue des suffrages. L'alinéa 2 de l'article 4, qui établissait la différence mentionnée entre 'attaque et la défense, fut même rejeté, n'ayant obtenu que 10 voix contre 12 et 10 abstentions.*'
- 224** The proposals by the Netherlands (Annex 12 and 22) provided: '*En tous cas les détroits qui unissent deux mers libres ne peuvent pas être barrés.*' '*Dans aucun cas la*

communication entre deux mers libres ne peut être barrée entièrement et le passage ne sera permis qu'aux conditions qui seront indiquées par les autorités compétentes.'

225 Thus, the Third Committee in its report to the plenary stated: 'Après discussion, il fut jugé préférable de ne rien ajouter au texte du Règlement, mais de modifier le passage du Rapport qui parle de la résolution prise sur cette question par le Comité d'Examen; on établirait dans le Rapport que les détroits sont restés en dehors des délibérations de la présente Conférence et, tout en réservant expressément les déclarations faites au sein du Comité par les Délégations des Etats-Unis d'Amérique, du Japon, de la Russie et de la Turquie, on indiquerait la conviction de voir appliquer sur les mines dont on pourrait se servir dans les détroits les conditions techniques adoptées par le présent Règlement.'

226 In the report of the Comité d'Examen these statements are summarized as follows: '... la Délégation du Japon... qui, tout en déclarant qu'il n'avait pas d'objection, si la règle s'appliquait seulement aux pays neutres, avait fait observer... que' amendement néerlandais... lui paraissait pouvoir s'adapter peut-être aux conditions géographiques des Etats continentaux, mais pas toujours à celles des Puissances insulaires. En raison de la configuration particulière du Japon... détroits qui sont partie intégrante de son territoire, mais qui tomberaient néanmoins sous le coup de la définition inscrite dans le dit amendement, la Délégation Japonaise ne pourrait adhérer à cette disposition.... le Contre-Admiral Sperry déclara, au nom de la Délégation des Etats-Unis d'Amérique, que 'prenant en considération le grand nombre d'îles qui composent le groupe des Philippines, et l'incertitude des résultats que pourrait avoir la stipulation en question, envisageant en outre les stipulations de traités comprises dans l'alinéa ajouté, il ne pourrait pas prendre part à la discussion comme, à son avis, la matière sort des limites de ses instructions'.... la Délégation Ottomane... exposa que: 'La Délégation Impériale Ottomane croit de son devoir de déclarer qu'étant donné la situation exceptionnelle créée par les traités en vigueur aux détroits des Dardanelles et du Bosphore, détroits qui sont partie intégrante du territoire, le Gouvernement Impérial ne saurait, d'aucune façon, prendre un engagement quelconque tendant à limiter les moyens de défense qu'il pourrait juger nécessaire d'employer pour ces détroits, en cas de guerre ou dans le but de faire respecter sa neutralité'.... La Délégation de Russie estime que le régime de certains détroits étant réglé par des traités spéciaux, basés sur des considérations politiques, les stipulations concernant ces détroits ne peuvent faire l'objet d'une discussion. Quant à créer un régime spécial pour une partie des détroits en exceptant les autres, ce procédé lui paraîtrait inconséquent et très dangereux. La diversité du régime qui en résulterait tant pour les neutres que pour les belligérants, serait inévitablement une nouvelle source de conflits entre eux.'

227 With regard to the difficulties in establishing the subjective element *see* Dinstein, above (n. 167), at 45. Stone, above (n. 188), 583 *et seq.* states: 'The escape from this prohibition provided by the reference to the *object* of the operation largely frustrated it from the first Article'.

228 The use of torpedoes is regulated by Art. 1, para. 3. Originally, the Conference's agenda was restricted to torpedoes. 'Torpedo' used to be the general designation that also covered mines. However, in view of the existence of self-propelling destructive devices, as early as 1907 the Conference agreed on the notion of 'mines'.

229 *See* Dinstein, above (n. 167), at 44; J. S. Cowie, *Mines, Minelayers and Minelaying* (OUP, 1949), 170.

230 *See* Dinstein, *ibid.*; Cowie, above (n. 233), 175.

- 231** See H. S. Levie, *Mine Warfare at Sea* (Nijhoff, 1992), 97 *et seq.* With regard to the current technological state, see *Jane's Underwater Warfare Systems*, <http://torrentz.eu/48402b17e5b2116fef155ddaef89bc142e284a28>.
- 232** Especially, R. R. Baxter, 'Treaties and Custom' (1970 I) 129 *RdC* 25-104, at 97, considers HC VIII to have become obsolete by desuetude. See also Stone, above (n. 188), 584 *et seq.*
- 233** Since modern anchored mines may be employed at greater depths than bottom mines, they are a highly effective means of naval warfare.
- 234** According to a minority opinion, Hague Convention VIII may be applied to modern mines by analogy. See Rauch, above (n. 45), 116. However, according to the view taken here, it is not possible to apply an international treaty by way of analogy to subjects not expressly regulated therein.
- 235** Allegedly, the former Soviet Union still disposes of a vast number of automatic contact mines of the World War II type. Other states, such as Iraq, were supplied with these mines.
- 236** See Levie, above (n. 231), 135 *et seq.*
- 237** For example, during the Iraq-Kuwait conflict, the US expressly referred to Hague Convention VIII. See U.S. DoD, *Conduct of the Persian Gulf War: Final Report to Congress* (1992), Appendix O. With regard to the customary status of the Convention, see also Levie, above (n. 231), 177 *et seq.*; NWP 1-14M, paras 9.2 and 9.2.3; *Canadian Manual*, above (n. 29), paras 828 *et seq.*
- 238** Cf. Levie, above (n. 231), 24 *et seq.*
- 239** See Hegelsom, above (n. 92), 27.
- 240** UN Doc. A/CN.10/141 of 8 May 1990.
- 241** Cf. Hegelsom, above (n. 92), 28.
- 242** See, e.g., *Jane's Underwater Warfare Systems*, above (n. 235).
- 243** Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea bed and the Ocean Floor and in the Subsoil Thereof, London, Moscow, Washington, 11 February 1971. For the text, see *UN Juridical Yearbook* (1970), 121-4.
- 244** See NWP 1-14M, para. 10.2.2.1.
- 245** According to Art. II, the 12 nautical miles limit applies even when the breadth of the territorial sea is less than 12 nautical miles.
- 246** On 7 October 1969, the US delegate declared: 'The Treaty would therefore prohibit, *inter alia*, mines that were anchored to or emplaced on the sea bed.'; *Documents on Disarmament* 479 (1969). See also A. G. Y. Thorpe, 'Mine Warfare at Sea—Some Legal Aspects of the Future' (1987) 18 *Ocean Development and International Law* 255-78, at 262.
- 247** Drifting or floating mines are neither 'emplanted' nor 'emplaced' in the sense of Art. I. See Rauch, above (n. 45), 131; Thorpe, above (n. 246), at 262.
- 248** *Ibid.*
- 249** O'Connell, above (n. 184), 157.
- 250** See T. A. Clingan Jr, 'Submarine Mines in International Law', in Robertson, above (n. 91), 351-61, at 354 *et seq.*; Thorpe, above (n. 246), 262.

- 251** Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps, and Other Devices (Protocol II).
- 252** See Levie, above (n. 231), 138.
- 253** Cf. W. Ide, 'Der Minenkampf in Nordsee und Ostsee' (1989/7) *Europäische Wehrkunde* 447 *et seq.*; R. F. Hoffmann, 'Offensive Mine Warfare: A Forgotten Strategy' (1977) 103 *USNIP* 142 *et seq.*
- 254** Thus, the NWP 1-14M, para. 9.2, provides: 'the general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines'. See also *Canadian Manual*, above (n. 29), paras. 836 *et seq.*; Dinstein, above (n. 167), 46; Thorpe, above (n. 246), 259 *et seq.*; P. J. Rowe, *Defence. The Legal Implications. Military Law and the Laws of War* (London: Brasseys, 1987), 128; Clingan, above (n. 254), 353; O'Connell, above (n. 184), 157.
- 255** See NWP 1-14M, para. 9.2; Rauch, above (n. 45), 130.
- 256** Art. 3 of the Swedish proposal provides: 'The indiscriminate use of mines is prohibited. Indiscriminate use is (a) any use of mines which is not or cannot be directed against a military objective; (b) any laying of mines which may be expected to cause incidental loss of civilian life, injury to civilians, or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.'
- 257** NWP 1-14M, para. 9.2.3 (5) provides: 'The location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and/or deactivation.' See also para. 84 of the *San Remo Manual*: 'Belligerents shall record the locations where they have laid mines.' Also Art. 7, para. 1 of the Swedish proposal: 'The parties to a conflict shall record all zones where they have laid mines.'
- 258** In NWP 1-14M, para. 9.2.1, the differences between controlled and armed mines is explained as follows: 'Armed mines are either emplaced with all safety devices withdrawn or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controlled mines (including mines possessing remote control activation devices) have no destructive capability until affirmatively activated by some form of controlled arming order (whereupon they become armed mines).' See also Dinstein, above (n. 167), at 46.
- 259** See *Jane's Underwater Warfare Systems*, above (n. 235).
- 260** Art. 1, para. 2, HC VIII; NWP 1-14M, para. 9.2.3; Art. 4 of the Swedish proposal: 'It is prohibited to lay anchored mines which do not become harmless as soon as they have broken loose from their moorings.'
- 261** While the mines used for the blockade of Haiphong were equipped with such devices, the mines laid by Iran in the Gulf war (1980-8) did not become harmless after they had broken loose from their moorings.
- 262** Dinstein, above (n. 167), at 46, seems to be in favour of a rule to that effect: 'The rule must be that the use of any mine—antiquated or sophisticated—is permissible only if they are anchored (even though the anchor may enable them to home in on a ship within a given range), and on condition that they become harmless as soon as they are disconnected from their moorings.' For the contrary view, see H. S. Levie, 'Means and Methods of Combat at Sea' (1988) 14 *Syracuse Journal of International Law and Commerce* 727-39, at 732 *et seq.*; Thorpe, above (n. 246), 260 *et seq.*

263 See *Jane's Underwater Warfare Systems*, above (n. 235).

264 NWP 1-14M, para. 9.2.3: 'Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them.' Art. 4, para. 3 of the Swedish proposal provides: 'It is prohibited to lay mines, unless an effective neutralizing mechanism is used on each mine, that is to say, a self-actuating or remotely controlled mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or at the latest 2 years after such emplacement.'

265 In the course of the proceedings of the *Corfu Channel* case it became evident that drifting automatic contact mines were less dangerous than generally believed. Cowie states: 'Incidentally, the legend has grown up that all drifting mines are dangerous to shipping, but this is by no means the case. When moored, mines are normally kept dangerous due to the tension in the mooring rope, and if they break adrift the tension is relaxed and a strong spring takes charge, so opening a switch in the circuit between the firing battery and the detonator. If a mine breaks adrift with a length of mooring trailing from it, that mooring may get caught up on rocks, pier structures, and so forth; the mine in effect becomes moored once more and so liable to detonate if one of the horns is struck. . . . Finally, it is extremely difficult to ram a mine or any small object floating freely on the surface of the sea. The chances of a ship being sunk or damaged by a mine which has broken adrift from its moorings are in fact remote, but none the less the prudent seaman will give them a clear berth.' Cowie, above (n. 233), 188 *et seq.*

266 *San Remo Manual*, para. 82 provides: 'It is forbidden to use free-floating mines unless: (a) they are directed against a military objective; and (b) they become harmless within an hour after loss of control over them.' See also Art. 4, para. 4 of the Swedish proposal: 'It is prohibited to use drifting mines.'

267 Art. 3, para. 2, HC VIII; NWP 1-14M, para. 9.2.3(1). Art. 6, para. 1 of the Swedish proposal provides: 'Effective warning, through notification of danger zones, of any use of activated mines which may affect neutral or non-belligerent shipping or vessels protected under Article 4, shall be given as soon as military considerations permit.' Para. 83 of the *San Remo Manual* reads: 'The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only be exploded by ships which are military objectives.' This implies that sophisticated and discriminating mines need not be notified.

268 This formulation stems from Art. 52, para. 2, AP I. The definition of military objectives contained in that provision is today generally accepted as customary international law and thus applicable in naval warfare. See commentary on Section 17.17; NWP 1-14M, para. 8.2.; *Canadian Manual*, above (n. 29), para. 825.

269 *ICJ Reports 1986*, 379 *et seq.*

270 According to the judgment of the ICJ in the *Nicaragua* case obviously any form of information may be considered sufficient as long as it is effective; see *ICJ Reports 1986*, para. 292.

271 The US, when mining Haiphong, employed mines that were activated three days after they had been laid. Thus, innocent shipping was able to leave Haiphong unmolested; see Levie, above (n. 231), 147. The *San Remo Manual*, para. 85, provides: 'Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.'

272 Art. 6, para. 2, of the Swedish proposal provides: 'When mines are employed, all feasible precautions shall be taken for the safety of vessels and shipping protected under Art. 4. Feasible precautions are those precautions which are practicable or practically

possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.'

²⁷³ See NWP 1-14M, para. 9.2.2. In the *Nicaragua* case the ICJ held: 'In peacetime for one state to lay mines in the internal or territorial waters of another is an unlawful act'; *ICJ Reports 1986*, 112.

²⁷⁴ See Arts. 87 and 58 UNCLOS.

²⁷⁵ See, *inter alia*, Clingan, above (n. 254), 356.

²⁷⁶ NWP 1-14M, para. 9.2.2. See also Thorpe, above (n. 246), 267.

²⁷⁷ NWP 1-14M, para. 9.2.2.

²⁷⁸ See, *inter alia*, Thorpe, above (n. 246), 267 *et seq.*; Rowe, above (n. 258), 128. D. W. Bowett, *Self Defence in International Law* (Manchester: Manchester University Press, 1958), 71, states: 'It can scarcely be contemplated that a state must remain passive while a serious menace to its security mounts on the high seas beyond its territorial sea. It is accordingly maintained that it is still permissible for a state to assume a protective jurisdiction, within the limits circumscribing every exercise of the right of self defence on the high seas in order to protect its ships, its aircraft and its right to territorial integrity and political independence from an imminent danger or actual attack.'

²⁷⁹ See Clingan, above (n. 254), 356.

²⁸⁰ Ibid., 355 *et seq.*

²⁸¹ See Art. 25, UNCLOS.

²⁸² *ICJ Reports 1986*, 112.

²⁸³ NWP 1-14M, para. 9.2.2.

²⁸⁴ NWP 1-14M, para. 9.2.2 provides: 'Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.'

²⁸⁵ NWP 1-14M, para. 9.2.2: 'If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required.'

²⁸⁶ *ICJ Reports 1949*, 28. See also R. R. Baxter, 'Passage of Ships Through International Waterways in Time of War' (1954) XXXI *BYIL* 187-216.

²⁸⁷ Lauterpacht, above (n. 134), 471 *et seq.*; Colombos, above (n. 12), paras 562 *et seq.*; NWP 1-14M, para. 9.2; *Canadian Manual*, above (n. 29), paras 836 *et seq.*

²⁸⁸ NWP 1-14M, para. 9.2.3 (6) provides: 'Naval mines may be employed to channelize neutral shipping, but not in a manner to impede the transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.' Para. 89, *San Remo Manual* reads as follows: 'Transit passage through international straits and passage through waters subject to the right of archipelagic sea lanes passage shall not be impeded unless safe and convenient alternative routes are provided.' See also L. M. Alexander, 'International Straits', in Robertson, above (n. 91), 91-108, at 94 *et seq.*

²⁸⁹ According to secret documents prepared by the German Naval High Command, in the following straits free passages and piloting services were provided by the belligerents: Skagerrak, the Sound and the Great Belt, the Kattegat, the Dover Strait, and the Firth of Forth. See Oberkommando der Kriegsmarine, *Urkundenbuch zum Seekriegsrecht* (1 Sept.

1939 to 31 Aug. 1940), document nos 340, 345, 346, 348, 354, 361. *See also* Levie, above (n. 231), 77 *et seq.*

290 For the ‘general area of naval operations’, *see* Sections 1010 *et seq.*; Colombos, above (n. 12), paras 558 *et seq.*

291 It may be added that according to military manuals the 12 nautical miles territorial sea is generally accepted as in accordance with international law and has to be respected in times of armed conflict. *See* NWP 1-14M, para. 7.3.5; *Canadian Manual*, above (n. 29), para. 802 *et seq.*

292 *See* NWP 1-14M, para. 7.3.7; *Canadian Manual*, above (n. 29), para. 804(1a).

293 *Canadian Manual*, above (n. 29), para. 804(1c).

294 *Ibid.*, para. 1509(1). *See also* para. 35, *San Remo Manual* which provides: ‘If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, *inter alia*, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.’

295 Tucker, above (n. 80), 303.

296 Tucker states: ‘Indeed, the severe condemnation of war zones from which neutral shipping is barred under threat of destruction from submarines and aircraft has not infrequently been accompanied by the acquiescence to zones from which neutral shipping is barred by means almost equally destructive’; Tucker, above (n. 80), 303.

297 *See* Thorpe, above (n. 246), 264.

298 NWP 1-14M, para. 9.2.3(8).

299 *See* Levie, above (n. 231), 41 *et seq.*, 177. The corresponding *opinio juris* can also be deduced from the practice of states during the Iran-Iraq war. States not parties to that conflict, by deploying naval units in the Persian Gulf, made abundantly clear that they were not willing to acquiesce in a restriction of the freedom of navigation by unrestricted mine warfare. *San Remo Manual*, para. 88, provides: ‘The minelaying States shall pay due regard to the legitimate uses of the high seas by, *inter alia*, providing safe alternative routes for shipping of neutral States.’

300 *See* Thorpe, above (n. 246), 257. G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals. Vol. II: The Law of Armed Conflict* (London: Stevens & Sons, 1968), 417, holds: ‘On the high seas, fields of anchored automatic contact mines, even if announced and supervised, amount to a purported occupation of a portion of the high seas of indefinite duration. It appears impossible to square pretensions of this character with the rules underlying the principles of the freedom of the seas; for they deny the free use of the mined area of the high seas not only to the enemy, but also to neutral shipping at large.’ However, this position finds no foundation in state practice.

301 For the term ‘armed attack’ *see, inter alia*, Y. Dinstein, *War, Aggression and Self-Defence*, at 205 *et seq.* (6th edn, Cambridge University Press 2017). ‘Aggression’ is defined in UNGA Res. 3314 (XXIX) of 14 Dec. 1974 that is meant to help the UN Security Council in determining the existence of such aggression. Certain kinds of direct force (open military attack, occupation of foreign territory, blockade, and attacks on foreign armed forces, ships, aircraft, etc.) are declared acts of aggression. That enumeration is not exhaustive; *see*

Verdross/Simma, s. 233. Despite the non-binding character of UN GA Resolutions, Res. 3314 (XXIX) is widely considered as declaratory of customary international law.

302 *ICJ Reports 1986*, 105.

303 See NWP 1-14M, para. 9.2.3; *Canadian Manual*, above (n. 29), paras 836 *et seq.*; Dinstein, above (n. 167), 45.

304 See Levie, above (n. 231), 32 *et seq.*; Dinstein, above (n. 167), 45; Stone, above (n. 188), 583-4. For an evaluation of Art. 2 from a purely military point of view, see Heintschel von Heinegg, 'Exclusion Zones, Mines, Abuse of Neutral Flags and Insignia, Booty in Naval Warfare', in Fleck (ed.), *Gladisch Committee*, above (n. 37), 39-59, at 46 *et seq.*

305 See NWP 1-14M, para. 9.2.3 (7); Dinstein, above (n. 167), 45.

306 Art. 5, para. 1, HC VIII; NWP 1-14M, para. 9.2.3(5); *Canadian Manual*, above (n. 29), para. 842. Para. 90, *San Remo Manual* provides: 'After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines. With regard to mines laid in the territorial seas of the enemy, each party shall notify their position and shall proceed with the least possible delay to remove the mines in its territorial sea or otherwise render the territorial sea safe for navigation.'

307 In one of the Protocols of the US-North Vietnamese Agreement of 27 January 1973, the US accepted international responsibility for the removal of approximately 8,000 mines it had laid in North Vietnamese coastal waters. 'Operation End Sweep' started in February 1973 and was completed in July 1973. Egypt, after the end of the Yom Kippur War (1973) also accepted its responsibility for the removal of mines it had laid in the Suez Canal and in the Red Sea. During the Gulf War (1980-8), Iran, on 13 August 1987, announced it would sweep mines in international waters of the Persian Gulf; *The Times* (London) 1 September 1987, 6. For further references see Levie, above (n. 231), 49 *et seq.*, 75, 88, 122, 149 *et seq.*

308 This follows from the judgment of the ICJ in the *Corfu Channel* case, *ICJ Reports 1949*, 4 *et seq.*

309 See Swedish proposal, Art. 7, para. 2: 'All such records shall be retained by the parties who shall: (a) as soon as possible, by mutual agreement, provide for the release of information concerning the location of activated mines, particularly in agreements governing the cessation of hostilities; (b) immediately after the cessation of active hostilities take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of mines; and make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of activated mines.'

310 After the end of the Yom Kippur War, for example, Egypt asked the US for assistance. Within three months (April to June 1973) the waters were cleared of the mines. See Levie, above (n. 231), 157 *et seq.*; H. Kowark and S. M. Taylor 'Die Räumung des Suezkanals' (1974) 71 *Marine-Rundschau* 724-36. India, after the close of the 1971 conflict with Pakistan, removed the mines it had laid with the assistance of the former Soviet Union. See C. H. Petersen, 'Die Operationen der sowjetischen Marine für die Wiedereröffnung der Häfen in Bangladesh. März 1972-Juni 1974' (1975) 72 *Marine Rundschau* 665-76. Swedish proposal, Art. 8: 'After the cessation of active hostilities, the parties shall endeavour to reach agreement both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance—including, in appropriate circumstances, joint operations—necessary to remove

or otherwise render ineffective mines placed in position during the conflict.’ An identical rule is laid down in para. 91, *San Remo Manual*.

311 See Levie, above (n. 231), 167 *et seq.*

312 See A. Gioia and N. Ronzitti, ‘The Law of Neutrality; Third States’ Commercial Rights and Duties’, in I. Dekker and H. Post (eds), *The Gulf War of 1980–1988* (Dordrecht: Nijhoff, 1992), 221–42, at 223 *et seq.*, 237 *et seq.*; Levie, above (n. 231), 168.

313 See Peace, (1988) 82 *Proceedings of the American Society of International Law* 151.

314 Quoted in T. Meron, ‘Neutrality, The Right of Shipping and the Use of Force in the Persian Gulf—Remarks’ (1988) 82 *Proceedings of the American Society of International Law* 164–9.

315 See N. Ronzitti, ‘La guerre du Golfe, le déminage et la circulation des navires’ (1987) XXXIII *Annuaire Français de Droit International* 647–62, at 651; Nordquist/Wachenfeld, above (n. 139), at 162 *et seq.*; Gioia/Ronzitti, above (n. 312), 237; Meron, above (n. 314), 168.

316 Originally, Iran had denied having laid mines for other purposes than coastal defence against US (!) attacks. When mines were detected in Omani waters, however, Iran proposed to remove them from Omani territorial waters. See Levie, above (n. 231), 168.

317 Nordquist/Wachenfeld, above (n. 139), at 162–4; Meron, above (n. 314), 167 *et seq.*

318 Ronzitti, above (n. 31), at 651.

319 *ICJ Reports 1949*, 4 *et seq.*

320 *Ibid.*, 22.

321 Accordingly, the *San Remo Manual*, para. 92, provides: ‘Neutral States do not commit an act inconsistent with the laws of neutrality by clearing mines laid in violation of international law.’

322 Cf., *inter alia*, Levie, ‘Commentary on the 1907 Hague Convention VIII’, in Ronzitti, above (n. 31), 140–8, at 143 with further references.

323 See NWP 1–14M, para. 9.4; *Canadian Manual*, above (n. 29), paras 836 *et seq.* *San Remo Manual*, para. 79 provides: ‘It is prohibited to use torpedoes which do not sink or otherwise become harmless when they have completed their run.’

324 For the technical aspects see *Jane’s Underwater Warfare Systems*, above (n. 235).

325 Cf. O’Connell, above (n. 184), 86 *et seq.*

326 Cf. A. L. Zuppi, *Die bewaffnete Auseinandersetzung zwischen dem Vereinigten Königreich und Argentinien im Südatlantik aus völkerrechtlicher Sicht* (Köln/Berlin/Bonn/München: Heymanns, 1990), 200 *et seq.*

327 For the Iran–Iraq conflict (1980–8), see R. Danziger, ‘The Persian Gulf Tanker War’ (1985) 111 *USNIP* 160 *et seq.*

328 *San Remo Manual*, para. 78, provides: ‘Missiles and projectiles, including those with over-the-horizon capabilities, shall be used in conformity with the principles of target discrimination as set out in Sections 38–46.’

329 Cf. Robertson, above (n. 91), 371 *et seq.*; Hegelsom, above (n. 91), 35.

330 See also NWP 1–14M, para. 9.10.

331 Hegelsom, above (n. 92), 36; S. C. Truver, 'The Legal Status of Submarine Launched Cruise Missiles' (1977) 103 *USNIP* 82 *et seq.*; W. H. Parks, 'Submarine-Launched Cruise Missile and International Law: A Response' (1973) 103 *USNIP* 120 *et seq.* For the opposing view, see O'Connell (1972) *AJIL* 785 *et seq.*

332 In any event a self-destruction device would not mean any improvement. The time period between launching and reaching the target is too short to achieve any modifications. The flight time of the missile fired by *USS Vincennes* against the Iranian Airbus took only 17 seconds from launching to impact. Cf. N. Friedman, 'The Vincennes Incident' (1989) 115 *USNIP* 76.

333 For a general overview of the law of submarine warfare, see Mallison, above (n. 112), 12 *et seq.*; J. L. Jacobson, 'The Law of Submarine Warfare Today', in Robertson, above (n. 91), 205 *et seq.*; J. Gilliland, 'Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare' (1985) *Georgetown Law Journal* 976 *et seq.*; H. Sohler, 'U-Bootkrieg und Völkerrecht' (Sept. 1956) *Marine Rundschau* 1; Heintschel von Heinegg, above (n. 15).

334 Cf., *inter alia*, Mallison, above (n. 112), 31 *et seq.*

335 *Ibid.*, 62 *et seq.*

336 Worth mentioning are also the so-called Nyon Arrangements of 1937 that contain similar provisions; cf. L. F. E. Goldie, 'Commentary on the 1937 Nyon Agreements', in Ronzitti, above (n. 31), 489 *et seq.*

337 Cf. Mallison, above (n. 112), 75 *et seq.*; Sohler, above (n. 337).

338 Cf. the references given by Gilliland, above (n. 333), at 978-9.

339 Judgment of 1 October 1946, Vol. 1, 350 *et seq.*

340 See also E. I. Nwogugu, 'Commentary on Submarine Warfare', in Ronzitti, above (n. 31), 358.

341 This view is especially taken by D. P. O'Connell, 'International Law and Contemporary Naval Operations' (1970) *LXIV BYIL* 52. See also Gilliland, above (n. 333).

342 Cf. D. Fleck, 'Topical Approaches Towards Developing the Laws of Armed Conflicts at Sea', in J. Delissen and G. Tanja (eds), *Essays in Honour of Frits Kalshoven* (The Hague: Nijhoff, 1990), 407-23, at 420; Jacobson, above (n. 333), 214 *et seq.*

343 Cf. *inter alia*, Whiteman, above (n. 182), Vol. X, 660 *et seq.*

344 The *Canadian Manual*, above (n. 29), para. 826, expressly repeats the wording of the Protocol and states that merchant vessels meeting the requirements of the definition of military objectives are not protected.

345 *NWP 1-14M*, para. 8.7.1, provides an enumeration of those conditions relieving submarines of the obligation to first, that is before attack, take crews, passengers, and ship's papers to a place of safety. Those conditions, however, do not differ from those applicable to surface ships. There are, for mere practical reasons, different provisions in order to differentiate between surface and subsurface warfare.

346 See, *inter alia*, Mallison, above (n. 112), 80 *et seq.*; *San Remo Manual*, paras 67 *et seq.*

347 This position is taken by esp. Gilliland, above (n. 333), 987.

348 Cf. K. Lautenschläger, 'The Submarine in Naval Warfare, 1901-2001' (1986-87) 11 *International Security* 94 *et seq.*

349 The same view is taken by Gilliland, above (n. 333), 991 *et seq.*

- 350** *San Remo Manual*, para. 45, provides: 'Surface ships, submarines and aircraft are bound by the same principles and rules.'
- 351** See para. 8 of the commentary on Section 17.17.
- 352** See also *NWP 1-14M*, para. 8.7.1.
- 353** See para. 1 of the commentary on Section 17.25.
- 354** For an excellent overview of the development of this method of naval warfare, see Fenrick, above (n. 71); Goldie, above (n. 336), 156 *et seq.*
- 355** Cf. Garner, above (n. 178), Vol. I, 351 *et seq.*; Goldie, above (n. 336), 158 *et seq.*; M. N. Schmitt, 'Asymmetrical Warfare and International Humanitarian Law', in W. Heintschel von Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges. Symposium in Honour of Knut Ipsen* (Berlin/Heidelberg: Springer, 2007), 11-48 [15].
- 356** Cf. Garner, above (n. 178), 333 *et seq.*
- 357** *Kriegsgebietserklärung*, published in *Reichs-Marine-Amt, Seekriegsrecht im Weltkrieg*, Nos 117, 135.
- 358** J. W. Garner, 'War Zones and Submarine Warfare' (1915) *AJIL* 594; Fenrick, above (n. 71), at 94 *et seq.*
- 359** For British economic warfare during World War I, see L. Guichard, *The Naval Blockade 1914-1918* (New York: Appleton, 1930), 22 *et seq.*
- 360** For this and further references, see J. A. Hall, *The Law of Naval Warfare*, 2nd edn (London: Chapman, 1921), 246 *et seq.*
- 361** Cf. Mallison, above (n. 112), 36 *et seq.*
- 362** Cf. Fenrick, above (n. 71), 100. The order to attack all enemy vessels in the Channel was issued on 4 and 17 October 1939. On 24 November 1939, neutral merchant shipping was advised to refrain from travelling in the sea areas around the British Isles.
- 363** This is evidenced by the statement of Admiral Nimitz before the Nuremberg Tribunal; see Vol. 17, 414 *et seq.* It should be added that other states participating in World War II proclaimed similar zones often labelled 'danger zones'.
- 364** I *IMT*, 350 *et seq.*
- 365** See also O'Connell, above (n. 341), 52.
- 366** Cf. Zuppi, above (n. 326), 190 *et seq.*
- 367** Cf. R. Leckow, 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones' (1988) *ICLQ* 629 *et seq.*; Fenrick, above (n. 71), 116 *et seq.*
- 368** During the Korean conflict the US Navy proclaimed something similar to an exclusion zone. According to the Rules of Engagement the 7th Fleet was entitled to attack any submarine contact in certain specified sea areas. Cf. O'Connell, above (n. 184), 167.
- 369** Text in LIII *BYIL* (1982), 542. Already on 7 April 1982 Great Britain had proclaimed a 200 nautical miles 'Maritime Exclusion Zone' around the Falklands to the effect that 'any Argentine warship and Argentine naval auxiliaries found within this zone will be treated as hostile and are liable to attack by British forces'. In its proclamation of the TEZ, the British government declared: 'The exclusion zone will apply not only to Argentine warships and naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The zone will also apply to any aircraft, whether military or civil, which is operating in support of the Argentine occupation. Any ship and any aircraft, whether military or civil, which is found within the zone without authority from the Ministry of Defence in London

will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British forces.’

370 On 7 May 1982, Great Britain extended the TEZ to all sea areas 12 nautical miles off the Argentine coast. Consequently, ‘any Argentine warship or military aircraft which is found more than 12 nautical miles from the Argentine coast will be regarded as hostile and is liable to be dealt with accordingly’.

371 However, in June 1982 the tanker *Hercules* flying the Liberian flag was attacked by Argentine aircraft outside the British TEZ and was severely damaged. Cf. 79 *ILR*, 1 *et seq.*

372 For the belligerents’ practice, see Danziger, above (n. 331), 162 *et seq.*; Leckow, above (n. 371), 636 *et seq.*; Fenrick, above (n. 71), 118 *et seq.*; Politakis, above (n. 122), 148; D. L. Peace, ‘Major Maritime Events in the Persian Gulf War’ (1988) 82 *Proceedings of the American Society of International Law* 147.

373 See the references given by Fenrick, above (n. 71), 121 *et seq.*

374 *UK Manual* (2004), paras 13.77.1 and 13.78.

375 *NWP 1-14M*, para. 7.9.

376 *Canadian Manual*, above (n. 29), paras 852 *et seq.*

377 The International Law Association, Report of the 67th Conference (Helsinki 1996), Committee on Maritime Neutrality, Final Report, 367–400, at 374–89.

378 Cf. Colombos, above (n. 12), paras 559 *et seq.*; Tucker, above (n. 80), 302; Mallison, above (n. 112), 91 *et seq.*; Whiteman, above (n. 182), Vol. X, 607 *et seq.*; Goldie, above (n. 336), 156 *et seq.*; Gilliland, above (n. 333), 991 *et seq.*; Fenrick, above (n. 71), 91 *et seq.*

379 Gilliland, above (n. 333), 991 *et seq.*; Fenrick, above (n. 71), 91 *et seq.*

380 See also Art. 30 HRAW 1923 which provides: ‘In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which it has had notice issued by the belligerent commanding officer, may be fired upon.’

381 For the most recent practice of such security zones, see broadcast warnings promulgated by the Worldwide Navigational Warnings Service (WWNWS), https://msi.nga.mil/NGAPortal/MSI.portal?_%20nfpb=true&_pageLabel=msl_portal_page_63.

382 The *UK Manual* is most ambiguous on the subject. In Chapter 12 on air operations there is a general paragraph on ‘war zones restrictions’. In Chapter 13 on maritime warfare the zones are termed ‘security zones’ but under the very same heading the *UK Manual* also refers to ‘maritime and total exclusion zones’.

383 An excellent overview of the different concepts made use of by belligerents is given by R. Jaques (ed.), *Maritime Operational Zones* (Naval War College, 2006).

384 *HPCR Manual*, introduction to Section P.

385 *Ibid.*

386 Cf. Fenrick, above (n. 71), at 93.

387 Cf. S. F. Gilchrist, ‘The Cordon Sanitaire: Is It Useful? Is It Practical?’ (1982) 35 *Naval War College Review* 60 *et seq.*

388 Cf. Gilliland, above (n. 333), 991 *et seq.*; Fenrick, above (n. 71), 110 *et seq.*

389 A similar approach is taken in the *San Remo Manual*, paras 105 *et seq.* See also *Canadian Manual*, above (n. 29), para. 853.

390 For example, the TEZ established around the Falkland Islands was, by some, misinterpreted as limiting attacks to the area covered by the zone. As the wording of the British declaration contained no such intention the Argentine warship *General Belgrano*—beyond any doubt a legitimate military objective—could be attacked and sunk although it was outside the British TEZ.

391 Even though the term ‘paper exclusion zone’ is an allusion to the term ‘paper blockade’ it is emphasized that the legal basis of exclusion zones is not the law of blockade.

392 See the declaration of 23 April 1982 in *The Times*, 26 April 1982; Fenrick, above (n. 71), 110.

393 A similar ‘defence bubble’ was proclaimed by the US Navy during the Iran–Iraq War. However, the US was not a party to that conflict.

394 Cf. Gilliland, above (n. 333), 991 *et seq.*; Fenrick, above (n. 71), 110 *et seq.*

395 During the Iran–Iraq War the US Navy considered 5 nautical miles as sufficient because the main threat was expected from the Iranian *Pasdaran*.

396 For a comprehensive legal, operational, and historical evaluation of blockades, see the contributions in B. A. Elleman and S. C. M. Paine (eds), *Naval Blockades and Seapower* (London/New York: Routledge, 2006).

397 For these provisions, see D. Fleck, ‘London Naval Conference (1908–1909)’, *MPEPIL*; Kalshoven, above (n. 171), 257 *et seq.*

398 Cf. C. J. Colombos, ‘The Actual Value of the Declaration of London of 1909’ (1959) 12 *Revue Hellenique de Droit International* 10 *et seq.*; NWP 1–14M, para. 7.7.5; *Canadian Manual*, above (n. 29), paras 844 *et seq.*

399 This was the case during the Iraq–Kuwait conflict in which the Allied forces were able to cut off all imports by sea and air destined for Iraq.

400 See also O’Connell, above (n. 12), Vol. II, 1154 *et seq.*

401 See, *inter alia*, NWP 1–14M, para. 7.7.1; Lauterpacht, above (n. 134), at 781; Castrén, above (n. 187), at 301. Further Tucker, above (n. 80), at 283 (n. 1): ‘The extension of blockades to include the air space over the high seas remains a development for the future. It is next to impossible to declare with any degree of assurance what procedures may govern blockade by air. Certainly, there are grave difficulties in assuming that the practices of naval blockade can be applied readily, by analogy, to aerial blockade.’ Note, however, that Tucker does not doubt the legality of a blockade if applied and enforced against air traffic.

402 *San Remo Manual*, para. 97.

403 Lauterpacht, above (n. 134), 780–1; Castrén, above (n. 187), at 300 *et seq.*

404 ‘The force maintaining the blockade may be stationed at a distance determined by military requirements.’ The term ‘force’ is broad enough to also cover military aircraft.

405 See Castrén, above (n. 187), at 409 *et seq.*

406 See also the *San Remo Manual*—Explanations, para. 97.1, at 178.

407 *San Remo Manual*, para. 95.

408 Kalshoven, above (n. 171), at 274 maintains: ‘[. . .] developments in the techniques of naval and aerial warfare have turned the establishment and maintenance of a naval blockade in the traditional sense into a virtual impossibility. It would seem, therefore, that the rules in the Declaration on blockade in time of war are now mainly of historical interest.’ This position is certainly not shared by those states having published manuals for

their respective navies or by other authors. *See* Stone, above (n. 188), at 508: ‘The realities of the present century require the British long distance blockade to be viewed as a long term transformation of the traditional law of blockade, rather than as mere reprisals, or mere breach of the traditional law.’ Further, Lauterpacht, above (n. 134), at 796–7.

⁴⁰⁹ *See* NWP 1–14M, para. 7.7.2.3; *UK Manual*, para. 13.67.

⁴¹⁰ Castrén, above (n. 187), at 409.

⁴¹¹ *San Remo Manual—Explanations*, at 177: ‘The Round Table considered whether the fact that aircraft could still land within the territory of the blockaded belligerent would affect the effectiveness of a sea blockade. This was found not to be the case, as, on the one hand, transport of cargo by air only constitutes a very small percentage of bulk traffic and, on the other hand, the fact that transport over land could take place without affecting this criterion.’

⁴¹² *San Remo Manual—Explanations*, at 177.

⁴¹³ Art. 5, LondonDecl 1909.

⁴¹⁴ *Ibid.*, Art. 6.

⁴¹⁵ *Ibid.*, Art. 7. *See also* NWP 1–14M, para. 7.7.3.

⁴¹⁶ Art. 1, LondonDecl 1909.

⁴¹⁷ Art. 18, LondonDecl 1909. *See also* para. 99, *San Remo Manual*.

⁴¹⁸ CDDH/215/Rev. 1, para. 73.

⁴¹⁹ *See also* Bothe, above (n. 95), 764. *San Remo Manual*, para. 102, provides: ‘The declaration or establishment of a blockade is prohibited if (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.’

⁴²⁰ Art. 70 AP I. *See also* *San Remo Manual*, para. 103.

⁴²¹ According to the *San Remo Manual*, para. 104, the ‘blockading belligerent shall [also] allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.’

⁴²² Bothe, above (n. 95), 764. For the opposite view, *see* Rauch, above (n. 45), 91 *et seq.*

⁴²³ *San Remo Manual*, para. 103.

⁴²⁴ NWP 1–14M, para. 7.7.2; *Canadian Manual*, above (n. 29), paras 844 *et seq.*; *San Remo Manual*, paras 93, 94, and 101.

⁴²⁵ Cf. O’Connell, above (n. 12), Vol. II, 1150.

⁴²⁶ *See also* Art. 2, LondonDecl 1909.

⁴²⁷ Cf. O’Connell, above (n. 12), Vol. II, 1153 *et seq.*

⁴²⁸ *San Remo Manual*, para. 96.

⁴²⁹ This result can—to a certain extent—be founded upon Art. 3 of the 1909 London Declaration according to which the ‘question whether a blockade is effective is a question of fact’. *See also* *San Remo Manual*, para. 95. Effectiveness is, therefore, dependent upon the circumstances of each case. *See also* Kalshoven, above (n. 171), 260.

- ⁴³⁰ Cf. NWP 1–14M, para. 7.7.5. See also van Hegelsom, above (n. 91), 46. A more cautious approach is taken in the *San Remo Manual*, para. 97: ‘A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.’
- ⁴³¹ Art. 2 HC VIII. See also para. 3 of the commentary on Section 17.42.
- ⁴³² See para. 2 of the commentary on Section 17.51.
- ⁴³³ Art. 4 LondonDecl 1909.
- ⁴³⁴ As to the minor modifications of HC X by GC II, see Pictet, above (n. 115), 156.
- ⁴³⁵ Art. 26 GC II; Art. 22, para. 1, lit. b, AP I.
- ⁴³⁶ Art. 22, para. 1, AP I. For an in-depth assessment see ICRC, *Commentary on the Second Geneva Convention*, above (n. 114), paras 1965 *et seq.*
- ⁴³⁷ Pictet, above (n. 115), 157.
- ⁴³⁸ Arts. 24 and 26 GC II.
- ⁴³⁹ Art. 24, para. 1, GC II.
- ⁴⁴⁰ Art. 24, para. 2, GC II.
- ⁴⁴¹ Art. 24, para. 2, in conjunction with Art. 22 GC II.
- ⁴⁴² Art. 22, para. 2, lit. a, AP I.
- ⁴⁴³ Art. 22, para. 2, lit. b, AP I.
- ⁴⁴⁴ Art. 26, first sentence GC II.
- ⁴⁴⁵ Cf. J. C. M. Mossop, ‘Hospital Ships in the Second World War’ (1947) XXIV *BYIL* 160 *et seq.*, 398 *et seq.*, 403 *et seq.*; Tucker, above (n. 80), 125 (n. 91).
- ⁴⁴⁶ For an analysis of the provision and its drafting history see ICRC, *Commentary on the Second Geneva Convention*, above (n. 114), paras 2115 *et seq.*
- ⁴⁴⁷ Art. 27 GC II.
- ⁴⁴⁸ Cf. Pictet, above (n. 115), 173.
- ⁴⁴⁹ Bundesgesetzblatt 1966 II, 323.
- ⁴⁵⁰ Cf. A. Schlögel, ‘Völkerrechtliche Aspekte des Einsatzes des Hospitalschiffes “Helgoland” ’ (1973) *Jahrbuch für Internationales Recht* 92 *et seq.*
- ⁴⁵¹ Cf. Y. Sandoz, in ICRC, *Commentary on the Additional Protocols of 8 June 1977*, para. 885 (Martinus Nijhoff 1987).
- ⁴⁵² Cf. Pictet, above (n. 115), 159.
- ⁴⁵³ Art. 33 GC II.
- ⁴⁵⁴ Art. 22, para. 2, GC II.
- ⁴⁵⁵ Originally, a period of thirty days was envisaged. After a proposal of the ICRC to this effect that period was reduced to ten days which was considered sufficient. Cf. Pictet, above (n. 115), 161.
- ⁴⁵⁶ See also *San Remo Manual*, para. 173.
- ⁴⁵⁷ Art. 43, para. 7, and Art. 41, para. 2, GC II.
- ⁴⁵⁸ Art. 43, para. 2, GC II.
- ⁴⁵⁹ Art. 43, para. 2, GC II.

- 460** Art. 6, Annex I to AP I.
- 461** Art. 7, Annex I to AP I.
- 462** Art. 8, Annex I to AP I.
- 463** Cf. R. Feist, 'Manual for the Use of Technical Means of Identification' (1990) *HuV-I* 212.
- 464** Cf. P. Eberlin, 'Underwater Acoustic Identification of Hospital Ships' (1988) 267 *IRRC* 505-28.
- 465** Geneva 1990.
- 466** Feist, above (n. 463), 212, stating that 'the only achievement was to start a discussion of the problem under the competent guidance of the ICRC'.
- 467** Cf. Pictet, above (n. 115), 179.
- 468** Cf. O'Connell, above (n. 12), Vol. II, 1120.
- 469** For example, in World War I the German hospital ship *Ophelia* was condemned because it had not afforded assistance and because it had transmitted encrypted messages that had not been properly documented. Moreover, the *Ophelia* was equipped with a radio system; then unusual for a hospital ship. The radio installations were destroyed by the crew prior to capture. Cf. O'Connell, above (n. 12), Vol. II, 1120.
- 470** See ICRC, *Commentary on the Second Geneva Convention*, above (n. 114), paras 2273 *et seq.*
- 471** Also provided in para. 171, *San Remo Manual*.
- 472** As was the case during the Falklands/Malvinas conflict. Instead, hospital ships were made to stay in a so-called 'Red Cross Box' established by *ad hoc* agreement between the belligerents.
- 473** See also ICRC, *Commentary on the Second Geneva Convention*, above (n. 114), para. 2403.
- 474** Art. 35, No. 2, GC II.
- 475** Art. 35, No. 5, GC II.
- 476** Art. 35, No. 4, GC II; Art. 22, para. 1, AP I.
- 477** *San Remo Manual*, para. 170.
- 478** See, however, ICRC, *Commentary on the Second Geneva Convention*, above (n. 114), para. 2421. According to the ICRC, 'weapons other than light individual arms should not be used by the personnel of hospital ships [...] because the enemy may legitimately consider such arming an "act harmful to the enemy".'
- 479** See also Pictet, above (n. 115), 180.
- 480** Art. 14 GC II.
- 481** Art. 16 GC II.
- 482** Art. 31, para. 1, GC II.
- 483** Cf. Pictet, above (n. 115), 183.
- 484** *Ibid.*, 185.
- 485** Art. 34, para. 2, GC II.
- 486** According to the *San Remo Manual*, para. 49, hospital ships and other protected vessels lose their exemption if they (a) are not innocently employed in their normal role; (b) do not submit to identification and inspection when required; and (c) intentionally hamper

the movements of combatants and do not obey orders to stop or move out of the way when required.

487 See *San Remo Manual*, para. 170.

488 Ibid., para. 50.

489 Ibid., para. 51.

490 See also *San Remo Manual*, para. 162; Pictet, above (n. 115), 205.

(p. 145) Chapter 7 Maritime Warfare

1 Introduction

THIS contribution deals with the principles and rules of international law applicable to international armed conflicts at sea, ie with the law of naval warfare and the law of maritime neutrality.¹ Although naval engagements during non-international armed conflicts occurred in the past,² the law governing such conflicts is not addressed here.(p. 146)

The legal framework governing armed hostilities at sea is mostly covered by the Hague Conventions of 1907.³ Other treaties date back to 1856,⁴ 1936,⁵ and, as regards the strictly humanitarian aspects, to 1949.⁶ In view of the considerable age of the Hague Conventions it is obvious that they do not any longer meet the realities of modern weaponry and of contemporary methods and means of naval warfare. However, their basic principles as well as those of the other treaties mentioned are still generally recognized as customary in character. Moreover, there are two private drafts;⁷ one by the San Remo Institute—the San Remo Manual⁸—and the other by the International Law Association—the Helsinki Principles⁹—that are widely accepted as being declaratory of the present law of naval warfare and maritime neutrality.¹⁰ Hence, despite the fact that many states are reluctant to engage in (p. 147) a reaffirmation and codification of that law, there exists a generally accepted and operable set of customary rules and principles.¹¹

It needs to be emphasized that—despite the considerable impact the 1982 UN Law of the Sea Convention (LOSC)¹² has had on the law governing armed hostilities at sea—the law of the sea has not led to an absolute demilitarization of the world's oceans and, thus, not to a prohibition on the exercise of belligerent rights at sea. Efforts aimed at demilitarization met with strong opposition from the predominantly Western sea powers.¹³ Hence, for the time being, military operations at sea—whether in times of peace or in times of international armed conflict—are not prohibited. It may, moreover, not be left out of consideration that already the wording of the third sentence of Article 87 paragraph 1 of LOSC ('inter alia') reveals that the list of high seas freedoms in list (a)–(f) is far from being exhaustive. Accordingly, the freedom of the high seas also comprises other uses. Moreover, it is emphasized in the second sentence that the freedom of the high seas is to be exercised not only 'under the conditions laid down by this Convention' but also 'by other rules of international law'. Hence, the admissibility of, for example, nuclear tests is to be judged in the light of the Seabed Treaty of 11 February 1971.¹⁴ The legality and admissibility of other military uses follow from either the law of naval warfare and neutrality at sea,¹⁵ or from other rules and principles of customary international law.(p. 148)

2 Entitlement to Exercise Belligerent Rights at Sea

In land warfare there is no prohibition on entrusting those who are not combatants proper with the exercise of belligerent rights.¹⁶ However, in the law of naval warfare, as in the law of air warfare,¹⁷ the exercise of belligerent rights is reserved to warships.

According to Article 29 of LOSC, which is widely considered as reflecting customary international law,¹⁸ a 'warship' is defined as a ship

- belonging to the armed forces;
- bearing the external marks distinguishing such ships of its nationality;
- under the command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service list or its equivalent; and

- manned by a crew which is under regular armed forces discipline.

Only state ships that meet the conditions of this definition are entitled to take belligerent measures. It is important to stress that ‘belligerent measures’ are not restricted to the use of armed force against enemy military objectives, they also comprise so called prize measures, ie visit, search, diversion, capture, and seizure of (enemy and neutral) merchant vessels, civil aircraft and/or their cargoes.¹⁹ In view of the rights of belligerents *vis-à-vis* neutral navigation (and aviation) it is, for reasons of transparency, important that only those state ships that fulfil the requirements of the definition interfere with neutral vessels and neutral civilian aircraft. That approach is confirmed by the prohibition of privateering that dates back to the 1856 Declaration of Paris.²⁰

The definition of warships covers all seagoing vehicles—surface or subsurface—irrespective of their design, construction, or equipment. Hence, not only traditional warships, like frigates, destroyers, or submarines, qualify as warships, but so too do small speed boats, like those in use by the Iranian *Pasdaran*, or transport ships and tankers, because there is no necessity for a warship to be armed.²¹ Vessels other than warships which belong to, or are operated by, the state for exclusively non-commercial purposes and used for the performance of supporting tasks for the (naval) (p. 149) forces, but which have civilian crews, are auxiliaries. Other vessels performing governmental tasks such as police vessels, customs vessels and state-owned yachts are state ships but not warships.

There are, however, some unresolved issues. The first relates to the question whether the exercise of belligerent rights is indeed limited to state ships that meet all the requirements of the definition of a warship. Indeed, as regards the relationship between the belligerents’ naval forces, it may seem rather odd if a lawful target, such as an enemy warship, could only be attacked by a warship and not by another state ship. Therefore, it could be argued that, in view of the object and purpose of the rule—ie transparency *vis-à-vis* neutral navigation through the prohibition of privateering—the scope of applicability of the rule is limited to the exercise of belligerent rights against neutral vessels and aircraft. Then, hostile acts against enemy naval forces could be taken by any state ship. However, it is far from settled whether the formal approach underlying the traditional law of naval warfare has been abandoned by states.²²

The second unresolved issue concerns unmanned seagoing vehicles (USVs). At first glance, such systems do not qualify as warships simply because they are not manned by a crew. We should bear in mind, however, that very often USVs are either integral components of a warship’s weapons systems, or otherwise controlled from a military platform. If that military platform is a warship or a military aircraft the USV could be considered as sharing the legal status of the respective platform. If, however, USVs are not part of, or controlled by, a warship, especially if they operate autonomously on a pre-programmed course, it is impossible to follow that approach. Of course, if operated by the armed forces or by another governmental institution, they constitute state craft enjoying sovereign immunity.²³ That, however, does not mean that they are ‘warships’ within the definition and thus entitled to the exercise of the entire spectrum of belligerent rights. Some of the problems could be solved if the scope of applicability of the rule on the exercise of belligerent rights could be limited to prize measures taken against neutral merchant vessels and civil aircraft. Another solution could be to interpret the definition of ‘warship’ in a more liberal way as in the case of the definition of ‘military aircraft’.²⁴ At present, however, there is no sufficient state practice that would justify either approach.

The third issue relates to civilian mariners on board warships. The use of civilians on board warships, especially of service personnel, is common practice. In most cases they are not ‘under regular armed forces discipline’ although they are part of the crew. The definition of warships, however, does not imply that the entire crew is subjected to military discipline. It suffices if the warship is manned by a crew that fulfils that requirement. The use of the

indefinite article is of importance in view of (p. 150) the different wording of Article 4 of the 1907 Hague Convention No VII,²⁵ which provides that *the* crew of a converted merchant vessel 'must be subject to military discipline'. The use here of the definite article makes sense in view of the fact that the ship concerned used to be a merchant vessel and is now to be used as a warship. No such necessity exists in cases of ships that were from the outset designed and constructed as warships. Of course, there is no final answer to the question about the exact percentage of crew members who need to be under military discipline. In any event, the use of civilian mariners on board a warship does not alter that ship's status under international law, and it continues to be entitled to conduct all military operations, including prize measures, during an international armed conflict. It should not be forgotten, however, that despite the fact that there is no prohibition under the law of international armed conflict to use civilians for military purposes, they, after capture by the enemy, run the risk of being prosecuted for having directly participated in the hostilities.

3 The Legal Framework Applicable to the Conduct of Hostilities at Sea

A. Basic principles applicable to naval warfare

Although the law of naval warfare has its roots in older treaties, there is general agreement that the basic principles underlying contemporary international humanitarian law are equally applicable. This, especially, holds true for the principle of distinction, the principle of humanity, and for the prohibition of unnecessary suffering and superfluous injury.²⁶

However, the obligations of belligerents engaged in naval warfare with regard to the protection of the natural environment are still largely unsettled. In this context, the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD Convention) hardly involves any problems. In accordance with this Convention, a modification of the natural environment is prohibited if the environment so modified is to be used with hostile intent to the detriment of another state, ie as a weapon. Disregarding nuclear weapons whose employment could, for example, cause huge tidal waves (tsunamis), no conventional weapons or techniques are now known whose employment could produce the above-mentioned effects. Likewise, there are no problems with (p. 151) regard to naval forces attacking targets on land. In this case, Article 55 and the basic rule laid down in Article 35, paragraph 3 of the 1977 Additional Protocol I of 1977 will apply.

Things are different, however, with regard to the employment of means and methods of naval warfare that are not directed against land targets, or that do not affect civilians or civilian objects on land. Although Article 35, paragraph 3 of AP I will apply in this case, currently no conventional weapons are known whose employment could cause the qualified damage to the natural environment. In this context, however, account should be taken of the fact that today the natural environment ranks among the objects meriting protection in accordance with international humanitarian law. Therefore, any damage to or destruction of the natural environment that does not imply a military advantage and is carried out arbitrarily is prohibited. With regard to the employment of methods and means of warfare, the parties to an international armed conflict at sea are furthermore obliged to pay due regard to the natural environment and the provisions of international law established for its protection. This applies especially to rare or fragile ecosystems and the habitat of species that are endangered, threatened or in danger of extinction and of other forms of marine life.²⁷

B. Geographical area

The area of naval warfare is the three-dimensional space in which acts of naval warfare may be carried out.²⁸

First, the territory, internal waters, archipelagic waters and territorial sea areas of neutral states are inviolable. Subject to special rules on maritime neutrality, belligerent rights may not be exercised within those areas because that would constitute a violation of the neutral states' sovereignty. However, the sovereignty of neutral states does not extend to the contiguous zone, the continental shelf, the fishery zone and the exclusive economic zone. Hence, all acts of naval warfare may be carried out in these sea areas of a neutral state if the principle of due regard is adequately observed.²⁹

Areas in which military activities are prohibited due to international agreements are not part of the area of naval warfare. In addition to those areas which have been permanently neutralized by international agreements (eg the Åland Islands) this also applies to areas for which the parties to the conflict have agreed that they shall only be excluded from hostilities for the duration of the conflict or a particular period (eg undefended cities, demilitarized zones, and zones devoted to humanitarian purposes into which wounded and sick persons will be taken for medical care).(p. 152)

Consequently, the area of maritime warfare comprises:³⁰

- the land territory of the parties to the conflict;
- their internal waters;
- where applicable, their archipelagic waters;
- their territorial seas;
- neutral contiguous zones, fishery zones, continental shelf areas, and exclusive economic zones;
- the high seas; and
- the airspace above those areas.

If the territorial seas of the parties to the conflict form part of an international strait the right of transit passage of neutral navigation and aviation may not be impaired or suspended.³¹ The same holds true for the right of archipelagic sea lanes passage.³² In the event of armed hostilities on the high seas, the parties to the conflict are obliged to pay due regard to the legitimate interests of other states.³³

C. Military objectives

According to the principle of distinction, attacks, including those at sea, must be confined to military objectives. On the one hand, international law permits the employment of that kind of force that is required for the destruction of such objects, but on the other, any collateral damage that is excessive, and therefore no longer justified by considerations of military necessity, must be avoided, as must superfluous injury and unnecessary suffering. Moreover, the parties to the conflict must take all feasible precautions in order to ensure that civilians and civilian objects remain as unaffected as possible by the hostilities.³⁴

The definition of military objectives in Article 52, paragraph 2 of AP I has been recognized as customary in character and it therefore applies not only to naval attacks on land targets, but also to any other use of weapons at sea.³⁵ Accordingly, military objectives are:

objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

(p. 153)

It must be stressed that this definition contains two main elements, both of which must be fulfilled:

- effective contribution to military action; and
- definite military advantage by neutralization.

In this context it must be noted that 'capture' is merely an alternative to attack. As such it must be strictly distinguished from capture based on the law of prize. Hence, there is no need for a judgment delivered by a prize court. Upon seizure, ownership of lawful enemy military objectives automatically passes to the capturing state.

(i) Enemy warships, auxiliaries, and military aircraft

It follows from the definition of military objectives that enemy warships and military aircraft may always be attacked and captured without prior warning because they contribute to the enemy's military action by nature and, obviously, their destruction or neutralization will always constitute a definite military advantage. The same applies to enemy auxiliary vessels. The fact that these vessels do not qualify as warships only means that they are forbidden to carry out acts of naval warfare. Still, they are effectively contributing to the enemy's military activities and their neutralization will constitute a definite military advantage.

These principles were illustrated during the Falklands/Malvinas Conflict (1982). After the sinking of the Argentine warship *General Belgrano* some claimed that the British submarine's attack had been illegal because it had taken place outside the British exclusion zone and the *General Belgrano* had been moving away from that zone.³⁶ This claim would only be correct if the United Kingdom had, in a legally binding manner, confined attacks on military objectives to the area inside the zone. Since no such undertaking had been given, and there was no doubt that the *General Belgrano* was an enemy warship, its sinking was lawful. The sinking would have been permissible even if it had taken place, for example, in the Indian Ocean. The 'ships taken up from trade' (STUFTS) which were used by the United Kingdom were also lawful military objectives, because they were auxiliary vessels. The fact that they were not attacked by Argentine naval and air forces, was no indication of any legal opinion on the part of Argentina to the effect that those ships were protected from attacks by international law, but merely the result of a lack of appropriate air and naval capabilities.

Of course, ships and aircraft qualifying as lawful military objectives may not be attacked if they have clearly expressed their intention to surrender. A ship can do this by hoisting its flag. That presupposes visual contact. Today, however, targets are (p. 154) attacked 'beyond visual range' (BVR) and it is unsettled whether a given conduct (eg electronic signals) is to be considered a clear expression of surrender.³⁷

The crews of captured or destroyed enemy warships, auxiliary vessels, and military aircraft are entitled to prisoner of war status. Moreover, after each engagement, the parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment and to ensure their adequate care, and to search for the dead and prevent their being despoiled.³⁸ As the wording 'after each engagement' suggests, this obligation does not apply at all times, but only when it does not conflict with military considerations. It does not apply as long as search and collection would imply disproportionately high risks to one's own security.³⁹

(ii) *Enemy merchant vessels and civil aircraft*

Merchant vessels and civil aircraft are enemy in character if they either fly the flag or bear the markings of the opposing party to the conflict, or if their enemy character may be presumed because of, eg, ownership, charter or control. Information to this effect will, as a rule, be provided by the intelligence services.

Within the geographical area of naval warfare, enemy merchant vessels and civil aircraft may be intercepted, visited, searched, and captured under the law of prize. Unless they enjoy special protection, they will always constitute 'good prizes'.⁴⁰ However, in principle, attacks on these vehicles are inadmissible, because they do not qualify as lawful military objectives by the mere fact of their enemy character/nature. In this context, it is important to note that, according to the 1936 London Protocol, an attack on an enemy merchant vessel is admissible in the cases of 'persistent refusal to stop on being duly summoned, or of active resistance to visit or search'. If an enemy merchant vessel is armed or sailing under convoy of enemy warships, this is a clear indication that it intends to actively resist visit and search. Therefore, it may be attacked in these cases. Moreover, it was clarified in the report by the committee of legal experts concerning the London Naval Treaty of 1930 that:

the expression 'merchant vessel', where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.

Today there is agreement that the prohibition of attacks on enemy merchant vessels (and enemy civil aircraft) does not apply if they are effectively contributing to the (p. 155) enemy's military action and if their destruction or neutralization offers a definite military advantage in the circumstances ruling at the time.

Hence, enemy merchant vessels may be attacked, as lawful military objectives, if they:⁴¹

- engage in belligerent acts on behalf of the enemy, eg by minelaying or mine clearance or by taking prize measures against other merchant vessels;
- act as auxiliary vessels to the enemy's armed forces, eg by transporting troops or replenishing warships;
- are incorporated into or assisting the enemy's intelligence and communication system, eg by engaging in reconnaissance, early warning, surveillance or other command, control, communications, and information missions;
- are sailing under convoy of enemy warships or enemy military aircraft;
- carry arms enabling them to inflict considerable damage on warships (this does not include light weapons used for the crew's self-defence, for instance, against pirates, and purely defensive systems such as chaff); or
- otherwise make an effective contribution to the enemy's military action, eg by carrying military cargo.

These rules also apply to enemy civil aircraft. They must, however, be adapted to the special features of aviation.⁴²

It goes without saying that even when, on the conditions mentioned, enemy merchant vessels and civil aircraft constitute lawful military objectives and may thus be attacked, the principles applicable to naval warfare and the rules concerning precautions in attack will apply.

(iii) Land targets

Naval attacks against land targets are regulated in the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX). For many states, however, this Convention is no longer applicable because it has been superseded by the 1977 Additional Protocol I. Therefore, in addition to the principles and rules already mentioned (principle of distinction, precautions in attack), attacks on land targets, whether conducted by naval guns or missiles or by naval aviation, are, in particular, subject to the provisions of Articles 50–60 of AP I. (p. 156)

D. Enemy vessels and aircraft enjoying (special) protection

Enemy vessels and aircraft serving humanitarian or other protected tasks may be neither attacked nor captured as long as their use is confined to the fulfilment of these tasks. While, due to the diversity of their functions, the protected status of these vehicles is designed in different ways, they must neither take part in hostilities nor wilfully interfere with the movements of armed forces. Besides, they are obliged to identify themselves and submit to inspections by enemy forces as well as comply with directions ordering them to leave a particular sea area.

(i) Hospital ships

Hospital ships are ‘ships built or equipped [...] specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them’.⁴³ It makes no difference whether they are transporting wounded, sick, and shipwrecked members of the armed forces or wounded, sick, and shipwrecked civilians. All that matters is that they are not performing any other tasks, especially none of a military nature.⁴⁴

In principle, the tonnage and the location of employment are of no significance. Nevertheless, to ensure maximum security, only hospital ships of over 2,000 tons gross should be utilized.⁴⁵

Hospital ships may be utilized by the naval forces of a party to the conflict (military hospital ships) or by officially recognized relief societies and private persons. In the latter case, they must be given an official commission by the party concerned.⁴⁶ Hospital ships utilized by neutral relief organizations or neutral private persons require the consent of their respective governments and an authorization granted by a party to the conflict whose directions they must accept.⁴⁷

Hospital ships may in no circumstances be attacked or captured, but shall at all times be respected and protected.⁴⁸ Of course, during and after an engagement they will act at their own risk.⁴⁹ This means that no violation of international law will be committed if they are located in the area of operations and affected by hostilities. Their lifeboats are protected as well. This protection is granted on condition that ten days before their employment their names and descriptions are notified to the parties to the conflict. The characteristics which must appear in this notification shall (p. 157) include registered gross tonnage, the length from stem to stern, and the number of masts and funnels.⁵⁰

The religious, medical, and hospital personnel of hospital ships and their crews shall also be respected and protected. They may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.⁵¹ This extensive protection of the personnel is to be explained by the consideration that hospital ships can only effectively perform their humanitarian functions if they can constantly rely on their trained and skilled personnel.

Hospital ships shall be distinctively marked in accordance with Article 43 of GC II and, because of the diminishing relevance of visual means of identification, they should also use such acoustic, optical, and electronic means of identification as agreed upon by the parties to the conflict.⁵² The markings and other means of identification are not constitutive for protected status but shall only facilitate identification of these vehicles. In view of the problems involved in clear identification even today, the parties to the conflict should follow the example of the Falklands/Malvinas Conflict and, whenever practically possible, conclude agreements to define certain sea areas as so-called red cross boxes in which hospital ships of either side are safe to operate.⁵³

The protection of hospital ships may not cease as long as they perform their protected function and they do not perform acts harmful to the enemy.⁵⁴ It is unsettled whether the prohibition, in Article 34, paragraph 2 of GC II, prohibiting the possession or use of 'a secret code for their wireless or other means of communication' is of continuing validity. This provision appears to imply a prohibition on possession and use of secure communication equipment for both sending and receiving encrypted communications. However, the English version is not the only authoritative text of the Convention. The equally authoritative French (and Spanish) text provides that 'les navires-hôpitaux ne pourront posséder ni utiliser de code secret pour leurs émissions par T.S.F. ou par tout autre moyen de communication'. According to Article 33, paragraph 3 of the Vienna Convention on the Law of Treaties 'the terms of the treaty are presumed to have the same meaning in each authentic text'.⁵⁵ Therefore, the conclusion is justified that only the possession or use of secure communications equipment for transmitting, not for receiving, messages in secret code is prohibited. While some states, like the United Kingdom during (p. 158) the Falklands/Malvinas conflict,⁵⁶ hesitate to share this interpretation others, like the United States⁵⁷ and Germany,⁵⁸ obviously are prepared to provide hospital ships with equipment that would enable them to receive messages in secret code. Indeed, that would not only be in accordance with the generally accepted rules on the interpretation of multilingual treaties. It would also guarantee the effective performance of the genuinely humanitarian function of hospital ships. If hospital ships were not allowed to receive encrypted messages the respective enemy would be in a position to intercept messages sent to them and to deduce from that message the location of a future military operation.⁵⁹ If a 'Red Cross Box' is not a feasible alternative the hospital ship would be prevented from performing its humanitarian function because the respective flag state would be forced to, at least, delay the message in order not to jeopardize the military operation in question.⁶⁰ In view of the overall importance of the protection of the wounded, sick, and shipwrecked an interpretation leading to such a result would be manifestly absurd or unreasonable. Hence, it is no surprise that the San Remo Manual provides:

In order to fulfill most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.⁶¹

This statement implies that hospital ships should be permitted to also use cryptographic equipment for the sending of messages. Indeed, in the explanations to the San Remo Manual,⁶² the commentators state:

The participants were of the opinion that as the inability to receive encrypted information jeopardises the ability of hospital ships to operate effectively, the rule ought to concentrate on the sending of military intelligence. Therefore, in order to fulfil their humanitarian mission effectively, hospital ships should be permitted to use cryptographic equipment (modern terminology for a secret code) which in modern technology is an integral part of most communications systems. This cryptographic equipment may not be used for any purpose other than the

humanitarian tasks of the vessel, obviously not to transmit intelligence data, nor for any other incompatible purpose.

(p. 159)

Seemingly, according to the San Remo Manual, hospital ships would not be prohibited to send encrypted messages as long as they are strictly related to the humanitarian function of the hospital ship and not used for any militarily useful purposes. In view of the importance of the humanitarian function and in view of modern communications technology it would indeed make sense if Article 34, paragraph 2 of GC II could be interpreted in that way. In this context it needs to be borne in mind that the prohibition of a 'secret code' is solely designed to reinforce the prohibition of committing acts harmful to the enemy in Article 34, paragraph 1 of GC II. Moreover, according to Article 35(1) of GC II a hospital ship may have on board an 'apparatus exclusively intended to facilitate navigation or communication'. Today, modern means of communication necessitate the use of equipment that could be considered as violating the 'secret code' prohibition of Article 34 of GC II. The same holds true for navigation equipment, eg if using military GPS. The rules on medical aircraft in Article 28(2) of the 1977 Additional Protocol I take that development into account. While medical aircraft are prohibited from being 'used to collect or transmit intelligence data' this implies that they are allowed to receive and transmit messages in a secret code as long as the respective data are not of a military nature.

Hence, an extensive interpretation would certainly be in accordance with the object and purpose of Article 34, paragraph 2 of GC II. However, every interpretation finds its limits in the 'ordinary meaning to be given to the terms of the treaty'. These terms merely justify an interpretation allowing hospital ships the use of equipment for the receiving, not for the sending, of encrypted messages. The San Remo Manual together with the explanations does not serve as evidence for a view to the contrary. In the explanations it is made clear that paragraph 171 does not reflect the law as it stands. Rather, the majority view was that 'the present law still prohibits the use of such equipment and that this law has not fallen into desuetude. [Therefore the majority was] of the opinion that the text needed to reflect this fact and that the participants were encouraging a change in the law'.⁶³

Since the sending of encrypted messages by hospital ships cannot be based upon the *lex lata*, states whose interests are specially affected should endeavour to contribute to a modification of the law. While a codification conference is not a realistic option, those states should rather convince other states to recognize a deviating practice as reasonable in order to safeguard the specially protected humanitarian function of such ships *de lege ferenda*. Numerous statements to that effect would certainly contribute to a modification of the law as it now stands.(p. 160)

An attack or other enforcement action is permissible only if a hospital ship has ignored a previous warning setting a reasonable time limit for abandoning the action or reversing the refusal in question. Even then, it may only be attacked if:⁶⁴

- temporary arrest, diversion or capture are practically impossible;
- no other means of military control are available;
- non-compliance with the requirements for protection is serious enough to justify the assumption that the hospital ship may qualify as an admissible military objective; and
- the loss of life and collateral damage are not out of all proportion to the concrete and direct military advantage anticipated.

(ii) Coastal rescue craft and other medical transports

To the extent permitted by the requirements of combat operations, small coastal rescue craft employed by states or by officially recognized relief organizations, including their lifeboats, are protected as well.⁶⁵ This shall also apply if no prior notification to that effect has been provided. Nevertheless, any details concerning these small craft which will facilitate their identification and recognition should be submitted beforehand.

Other medical transports shall be respected and protected as well. If they are transporting equipment exclusively intended for the treatment of wounded, sick, and shipwrecked members of armed forces or for the prevention of disease, and if the particulars of their voyage have been notified to the enemy and approved by the latter, they may be intercepted and searched but not captured and attacked. The equipment on board must not be seized. Other medical transports shall be protected as well, in particular they must not be withdrawn from their medical mission. They will continue, however, to be subject to the law of war. They may be ordered to stop, divert, or keep a particular course. Such orders must be complied with. As soon as they are no longer carrying any wounded, sick, and shipwrecked, the transports concerned may be captured and seized.

These craft shall be marked. Their protected status will exist as long as they are employed for the performance of their usual tasks, identify themselves, and comply with an order to stop, submit to visit and search, or keep a particular course, and do not wilfully interfere with the movements of armed forces. They may, however, only be attacked if diversion or capture are practically impossible, no other means of military control are available, non-compliance with the requirements for protection is serious enough to justify the assumption that they may (p. 161) qualify as lawful military objectives, and the loss of life and collateral damage are not excessive in relation to the concrete and direct military advantage anticipated.

(iii) Cartel vessels and aircraft as well as other vehicles granted safe conduct

As a rule, cartel vessels and aircraft are used for the transport of prisoners of war or of *parlementaires*. Just like other vehicles given safe conduct, they shall only enjoy protection if this has been agreed between the parties to the conflict and as long as they observe the conditions laid down in the respective agreement.⁶⁶

(iv) Ships engaged in local trade and coastal fishery

Vessels utilized solely for coastal fishery (not deep ocean fishery!) or for small-scale local trade as well as their fishing equipment, their rigging, their shipboard equipment and their cargo may not be captured, seized, or attacked because they are intended for no other purpose than to satisfy the basic needs of the civilian population.⁶⁷ These craft too will only be protected if they are performing their usual tasks and do not interfere with the movements of naval forces or otherwise take part in the hostilities.

(v) Other protected vessels

Finally, the following vessels are also exempt from capture or seizure and attack:⁶⁸

- ships performing humanitarian tasks, especially those carrying relief shipments for the civilian population;
- ships enjoying special protection in accordance with the Hague Convention of 1954 because they are carrying cultural property;
- ships that have been assigned religious (eg pilgrim ships), scientific, or humane tasks; research ships which, for instance, are also collecting data that can be used in a military context are not protected;

- ships built and employed for the sole purpose of fighting marine pollution; and
- their lifeboats and life rafts.

E. Means and methods of naval warfare

It follows from the applicability of the basic principles of international humanitarian law to naval warfare that the belligerents are prohibited from engaging in indiscriminate (p. 162) attacks or to use methods and means of naval warfare that cause, or are expected to cause, unnecessary suffering or superfluous injury. Moreover, they are, of course, under an obligation to comply with general or specific prohibitions on certain weapons, such as chemical or biological weapons.

The law of naval warfare provides such specific rules on means and methods whose employment is to be considered a special feature of naval combat operations.

(i) Naval mines and torpedoes

Naval mines are lawful means of naval warfare. This holds true for the old submarine contact mines as for modern naval mines. It does make a difference whether the mines concerned are anchored or unanchored naval mines.⁶⁹ The same applies with regard to torpedoes, which means that it does not matter whether they are wire-guided, actively homing in on their targets, or operated by a combination of different technologies.⁷⁰

However, the use of naval mines and torpedoes involves the risk of damaging vessels and objects not qualifying as lawful military objectives, especially neutral and protected vessels. Therefore, certain principles aiming at protecting, as far as possible, innocent navigation from these hazards were agreed upon in the 1907 Hague Convention VIII. According to the Convention, naval mines must be so constructed as to become harmless as soon as they have broken loose from their moorings or when they can no longer be adequately controlled for other reasons. Torpedoes must become harmless when they have missed their mark. Although the provisions of Hague Convention VIII are formally applicable only to automatic submarine contact mines, today they are regarded as customary law that also applies to modern (and highly sophisticated) naval mines and torpedoes.

Taking into account that modern naval mines and torpedoes are highly discriminating weapons, the established rules regarding the use of these means of naval warfare can be summarized as follows:⁷¹

- Torpedoes must not be employed unless they sink or become harmless in some other way after having terminated their run.
- Naval mines may be used only for legitimate purposes; this also includes the denial of sea areas to the enemy.
- Subject to the rules concerning floating naval mines, the use of naval mines is restricted to those types that can be neutralized once they have broken loose from (p. 163) their moorings or their control can no longer be adequately ensured for other reasons.
- The employment of free floating naval mines is prohibited unless they are employed against a military objective and they become harmless within one hour after ceasing to be under control.
- The laying of naval mines or the arming of naval mines and minefields that have already been laid must be notified unless they can only hit ships that are lawful military objectives.

- The parties to the conflict are obligated to map the location of the naval mines they have laid.
- If naval mines are laid in the internal waters, territorial seas, or archipelagic waters of the parties to the conflict, shipping of neutral states should be provided an opportunity to leave these sea areas beforehand.
- The laying of naval mines is prohibited in neutral internal waters, neutral archipelagic waters, and neutral territorial seas.
- The laying of naval mines must not have the effect of barring neutral territory or neutral waters.
- The party to the conflict laying naval mines must pay due regard to the legitimate interests in freedom of navigation on the high seas, eg by keeping open safe alternative routes for neutral shipping.
- The rights of transit passage and archipelagic sea lanes passage must not be impaired or suspended unless safe and equally convenient alternative routes are open to sea and air traffic.
- After termination of hostilities, each party to the conflict undertakes to do its utmost to render harmless the naval mines it has laid. With regard to the mines laid in the enemy's territorial sea, the enemy's internal waters or the enemy's archipelagic waters, the party to the conflict which laid them shall notify the former opponent of their position.

(ii) Missiles

Missiles and other projectiles using over-the-horizon or beyond-visual-range technologies are admissible means of naval warfare. This requires, however, that they are either equipped with sensors or receive enough data from external sources to adequately ensure that they can only be directed against lawful military objectives.⁷²

(iii) Submarines

Submarines are warships proper, ie as long as they meet the requirements of the definition laid down in Article 29 of LOSC and in the corresponding customary (p. 164) rule, they are lawful means of warfare and thus entitled to actively take part in hostilities at sea.⁷³ This includes combat activities against enemy military objectives as well as prize measures against enemy and neutral merchant vessels. It needs to be emphasized that submarines are subject to the same rules and principles of international law applicable to surface warships.⁷⁴ Since there is agreement on the fact that, for instance, enemy and neutral merchant vessels can, on the conditions mentioned, also be lawful military objectives,⁷⁵ today the relevance of this principle is confined to measures based on the law of prize. If crew, passengers, and papers of a merchant vessel subject to capture cannot be taken to a place of safety, destruction based on the law of prize must be avoided.

(iv) Naval blockade

A naval blockade is a method of warfare.⁷⁶ A blockade is used to prevent naval vessels and aircraft from entering or exiting enemy coastal areas or ports. It is aimed at preventing imports and exports from the enemy area concerned as well as maritime and air transport from and to that area. In contrast to the law of prize, which only allows action against certain vehicles and goods that furthermore must be intended for the enemy's armed forces, a blockade may be used to comprehensively prevent enemy commerce, ie imports and exports. The practical consequences of these findings are quite extensive. Thus, the practice in the Iran-Iraq conflict (1980-88) of preventing the export of petroleum exclusively by attacking tankers was illegal. Even though revenues from sales will enable the enemy to sustain or intensify the war effort, export goods will never constitute

contraband. The only admissible way of preventing exports is by establishing and enforcing a blockade.

Although a naval blockade is directed exclusively against enemy territory, it also affects neutral vessels and aircraft. Therefore the issue of naval blockade is sometimes dealt with in the context of maritime neutrality.⁷⁷(p. 165)

(a) Establishment and maintenance of a blockade

A blockade must be declared and notified by the government of the party to the conflict or by a commander authorized by his government.⁷⁸ The declaration must include:

- the exact date on which the blockade is to begin;
- the exact coordinates of the blockade line; and
- the period of grace granted neutral vessels and aircraft to leave the blockaded area.

Likewise, the blockading power is obliged to declare and notify:

- any expansion or prolongation,
- reestablishment; and
- any temporary or final lifting of the blockade.⁷⁹

The enemy as well as all neutral states must be notified of the declaration of a blockade. This may usually be achieved by a Notice to Mariners (NOTMAR).

(b) Effectiveness

In order to be legally binding, a naval blockade must be effective.⁸⁰ Effectiveness is a question of fact, ie it depends on the circumstances of each individual case. In general, however, a blockade is effective if, due to the presence of naval and air forces or other assets for maintaining and enforcing the blockade, there is a high probability that leaving or heading for the blockaded area will be detected and prevented or if, for other reasons, such movements will involve considerable hazards. Therefore, even a so-called long-distance blockade is not inadmissible in any case.⁸¹ The fact that the blockading force is temporarily absent due to stress of weather or for the purpose of pursuing a blockade runner will not jeopardize the effectiveness of a blockade.⁸² Neither is there any need to close every avenue of approach or exit so that, for instance, air transports do not have to be prevented.⁸³

If a blockade no longer meets these requirements it will become legally void. An expulsion or destruction of the blockading force by the enemy will terminate effectiveness, even if new forces are entrusted with maintaining and enforcing the blockade straightaway. Such cases require a renewed declaration and notification of the blockade.(p. 166)

(c) Further conditions of admissibility

Maintenance and enforcement of a blockade do not always require the employment of surface forces. It is also admissible to use a combination of means and methods of warfare that are consistent with international humanitarian law.⁸⁴ Thus it may be sufficient, for instance, to blockade an enemy port by the employment of naval mines.⁸⁵ It must be ensured, however, that vessels enjoying special rights of access (eg distressed vessels) can be given a timely warning and directed into a port without any damage.

As a method of warfare solely directed against enemy, or enemy controlled, territory, a naval blockade must not bar access to neutral ports and coasts.⁸⁶

A blockade must be implemented impartially.⁸⁷ This means that it must be enforced against vessels and aircraft of all states. Preferential treatment of the vehicles of a particular nationality, including those of one's own nation, renders the blockade legally invalid.

A blockade must never be devoted to the sole objective of starving the civilian population or depriving it of vital items (prohibition of the so-called hunger blockade). A blockade is also inadmissible, if it is certain or to be anticipated that the negative effect on the civilian population is excessive in relation to the concrete and direct military advantage anticipated.⁸⁸

(d) Special entry and exit regulations

Although neutral warships and neutral military aircraft enjoy no right of access to the blockaded area, their entry or exit may be authorized. Such special authorization may be made subject to conditions the blockading power considers appropriate.⁸⁹

Neutral vessels and aircraft in evident distress should be authorized entry into as well as subsequent exit from the area. Of course, this authorization may also be subject to special conditions.

If there is a shortage of foodstuffs and pharmaceuticals or other essential items for the civilian population in the blockaded area, the blockading power is obligated to authorize the passage of relief consignments.⁹⁰ This also applies to pharmaceuticals intended for the wounded and sick members of the armed forces.⁹¹ The blockading power will continue to be entitled, however, to determine the technical details for a passage of this kind, including visit and search. Moreover, it can (p. 167) make the authorization conditional upon the fact that local distribution of relief supplies is monitored by a protecting power or a humanitarian relief organization (eg International Committee of the Red Cross) ensuring impartiality. Use of the relief consignments is to be confined to their original purpose.⁹²

(e) Breach of blockade

A vessel or aircraft which has attempted to leave or enter the blockaded area while being aware of the blockade is subject to capture as long as it is being pursued by a warship or military aircraft. If pursuit is abandoned, for instance, because the vessel has reached a neutral territorial sea, it may no longer be captured even if it is subsequently encountered on the high seas again. A vessel that has been captured because of a breach of blockade is subject to confiscation. If it actively resists capture despite prior warning, it may be attacked.⁹³

An attempt of breach of blockade occurs if a vessel leaves a blockaded port or if an aircraft takes off from an airport in the blockaded area or if they are on a course destined to such port or airport. According to the US Manual, it 'is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area'.⁹⁴ This implies that the doctrine of continuous voyage may be applied to naval blockades. There are, however, good reasons to maintain that the doctrine of continuous voyage may not be applied to blockades.⁹⁵ Moreover, Article 19 of the 1909 London Declaration provides: 'Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.'

(f) Zones

Under the conditions of modern naval warfare it is indispensable to monitor and control as far as possible the area of operations and the objects within the respective sea area. The law of naval warfare recognizes this by, inter alia, accepting interference with neutral navigation (and aviation) for force protection or other legitimate purposes. As long as the principle of proportionality is observed, the respective control measures may be extended beyond the actual area of operations.

(g) Control of the immediate vicinity of operations and warning zones

The immediate area or vicinity of operations is that area within which hostilities are taking place or belligerent forces are actually operating.⁹⁶ Within that area belligerents are entitled to establish special restrictions for neutral maritime and air transport. They may, for instance, require vessels and aircraft to clearly identify (p. 168) themselves or refrain from certain activities when approaching a force (so-called defence bubbles which are also admissible in peacetime). If this is absolutely necessary for the safety of the units or the success of the respective mission, the access of neutral vehicles to the area of operations may be barred completely. Such measures, however, are only admissible in the area within which combat activities are taking place or units of the naval or air forces are actually operating, or in the adjoining environment. Access to neutral ports or coasts or passage through international straits in which the right of transit passage applies must not be impeded under any circumstances, unless another route of similar convenience with respect to navigational and hydrographical characteristics is available. The recognition of special belligerent rights in the immediate vicinity of operations is due to the fact that the presence of vessels and aircraft in that area will legitimately be considered a high threat, both for the vehicles concerned and for the belligerent units operating in the area.

Warning zones are designed to warn others of certain dangers caused by either the lawful uses of the seas or international air space (eg weapons exercises), measures of force protection ('defensive bubbles'), or activities taken in order to accomplish a particular mission. Their legality is generally recognized both in times of peace and in times of war.⁹⁷

(h) Exclusion zones

In view of the illegality of the war zones established especially by the Nuremberg Tribunal⁹⁸ and the doubts raised as to the legality of the zones established by the belligerents of the Falklands/Malvinas conflict (1982)⁹⁹ and of the Iran-Iraq War (1980-88),¹⁰⁰ it is not absolutely clear whether and to what extent so-called exclusion zones are in accordance with the law of naval warfare. Still, because of their recognition in national military manuals,¹⁰¹ the San Remo Manual,¹⁰² and the Helsinki Principles¹⁰³ some general conclusions are possible.(p. 169)

An exclusion zone is the three-dimensional space in which a party to the conflict claims comprehensive control rights or denies access to vessels and aircraft in order to protect them from the effects of armed conflicts. Due to their extensive effects on neutral maritime and air transport, such exclusion zones are admissible only in exceptional cases and are subject to stringent requirements. They must not be devoted to the purpose of evading the requirements of the law of blockade or of absolving the parties to the conflict of the obligation to positively identify lawful military targets. A vehicle that may not be attacked, ie especially neutral merchant vessels and civil aircraft, will never lose this protection for the sole reason that they have entered an exclusion zone without authorization.

If a party to the conflict thus feels compelled in specific exceptional circumstances to establish (and enforce) an exclusion zone, the following restrictions apply:¹⁰⁴

- Inside the exclusion zone the same rules and principles of international law applicable in international armed conflict will apply as outside.
- Location and size of the zone and the duration of its existence as well as the measures to be taken in it must not be disproportionate to the absolutely necessary and legitimate needs of security and defence.
- Due regard must be paid to the rights of the neutral states regarding the use of the seas.

- Safe passages for sea and air traffic must be kept open if, due to its spatial dimensions, the zone considerably restricts free and safe access to neutral ports and coasts or if routes normally used by international sea and air traffic are affected.
- The beginning and duration of the zone's existence and its location and size as well as the restrictions imposed on neutral vehicles in this area must be publicized, including the notification of all other states.

If a neutral vessel or aircraft observes the restrictions imposed on it in an exclusion zone by one of the parties to the conflict, the opposing party to the conflict may not consider such compliance as a form of contributing to the enemy's military action.(p. 170)

4 Capture and Destruction of Enemy Merchant Vessels and Civil Aircraft under Prize Law

A. Enemy merchant vessels and their cargoes

Unless performing special tasks, especially of a humanitarian character, enemy merchant vessels and civil aircraft may be subjected to all measures based on the law of prize. Hence, they may be captured at any time within the region of naval warfare.¹⁰⁵ Capture does not require prior interception followed by visit and search. Capture only means the assumption of command. Ownership of these vehicles will pass to the capturing state only as a result of a judgment delivered by a prize court.¹⁰⁶

In exceptional situations, captured enemy merchant vessels and civil aircraft may be destroyed as prizes if, owing to the circumstances, there is no chance of taking them into an own or allied port.¹⁰⁷ Such destruction under the law of prize must be strictly distinguished from cases in which an enemy merchant vessel qualifies as a lawful military objective. It is only admissible if, prior to destruction:

- passengers and crew have been placed in a place of safety; for this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board;
- the ship's papers have been safeguarded; and
- if feasible, the personal effects of passengers and crew have also been taken to a safe place.¹⁰⁸

The cargo of enemy vehicles is subject to seizure and confiscation if it can be established that it consists of enemy goods or contraband. Goods owned by neutrals and not constituting contraband must be returned to the owners. If this is not possible, the owners must be indemnified.(p. 171)

B. Crews and passengers of captured enemy merchant vessels and civil aircraft

The officers and crew members of captured enemy merchant vessels and civil aircraft are entitled to prisoner of war status.¹⁰⁹ However, they may also be released. The passengers are subject to the discipline of the captor. Passengers who are nationals of a neutral state will be released unless they have directly taken part in the hostilities, actively resisted capture, or if they had been employed in the service of the enemy. In such cases they will also become prisoners of war.

5 Maritime Neutrality

A. Preliminary remarks

At present the continuing validity and binding force of the law of neutrality is far from generally accepted. In view of the political implications and economic interests, but also due to the comparatively long time for which the international agreements have been in force, there is no full consensus among states about the scope of the law of neutrality. Even today, some states take the view that the applicability of the law of neutrality is limited to a state of war *strictu sensu*. However, there are considerably different conceptions about the features distinguishing 'war' from 'international armed conflict'. While some states continue to regard a declaration of war as a precondition, others base their assessment on the extent and intensity of the armed conflict.¹¹⁰

Irrespective of these uncertainties, however, there is general agreement on the fact that in each international armed conflict at sea there is a need to protect states that are not involved in the conflict, their nationals and the aircraft and vessels operated under their flag. The law of maritime neutrality, however, not only comprises protective regulations, but also obligations to be fulfilled by neutral states and their nationals because the law of maritime neutrality also has an aim to prevent the escalation of an international armed conflict.¹¹¹(p. 172)

B. Fundamental features of maritime neutrality

(i) *Neutral status*

As long as states explicitly proclaim their neutrality once an international armed conflict has come into existence, their neutral status is beyond doubt. In present-day armed conflicts, however, it has become very rare to issue such declarations of neutrality. This is the result, among other things, of the fact that, according to traditional law, neutral states are especially committed to the strict observance of impartiality and abstention so that, for instance, the export of goods to one of the parties to the conflict could be considered by the other party to the conflict as a violation of the state's neutral duties.

It is true that the law of maritime neutrality also involves obligations of abstention and impartiality, but these are far less stringent than the ones laid down in the traditional law of neutrality. Regarding the law of maritime neutrality, it is therefore generally agreed that every state that is not a party to the conflict is a neutral state.

The terms 'neutral vessels' and 'neutral aircraft' refer to all vessels and aircraft either flying the flag or bearing the markings of a neutral state. In this context it must be emphasized that the flag and the marks only provide *prima facie* evidence. Consequently, vessels and aircraft, although flying a neutral flag, or bearing neutral marks, may be treated as enemy in character, if, for example, a vessel is found to be registered in the enemy state or if there is other evidence justifying doubt as to its entitlement to fly the neutral flag.¹¹²

(ii) *Neutrality and the Charter of the United Nations*

According to the Charter of the United Nations, states are obliged to settle their disputes by peaceful means. In particular, it is prohibited to resort to the threat or use of military force. If the UN Security Council determines a threat to or a breach of the peace, or the existence of an act of aggression according to Chapter VII of the Charter, it can decide upon non-military or military enforcement measures designed to maintain or restore international peace and security. When called upon by the Security Council, the members of the United Nations are obliged to support the United Nations or the states authorized by the Security Council to execute the enforcement measures. In particular, they are forbidden to render any kind of assistance to the state against which enforcement action is taken. At best, an

exception will be made in the case of humanitarian relief shipments that, as a rule, require the consent of the Security Council.

These obligations laid down in the Charter of the United Nations will take precedence over the obligations arising from the law of maritime neutrality.¹¹³ If the (p. 173) Security Council has made use of its powers under Chapter VII of the Charter, no state will be allowed to escape the resulting duties by invoking the law of (maritime) neutrality. Of course, this precedence is of practical significance only in those cases in which the Security Council decides on enforcement measures or at least names the lawbreaker. Without an authoritative decision of the Security Council there is at best only the theoretical possibility of declaring a breach of the law because, in practice, not infrequently both or all parties to the conflict will plead that they are only making use of their right of self-defence. Consequently, in the absence of a Security Council decision the states not involved in the conflict remain free to claim neutral status.

C. Neutral sea areas

The outbreak of armed hostilities at an international level does not alter the continued validity of the international law of peace with regard to the relationship between the parties to the conflict and neutral states. The international law of peace, however, is modified by the law of maritime neutrality to the extent that this is required for the purpose of preventing an escalation of the armed conflict. On the one hand, the parties to the conflict are obliged to respect the inviolability of neutral territory, neutral internal waters, neutral territorial seas, and the neutral airspace above these areas.¹¹⁴ Within and above these areas all hostilities, that is the use of armed force and of other measures of maritime war (including measures based on the law of prize) are prohibited.¹¹⁵ There is one exception to this principle which applies to measures of self-defence, in the event that one of the parties to the conflict is under (imminent) attack in these areas. On the other hand, a neutral state is obliged to prevent the parties to the conflict from abusing these areas as a sanctuary or base of operations. If the neutral state is unwilling or unable to do so, the aggrieved belligerent is entitled to take all measures necessary to terminate the violation of neutral territory or neutral waters.¹¹⁶

(i) Belligerent warships in neutral ports and roadsteads

A neutral state is entitled to close all or some of its ports and roadsteads to warships of the parties to the conflict. In doing so it must not discriminate against any of these parties. If, at the outbreak of hostilities, a warship of a party to the conflict is in a neutral port or roadstead, and if the neutral state decides to close its ports and roadsteads, the warship must be afforded a 24-hour period of grace in which to (p. 174) depart. Except for cases of distress, belligerent warships are only allowed to call at those ports and roadsteads that have been kept open. The neutral state is obliged to take all measures required to enforce the closure.

Unless the neutral state has adopted regulations to the contrary, the period for which a warship of the parties to the conflict stays in its ports and roadsteads must not exceed 24 hours.¹¹⁷ A warship's stay exceeding 24 hours is admissible only on the occasion of damage or due to the existing sea conditions. As soon as the cause of the delay has been removed, the warship must immediately leave. If it does not, or is unable to comply with an appropriate request, the warship shall be arrested and its crew shall be interned.

Unless otherwise provided for by the laws and regulations of the neutral state, not more than three warships of one party to the conflict may be in one of the neutral state's ports or roadsteads at the same time. When warships of both parties to the conflict are present in a neutral port or roadstead at the same, not less than 24 hours must elapse between the departure of the vessels of the respective parties.¹¹⁸ The order of departure is determined by the order of arrival, unless an extension of stay has been granted to the ship that was the

first to arrive. A warship of a party to the conflict may not leave a neutral port or roadstead less than 24 hours after the departure of a merchant ship flying the flag of its adversary.¹¹⁹

Belligerent warships are prohibited to make use of neutral ports or roadsteads to replenish or increase their military supplies or their armaments.¹²⁰ Augmentation of the crews is forbidden too. These rules are to be explained by the fact that it is prohibited to misuse neutral territory and neutral waters as bases for acts of naval warfare. In neutral ports or roadsteads, the warships of the parties to the conflict are therefore also forbidden to erect or employ any apparatus for communicating with friendly or allied forces. Naturally, there will still be a chance of contacting the embassy or other diplomatic missions by other means. However, belligerent warships may replenish *food and fuel*. Article 19, paragraph 1 of the 1907 Hague Convention XIII restricts the quantity of food to the 'peace standard'. The quantity of fuel shall be limited to that what is required for reaching the 'nearest port in their own country' (Article 19, paragraph 2). In practice, it is up to the neutral states to determine the conditions for the replenishment with food and fuel. In doing so, they must observe the principle of impartiality and the prohibition of the abuse of neutral areas as bases for acts of naval warfare.

Prizes are enemy or neutral merchant ships that have been captured and seized. A prize may only be brought into a neutral port because of unseaworthiness, adverse sea conditions, or want of fuel or provisions.¹²¹ It must leave as soon as the (p. 175) circumstances allowing entry into the neutral port have ceased to exist. If it fails to comply with an appropriate request, the neutral port state is obliged to use all means available to effect the release of the prize together with its officers and crew and to intern the members of the prize crew (the officers from the belligerent warship that captured the prize).

(ii) Neutral territorial seas and the right of innocent passage

The sovereignty of a coastal state extends to its territorial sea, the breadth of which must not exceed 12 nautical miles measured from the baselines drawn in accordance with the international law of the sea. The parties to the conflict are obliged to respect the inviolability of a neutral state's territorial sea and the airspace above. All hostilities and every exercise of belligerent rights within the boundaries of the neutral territorial sea constitute a violation of the neutral state and are strictly forbidden. The principle of inviolability and the resulting duties, however, apply only in those territorial sea areas that are in compliance with the international law of the sea. As in peacetime, excessive claims are invalid in times of international armed conflict.

As a general rule, within the territorial sea the right of innocent passage is applicable to the ships of all states, including those of the belligerents. There is no corresponding right of overflight. However, neutral coastal states are entitled to suspend temporarily, without discriminating in form or fact among foreign ships, the innocent passage of foreign ships in specified areas of its territorial sea if such suspension is essential to the protection of its security. If such suspension is duly published it shall apply not only to warships of the parties to the conflict but to the ships of all states.¹²² These rules of the international law of the sea are modified by the law of maritime neutrality to the effect that a neutral coastal state may completely or partially close its territorial sea only to the warships, auxiliaries, and prizes of the parties to the conflict.¹²³ It is also admissible to prohibit only the passage of certain warships, such as submarines. International straits and archipelagic waters, however, in which special rights of transit apply must be exempted from such prohibitions.¹²⁴ If a neutral state decides to close its territorial sea to warships and prizes of the parties to the conflict, it must not discriminate against any of these parties. If the closure is duly published, the right of innocent passage of the ships concerned will be suspended until the end of the armed conflict. The only exceptions will be made in cases of distress or, following an appropriate approval by the authorities of the neutral state, for

medical transports. The neutral state is obliged to use all means available to enforce the closure of its territorial sea.(p. 176)

A neutral coastal state, however, is not obliged to suspend the right of innocent passage but may keep its territorial sea open for the warships, auxiliaries, and prizes of the parties to the conflict. If these vessels make use of the right of innocent passage, they will be subject to the general rules of the international law of the sea. In neutral territorial seas, submarines and other underwater vehicles are therefore required to navigate on the surface and to show their flag. In addition, the activities enumerated in Article 19 of LOSC continue to be prohibited.¹²⁵

It must be emphasized that in and over international straits all surface and subsurface vessels as well as aircraft of the parties to the conflict and neutral states enjoy the right of transit passage. Submarines may transit international straits while submerged. Only the Bosphorus and the Dardanelles are clearly exempt from this rule.¹²⁶ Neutral states are not permitted to hamper or suspend transit passage.¹²⁷

The parties to the conflict must also respect the inviolability of archipelagic waters provided they are in conformity with the provisions of the international law of the sea. No acts of naval warfare may be executed in neutral archipelagic waters. Moreover, it is prohibited to misuse these waters as bases or places of sanctuary. If only the right of innocent passage is applicable in archipelagic waters, the neutral archipelagic state is entitled but not obliged to close them to the warships and prizes of the parties to the conflict. In and above those parts of archipelagic waters which are usually used for international navigation or for which the archipelagic state has designated specific sea lanes and air routes all vessels and aircraft of the belligerents enjoy the right of archipelagic sea lanes passage. The neutral archipelagic state may neither interfere with nor suspend this right.¹²⁸(p. 177)

D. Neutral trade

The outbreak of an international armed conflict basically has no effect whatsoever on the right of neutral states and their nationals to engage in trade. This applies not only to the exchange of goods between neutral states but also to the exchange between neutral states and the parties to the conflict. Trade relations between a neutral state and a party to the conflict, however, involve considerable risks for the opposing party to the conflict since it may comprise war material. Hence, Article 6 of the 1907 Hague Convention XIII prohibits the supply of war material and Article 8 prohibits the fitting out of ships for use in war.

According to Article 7 of the 1907 Hague Convention XIII, however, a neutral state is not bound to prevent the export or transit, carried out for the account of either party to the conflict, of arms, ammunition or, in general, anything which could be of use to belligerent armed forces. Today, this rule may be modified so that the approval of such shipments constitutes a violation of the law of neutrality insofar as exports of war materials are government-controlled. This, however, is far from settled.

In the context of neutral trade, there is no need to go into this issue in greater detail since it only concerns intergovernmental relations. What matters here are the measures taken by the belligerents against merchant vessels and civil aircraft of neutral states. Insofar, it is generally agreed that the parties to an international armed conflict are entitled to control neutral merchant vessels and neutral civil aircraft and especially to prevent the transport of contraband. The pertinent rules and principles are summarized under the term 'law of prize'.¹²⁹ It must be emphasized that neutral merchant vessels and civil aircraft may be liable to attack if they are engaged in activities rendering them lawful military objectives.¹³⁰

(i) Contraband

The term contraband refers to goods that are directly or indirectly destined for an area controlled by the opposing party to the conflict and that are susceptible for use in armed conflict. It covers only imports, export articles do not constitute contraband.¹³¹

The traditional differentiation between absolute and conditional contraband,¹³² which is behind the provisions of the 1909 London Declaration concerning the Laws of Naval War, is no longer relevant today. This is due to the fact that the two (p. 178) prerequisites of this definition cannot be specified in a way to make them generally applicable. In any case, however, there must be sufficient proof that the goods concerned are ultimately intended for the enemy armed forces. Moreover, there is now agreement on the necessity of a prior publication of lists specifying either the contraband goods or the so-called free goods.¹³³

Contraband is subject to seizure and confiscation.¹³⁴ It makes no difference whether it is found on board of a neutral merchant vessel or on board of a neutral civil aircraft. The ownership rights under civil law and other legal relationships do not matter either. Goods and items not included in a list of contraband are free goods that may not be condemned or confiscated. Certain items enjoy special protection under international humanitarian law which necessarily makes them free goods.¹³⁵

(ii) *Navicerts and aircerts*

In order to facilitate the monitoring of neutral commerce, the parties to the conflict may issue certificates, which indicate that a neutral merchant vessel (so-called navicert) or a neutral aircraft (so-called aircert) has been examined and does not carry any contraband.¹³⁶ Subject to the consent of the port state, the examination can also be carried out in neutral ports. A navicert or aircert reduces interference with neutral commerce, because it can render interception and the ensuing visit and search unnecessary. The certificates will not, however, guarantee an unimpeded voyage. Therefore, the issuing party to the conflict is particularly entitled to interception, visit and search and capture when new facts have come to light after the issuance of the certificate. On the other hand, absence of a certificate is not, in itself, a sufficient ground for capture of a neutral merchant vessel or civil aircraft. A party to the conflict must not take the fact that a vessel or aircraft is carrying a certificate issued by the opponent as a basis for discriminating against said vessel or aircraft.¹³⁷

(iii) *Neutral merchant vessels and civil aircraft*

The international law of peace is modified by the law of maritime neutrality to the effect that neutral merchant vessels and neutral civil aircraft are obliged to tolerate the following measures based on the law of prize taken by the parties to the conflict:

- interception and visit and search;
- diversion; and
- under certain conditions, capture and destruction.

(p. 179)

The obligation to tolerate those measures does not apply if a neutral merchant vessel is sailing under convoy of neutral warships and if the following prerequisites are met:

- the vessel is bound for a neutral port;
- it is sailing under convoy of a neutral warship under the same flag or of another neutral warship belonging to a state with which the merchant vessel's flag state has concluded an agreement providing for such escort services;
- the flag state of the neutral warship warrants that the neutral merchant vessel is not carrying any contraband or otherwise engaged in activities inconsistent with its neutral status; and
- the commander of the neutral warship provides, if requested by the commander of the warship or military aircraft of the party to the conflict, all information as to the

character of the merchant vessel and its cargo which otherwise could only be obtained by interception and visit and search.

In the case of neutral civil aircraft a similar rule applies.¹³⁸

Interception and visit and search are the measures based on the law of prize which a belligerent may take in order to verify the enemy or neutral character of a merchant vessel or civil aircraft, the nature of its cargo (contraband) or its actual function. In and over neutral internal waters, neutral territorial seas, and neutral archipelagic waters measures based on the law of prize are prohibited.¹³⁹ Neutral merchant vessels and civil aircraft are obliged to comply with all orders.

If visit and search at sea is impossible or too dangerous, the commander of the intercepting warship may order the neutral merchant vessel by way of diversion to proceed to a particular sea area or port for the purpose of visit and search.¹⁴⁰

Capture denotes the assumption of command over a vessel or aircraft. It must be distinguished from confiscation that is effected by a judgment delivered by a prize court.

Neutral merchant vessels and neutral civil aircraft are subject to capture and confiscation if they:

- are carrying contraband;
- are on a voyage undertaken solely for the purpose of transporting members of the enemy's armed forces;
- are under direct control of or have been chartered by the enemy;
- present irregular or fraudulent papers or do not carry the required documents or if the papers are destroyed or concealed; (p. 180)
- disregard legitimate orders; or
- are breaching, or attempting to breach, a blockade. ¹⁴¹

Usually, capture is effected by sending a prize crew on board of the vessel in order to assume command. Possible resistance on the part of the crew can be overcome by reasonable and proportionate enforcement action. All documents relating to the vessel and its cargo must be preserved as they are evidence to be presented to the competent prize court. In exceptional cases captured neutral merchant vessels may be destroyed if the crew, passengers, and documents can be taken to a safe place.¹⁴² Each destruction based on the law of prize must be confirmed by a judgment delivered by a prize court.¹⁴³

The crews of captured neutral vessels and aircraft, who are nationals of a neutral state, must be released and repatriated as soon as possible. If, however, the vessel qualifies as a lawful target, the neutral crew will be made prisoners of war. The passengers must also be released, unless they are members of the enemy's armed forces; en route to serve in the enemy's armed forces; or officially employed in the service of the enemy.

6 Concluding remarks

The law of naval warfare and maritime neutrality might be considered a remnant from a distant past. Especially the rules on visit, search, and capture do not seem to be of any significant relevance any longer. Why should belligerents be entitled to apply prize measures in sea areas remote from the actual armed hostilities? Why should they be entitled to interfere with neutral merchant vessels and civil aircraft if any such interference would imply considerable financial losses and, probably, also the use of force against the vessels and aircraft? Indeed, some governments have decided that apart from those rules pertaining to armed hostilities at sea many of the traditional rules of prize law and of maritime neutrality have become obsolete. However, that position is certainly not shared by other governments. For instance, the United States and Germany continue to recognize the

continuing validity of all the rules and principles dealt with in the present contribution. Of course, at present, it is hardly imaginable that the US Navy or the German Navy will apply prize measures directed against neutral navigation and aviation if they are engaged (p. 181) in an international armed conflict. The fact that such conduct is not likely to occur, however, does not mean that the respective rules and principles have become obsolete by desuetude. It may be recalled that similar statements were made with regard to occupation law and blockade. Many believed that belligerents would no longer occupy enemy territory or establish and enforce a naval blockade. Recent events have shown that the allegations of the irrelevance of occupation law and of blockade law were premature. It may not be forgotten that the law of naval warfare and maritime neutrality offers options belligerents may choose to make use of or not. If they decide to make use of those instruments it is far better that international law provides accepted rules the belligerents and the neutrals are obliged to comply with rather than claiming a legal vacuum and desperately hoping for the UN Security Council to take action.

Footnotes:

¹ Note that, although the subject matter of that law is armed conflict, it would be imprecise to use the term 'international humanitarian law'. The law of neutrality in most parts is not humanitarian in character, nor is it correct to say there is a humanitarian character in the law of the sea that has a considerable impact on the exercise of belligerent rights at sea.

² For an analysis of the applicability of the law of naval warfare to non-international armed conflicts, see W. Heintschel von Heinegg, 'Methods and Means of Naval Warfare in Non-International Armed Conflicts', 42 *IsrYBHR* (2012) 55-81.

³ Hague Conventions of 18 October 1907: No VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; No VII Relating to the Conversion of Merchant Ships into War-Ships; No VIII Relative to the Laying of Automatic Submarine Contact Mines; No IX Concerning Bombardment by Naval Forces in Time of War; No XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War; No XIII Concerning the Rights and Duties of Neutral Powers in Naval War.

Mention must also be made of the Declaration of London Concerning the Laws of Naval War, signed on 26 February 1909 which did not, however, enter into force because it was not ratified by any signatory. See also *The Laws of Naval War Governing the Relations between Belligerents*, Manual adopted by the Institute of International Law, Oxford, 6 November 1913. These treaties and documents as well as the others referred to above and below are reprinted in A. Roberts and R. Guelff, *Documents on the Laws of War* (3rd edn, Oxford: Oxford University Press, 2001). See also the compilation of treaties at <<http://www.vilp.de>>.

⁴ Declaration Respecting Maritime Law, Paris, 16 April 1856.

⁵ Procès-verbal relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, London, 6 November 1936. For a short analysis see E.I. Nwogugu, 'Submarine Warfare—Commentary', in N. Ronzitti (ed), *The Law of Naval Warfare* (Dordrecht: Martinus Nijhoff, 1988), 353-65.

⁶ Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereinafter: GC II). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977 (hereinafter: AP I).

⁷ See, however, also: Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), *Manual on International Law Applicable to Air and Missile Warfare* (Bern, 15 May 2009) (HPCR Manual).

⁸ International Institute of International Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. See also the Explanations to the Manual in: *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck (ed), Cambridge, 1995) (San Remo Manual).

⁹ Helsinki Principles on the Law of Maritime Neutrality, *Final Report of the Committee on Maritime Neutrality*, International Law Association, Report of the 68th Conference, 496ff (Taipei, 1998).

¹⁰ The drafts are regularly referred to in manuals on the law of naval operations. See Office of the Chief of Naval Operations, US Dept of the Navy, *The Commander's Handbook on the Law of Naval Operations* (July 2007 edn, Naval Warfare Pub No NWP 1-14M); UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Ch 13 (Oxford, 2004) (UK Manual); German Navy, *Commander's Handbook—Kommandanten-Handbuch* (Bonn, 2002) (German Handbook).

¹¹ It is important to mention older publications that are of continuing interest and value, such as R.W. Tucker, *The Law of War and Neutrality at Sea* (Washington, DC: Naval War College, 1957); C.J. Colombos, *The International Law of the Sea* (6th edn, London: Longmans, 1967), 477ff; E. Castrén, *The Present Law of War and Neutrality* (Helsinki: Suomalaisen Kirjallisuuden Seuran Kirjapainor Oy, 241ff, 492ff); L. Oppenheim, *International Law* vol II. (7th edn, London: H. Lauterpacht, 1952), 457ff, 768ff; Ch. Rousseau, *Le Droit des Conflits Armés* (Paris: Pedone, 1983), 213ff, 409ff; D.P. O'Connell, *The International Law of the Sea*, vol II (ed I.A. Shearer) (Oxford: Clarendon Press, 1984), 1094ff.

¹² United Nations Convention on the Law of the Sea of 10 December 1982; entry into force on 16 November 1994. See also the Agreement relating to the Implementation of Part XI of the Convention, entered into force on 28 July 1994.

¹³ For further details, see R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, Manchester: Juris Publishing, 1999), 426; R. Wolfrum, 'Restricting the Use of the Sea to Peaceful Purposes, Demilitarization in Being?', 24 *GYIL* (1981) 200–41; T. Treves, 'La notion d'utilisation des espaces marines à fins exclusivement pacifiques dans le nouveau droit de la mer', 26 *AFDI* (1980) 687–99.

¹⁴ Wolfrum (n 13), 220–4; H.S. Levie, *Mine Warfare at Sea* (Dordrecht et al: Martinus Nijhoff, 1992), 138.

¹⁵ See the references in n 11. For more recent analyses of the law of naval warfare and maritime neutrality, see G.P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (London: Kegan Paul, 1998); W. Heintschel von Heinegg, *Seekriegsrecht und Neutralität im Seekrieg* (Berlin: Duncker and Humblot, 1995).

¹⁶ However, if and for such time civilians directly participate in the hostilities, they lose their protection against attack.

¹⁷ HPCR Manual, Rule 17. See also Art 13 of the Rules of Aerial Warfare, The Hague, 17 *AJIL* (1923) Suppl. 245: 'Military aircraft are alone entitled to exercise belligerent rights'.

¹⁸ See, inter alia, San Remo Manual, para 13(g).

- ¹⁹ San Remo Manual, paras 112ff; W. Heintschel von Heinegg, 'Visit, Search, Diversion and Capture in Naval Warfare—Conditions of Applicability: Part II, Developments since 1945', 30 *CanYIL* (1992) 89–136.
- ²⁰ See n 4.
- ²¹ O'Connell (n 11), 1106.
- ²² For example, the *German Navy's Handbook* (n 10), para 83, still contains the traditional rule reserving the exercise of belligerent rights to 'warships'.
- ²³ See NWP 1-14M (n 10), para 2.3.6.
- ²⁴ HPCR Manual, Rule 1(x).
- ²⁵ See n 3.
- ²⁶ San Remo Manual, paras 38ff.
- ²⁷ San Remo Manual, paras 11, 35, 44.
- ²⁸ San Remo Manual, paras 10ff.
- ²⁹ San Remo Manual, paras 12, 34, 35; NWP 1-14M (n 10), para 7.3.8.
- ³⁰ San Remo Manual, para 10.
- ³¹ San Remo Manual, para 27.
- ³² San Remo Manual, para 27.
- ³³ San Remo Manual, paras 12, 36, 37.
- ³⁴ NWP 1-14M (n 10), para 7.3; German Handbook, paras 308ff; UK Manual, paras 13.24ff; San Remo Manual, paras 38ff.
- ³⁵ H.B. Robertson, 'The Principle of Military Objective in the Law of Armed Conflict', in M.N. Schmitt (ed), *The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt*, vol 72 (Newport, Rhode Island: US Naval War College International Law Studies, 1998); San Remo Manual, para 40; UK Manual, para 13.26; NWP 1-14M (n 10) para 8.2.
- ³⁶ For the historical facts, see D. Rice and A. Gavshon, *The Sinking of the Belgrano* (London: Martin Secker & Warburg Ltd, 1984).
- ³⁷ If the commander of a warship wishes to surrender she/he should take all feasible measures to inform the enemy of her/his intention and comply with all orders.
- ³⁸ Article 18 GC II.
- ³⁹ For a discussion, see Commentary GC II, 130ff.
- ⁴⁰ NWP 1-14M (n 10), para 8.6.2.1; German Handbook, para 372; UK Manual, para 13.99; San Remo Manual, para 135.
- ⁴¹ San Remo Manual, paras 67, 70; NWP 1-14M (n 10), para 8.6.2.2; UK Manual, para 13.47; German Handbook, para 333.
- ⁴² San Remo Manual, para 63; UK Manual, para 12.43ff.
- ⁴³ Article 22, para 1 of GC II.
- ⁴⁴ For instance, the so-called 'fighting hospital ships' employed during the second Gulf War did not qualify as a protected hospital ships because their use was not confined to taking care of casualties but also extended to the transport of armed forces and weapons. Neither

will a Naval Rescue Coordination Centre embarked on a combat support ship confer on this vessel the status of a hospital ship.

⁴⁵ Article 26 of GC II.

⁴⁶ Article 24, para 1 of GC II.

⁴⁷ Article 25 of GC II.

⁴⁸ Article 22, para 1 of GC II.

⁴⁹ Article 30, para 4 of GC II.

⁵⁰ Article 22, para 2 of GC II.

⁵¹ Article 36 of GC II.

⁵² San Remo Manual, para 169.

⁵³ *S.S. Junod, La protection des victimes du conflit armé des îles Falkland—Malvinas* (1982): *Droit international humanitaire et action humanitaire* (2nd edn, Geneva: ICRC, 1985).

⁵⁴ Article 34, para 1 of GC II. Note that the conditions enumerated in Art 35 of GC II shall not be considered as depriving hospital ships of their protection.

⁵⁵ For an equal consideration of the other authentic texts, see J. Ashley Roach, 'The Law of Naval Warfare at the Turn of Two Centuries', 94 *AJIL* (2000) 64 at 75; Commentary AP I and II, 1262–3.

⁵⁶ The British did not want to send messages in the clear because they did not want the Argentine forces to get in advance information about the possible movements of their forces. Instead, they created so-called 'Red Cross Boxes' where the hospital ships were deployed and where they waited to receive wounded soldiers.

⁵⁷ NWP 1-14 (n 10), para 8.6.3: 'As a practical matter, modern navigational technology requires that the traditional rule prohibiting 'secret codes' be understood to not include modern encryption communications systems.'

⁵⁸ German Handbook, para 357: 'Devices designed for the reception of encrypted messages should also be permitted when they are employed solely for the effective performance of humanitarian tasks.'

⁵⁹ Already in 1970 the late Professor O'Connell noted that dilemma. See D.P. O'Connell, 'International Law and Contemporary Naval Operations', 64 *BYBIL* (1970) 19–85 at 59ff.

⁶⁰ During the Falklands/Malvinas conflict the 'Red Cross Box' created considerable problems because the hospital ships were not informed prior to the arrival of the wounded and were, thus, not well prepared to treat them efficiently. See Junod (n 53), 26.

⁶¹ San Remo Manual, para 171.

⁶² Explanations to the San Remo Manual, para 171.4.

⁶³ Explanations to the San Remo Manual, 171.5. Therefore, the participants could not agree on the formulation 'may' but merely on the formulation 'should be allowed to'.

⁶⁴ San Remo Manual, paras 49ff; UK Manual, paras 13.35ff.

⁶⁵ Article 27 of GC II; San Remo Manual, para 47(b); UK Manual, para 13.33; NWP 1-14M (n 10), para 8.6.3.

⁶⁶ San Remo Manual, para 47(c); UK Manual, para 13.33(c).

⁶⁷ Article 3 of the 1907 Hague Convention XI; NWP 1-14M (n 10), para 8.6.3; UK Manual, para 13.33(b); German Handbook, para 370; San Remo Manual, para 47(g).

- ⁶⁸ German Handbook, para 371; San Remo Manual, para 47; UK Manual, para 13.33; NWP 1-14M (n 10), para 8.6.3.
- ⁶⁹ For an in-depth analysis, see H.S. Levie, *Mine Warfare at Sea* (Dordrecht et al: Martinus Nijhoff, 1992), 23ff; W. Heintschel von Heinegg, 'The International Law of Mine Warfare at Sea', 23 *IsrYBHR* (1993) 53-76.
- ⁷⁰ San Remo Manual, para 79; NWP 1-14M (n 10), para 9.4; UK Manual, para 13.51.
- ⁷¹ Articles 1-5 of the 1907 Hague Convention VIII; San Remo Manual, paras 80-92; NWP 1-14M (n 10), para 9.2; UK Manual, paras 13.52ff; *German Handbook*, paras 377ff.
- ⁷² San Remo Manual, para 78; UK Manual, para 13.50; German Handbook, para 380.
- ⁷³ NWP 1-14M (n 10), para 8.7, 7.10; German Handbook, para 381; Helsinki Principles (n 9), para 5.2.10. See also W. Heintschel von Heinegg, 'The International Legal Framework of Submarine Operations', 39 *IsrYBHR* (2009) 331-56.
- ⁷⁴ San Remo Manual, para 45.
- ⁷⁵ See text accompanying nn 41 and 42. Further, San Remo Manual, para 67; Helsinki Principles (n 9), para 5.1.2.
- ⁷⁶ See W. Heintschel von Heinegg, 'Blockade', in *Encyclopedia of Public International Law* (ed R. Wolfrum), available at <<http://www.mpepil.com>>.
- ⁷⁷ See the references in n 10. See further NWP 1-14M (n 10), para 7.7; German Handbook, paras 291ff.
- ⁷⁸ San Remo Manual, para 93.
- ⁷⁹ San Remo Manual, para 94.
- ⁸⁰ See the 1856 Paris Declaration (n 4), para 4; San Remo Manual, para 95; UK Manual, para 13.67; German Handbook, paras 293ff.
- ⁸¹ San Remo Manual, para 96: 'The force maintaining the blockade may be stationed at a distance determined by military requirements'.
- ⁸² German Handbook, para 293.
- ⁸³ German Handbook, para 293.
- ⁸⁴ San Remo Manual, para 97: 'A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.' See also UK Manual, para 13.69.
- ⁸⁵ As in the case of Haiphong.
- ⁸⁶ San Remo Manual, para 99; UK Manual, para 13.71.
- ⁸⁷ NWP 1-14M (n 10), para 7.7.2.4; San Remo Manual, para 100.
- ⁸⁸ San Remo Manual, para 102.
- ⁸⁹ NWP 1-14M (n 10), para 7.7.3.
- ⁹⁰ San Remo Manual, para 103; UK Manual, para 13.75; German Handbook, para 300.
- ⁹¹ San Remo Manual, para 104.
- ⁹² San Remo Manual, para 103.
- ⁹³ San Remo Manual, paras 60(e), 67(a).
- ⁹⁴ NWP 1-14M (n 10), para 7.7.4.

- ⁹⁵ See Heintschel von Heinegg, 'Blockade' (n 76), para 41.
- ⁹⁶ NWP 1-14M (n 10), para 7.8. See also San Remo Manual, para 131.
- ⁹⁷ NWP 1-14M (n 10), para 7.8, para 4.4.7. See also HPCR Manual, Rule 106.
- ⁹⁸ The IMT, in its judgment against Admiral Dönitz, held that 'the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the War of 1914-18 by Germany and adopted in retaliation by Great Britain. The Washington conference of 1922, the London Naval Agreement of 1930, and the Protocol of 1936, were entered into with full knowledge that such zones had been employed in World War I. Yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol', 22 *IMT* 635ff.
- ⁹⁹ See R.P. Barston and P. Birnie, 'The Falkland Islands/Islas Malvinas Conflict—A Question of Zones', 7 *Marine Policy* (1983) 14-24.
- ¹⁰⁰ See W.J. Fenrick, 'The Exclusion Zone Device in the Law of Naval Warfare', 24 *CanYIL* (1986) 91-126.
- ¹⁰¹ NWP 1-14M (n 10), para 7.9; UK Manual, paras 13.77ff; German Handbook, paras 304ff.
- ¹⁰² San Remo Manual, paras 105ff.
- ¹⁰³ Helsinki Principles, para 3.3.
- ¹⁰⁴ See the preceding references in nn 101-103.
- ¹⁰⁵ San Remo Manual, paras 135, 141. See also HPCR Manual, Rule 134.
- ¹⁰⁶ See P. Reuter, 'Etude de la règle: "Toute prise doit être jugée"' (Paris: Les éditions internationales, 1933).
- ¹⁰⁷ San Remo Manual, para 139; HPCR Manual, Rule 135.
- ¹⁰⁸ San Remo Manual, para 139; HPCR Manual, Rule 135.
- ¹⁰⁹ Article 4A, para 5 of GC III.
- ¹¹⁰ See W. Heintschel von Heinegg, "'Benevolent" Third States During International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007), 543-68.
- ¹¹¹ Heintschel von Heinegg (n 110), 543-68.
- ¹¹² San Remo Manual, paras 7-9.
- ¹¹³ San Remo Manual, paras 7-9. See also Helsinki Principles (n 9), para 1.2; HPCR Manual, Rule 165.
- ¹¹⁴ San Remo Manual, paras 14-17; Helsinki Principles (n 9), paras 1.4, 2.1.
- ¹¹⁵ San Remo Manual, paras 14-17; Helsinki Principles (n 9), paras 1.4, 2.1. See also UK Manual, paras 13.77ff; NWP 1-14M (n 10), para 7.3; German Handbook, paras 236ff.
- ¹¹⁶ San Remo Manual, para 22; HPCR Manual, Rule 168(b).
- ¹¹⁷ San Remo Manual, para 21; Helsinki Principles (n 9), para 2.2.
- ¹¹⁸ San Remo Manual, para 21; Helsinki Principles (n 9), para 2.2.

- 119** San Remo Manual, para 21; Helsinki Principles (n 9), para 2.2. NWP 1-14M (n 10), para 7.3.2.1.
- 120** San Remo Manual, para 20.
- 121** NWP 1-14M (n 10), para 7.3.2.3.
- 122** Article 25, para 3 of LOSC (n 12).
- 123** Helsinki Principles (n 9), para 2.3.
- 124** San Remo Manual, paras 27-30.
- 125** Article 19 contains the following activities: any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; any exercise or practice with weapons of any kind; any act aimed at collecting information to the prejudice of the defence or security of the coastal state; any act of propaganda aimed at affecting the defence or security of the coastal state; the launching, landing, or taking on board of any aircraft; the launching, landing, or taking on board of any military device; the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal state; any act of wilful and serious pollution contrary to this Convention; any fishing activities; the carrying out of research or survey activities; any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state; any other activity not having a direct bearing on passage.
- 126** Passage through the Turkish Straits is regulated by the 1934 Montreux Convention. Therefore, according to Art 35 lit(c) of LOSC (n 12), the right of transit passage does not apply. It is unsettled whether the Strait of Magellan and the Danish Straits are likewise exempted from the transit passage regime.
- 127** San Remo Manual, para 29.
- 128** San Remo Manual, para 29.
- 129** San Remo Manual (Part V, paras 112ff) uses the term 'measures short of attack'.
- 130** San Remo Manual, paras 67 and 70; Helsinki Principles (n 9), para 5.1.2(4); HPCR Manual, Rule 174.
- 131** San Remo Manual, paras 146ff; Helsinki Principles (n 9), paras 5.2.2ff; NWP 1-14M (n 10), para 7.4.1.
- 132** For the traditional distinction between absolute and conditional contraband, see Colombos (n 11), 675ff.
- 133** San Remo Manual, paras 149 and 150.
- 134** San Remo Manual, para 147. See also NWP 1-14M (n 10), para 7.4.
- 135** San Remo Manual, para 150.
- 136** NWP 1-14M (n 10), para 4.4.2; San Remo Manual, para 22; Helsinki Principles (n 9), para 5.2.6.
- 137** San Remo Manual, para 123.
- 138** HPCR Manual, Rule 140; San Remo Manual, para 153.
- 139** The exercise of prize measures is an exercise of belligerent rights that is prohibited in areas where neutral states enjoy territorial sovereignty. See the text accompanying nn 28 and 29.

- 140** San Remo Manual, para 121. It must be noted that diversion is also lawful as an alternative to visit and search. See San Remo Manual, para 126.
- 141** San Remo Manual, paras 146 and 153; HPCR Manual, Rule 140.
- 142** San Remo Manual, para 151.
- 143** San Remo Manual, para 151(2): 'Destruction shall be subject to adjudication'.

(p. 182) Chapter 8 The Law of Occupation

1 Introduction

FOR many years, occupation and the legal questions that it raised concerned a limited number of contexts such as the Palestinian territories, Northern Cyprus, or the brief occupation of Kuwait by Iraq. Most legal issues had been comprehensively discussed, if not necessarily agreed upon. In terms of legal topics to be explored, occupation appeared to be a topic of the past or at least a topic followed by a very small number of experts.

Undeniably, the occupation of Iraq in 2003–04 brought the topic back into the focus of attention and raised a number of new questions. Apart from this specific event, however, recent years have been characterized by a multiplication of extraterritorial military interventions. Some of these interventions have given rise to new forms of foreign military presence in the territory of a state, sometimes consensual but very often imposed. These new forms of military presence have thus renewed interest in the law of occupation. In this respect, the topic has attracted considerable comment, in particular in the legal doctrine. Some commentators challenge the (p. 183) relevance of the law of occupation head-on while others emphasize that this body of law still serves useful purposes.

Another observation is that the phenomenon of occupation is most often only observed through the lens of contexts such as the occupation of Iraq in 2003–04 and even more so the long-lasting Israeli occupation of Palestinian territories. Looking at the law of occupation on the basis of these two cases alone can be problematic, however, as they are actually cases with a number of specific or atypical features, hence not necessarily lending themselves to general conclusions on the state of the law of occupation. Indeed, it would be a mistake to believe that the contemporary phenomenon of occupation is limited to these two situations. Former Yugoslavia, the Democratic Republic of Congo, Eritrea/Ethiopia, Nagorno-Karabakh and other volatile situations have recently shown that occupation is by no means a side issue in the present landscape of belligerency.

In many of the above-mentioned situations, the law of occupation has been responsive to the challenges at hand, in particular those relating to humanitarian emergencies, arising from the effective control of a territory—or part thereof—by foreign forces. Yet, the applicability and application of the law of occupation to such contexts also raises a number of legal issues. In this respect, several important questions are of concern including the beginning and end of occupation, the delimitation of the rights and duties of the Occupying Power (including the highly debated issue of transformative occupation and the sensitive topic of prolonged occupation), as well as the interaction between the law of occupation and human rights law or the legal framework governing the use of force in occupied territory.

The limited scope of this contribution does not allow for a comprehensive analysis of all questions raised by contemporary occupation. Rather, after having described the general features and principles of the law of occupation, this Chapter will address a few selected issues which, from the author's perspective, have had particularly important operational implications on the ground insofar as their legal dimension may have a direct impact on the population living in a territory subject to the effective control of a foreign army.

2 The General Legal Framework Governing Occupation

For a significant period of time, occupation was seen and perceived only as a matter of inter-state relationships. Based on the premise that occupation constitutes only a temporary situation neither causing nor implying any devolution of sovereignty, the (p. 184) law of occupation, as reflected in The Hague Regulations of 1907 (Hague Regulations), was mainly

geared towards the maintenance of the sovereign rights of the ousted government until belligerents agreed upon the conditions for its return.

However, this nineteenth-century reality on which the law of occupation was premised has radically changed. A turning point was undeniably the response in perception, and then in specific legal development, following the horrors committed by the Nazi regime in occupied territories during World War II. Situations of contemporary occupation are more and more characterized by the tension existing between the Occupying Power and the local population (or at least some components thereof) as well as by an incremental role played by the Occupying Power in the administration of the occupied territory.

These facts and the lessons learnt from the World War II experience prompted important legal changes and compelled international humanitarian law (IHL) drafters to focus more on the welfare of the population living under occupation. The need for enhanced protection of the occupied population thus became a crucial part of the Geneva Conventions of 1949, particularly the Fourth Geneva Convention relative to the protection of civilian persons in time of war (GC IV), filling in the gaps existing in the law at the time, notably by ensuring that their basic needs were met.

Despite this important legal evolution, recent occupations have shown that the law of occupation still faces difficult challenges. The applicability of the law of occupation to situations of effective foreign control over a territory has been recurrently contested by invading states, which clearly illustrates the reluctance of those states to be considered as Occupying Powers.¹ This trend of denying the applicability of the law of occupation can be partly explained by the fact that the concept of occupation suffers a pejorative connotation and has been frequently referred to as an 'unlawful' situation running contrary to the overall objective of international peace and security foreseen by the United Nations Charter. Consequently, the reference to 'unlawful occupation' can be misleading as it confuses the question of the lawfulness of the resort to the use of force with that of the rules of conduct to be applied once armed force has been used and, as such, affects the separation between *jus ad bellum* and *jus in bello*. From a purely IHL perspective, the law of occupation applies equally to all occupations, be they the result of a lawful or unlawful use of force within the *jus ad bellum*.² Another important reason for contesting a situation of occupation regularly (p. 185) arises in situations where a country, having taken control of a territory, disputes the sovereign claim to this territory by the other side. A long list of past and present situations of this kind can be drawn up with the invariable finding that one side will invoke the law of occupation and the other side will vehemently and irrevocably deny it.

As a preliminary remark, it is worth mentioning that the law of occupation only applies in international armed conflict. Despite some proposals to expand the applicability of this body of law to non-international armed conflicts,³ the majority view maintains that the retaking by government armed forces of national territory previously held by insurgents is not occupation, nor can insurgents occupy part of the national territory within the law of occupation's meaning.⁴ This, however, does not mean that no IHL rules apply for the insurgent side since they must—when exercising control over parts of the national territory—always abide by the provisions of Common Article 3 of the Geneva Conventions of 1949 and by Additional Protocol II when applicable.

Turning now to the substance and content of the law of occupation, it must be pointed out that this area of law is made up of a significant web of well-recognized customary and treaty rules mainly drawn from the Hague Regulations and GC IV. Even if scattered across various IHL instruments and sources, occupation law norms generally share a common rationale, which revolves around four general principles.⁵

First, the Occupying Power does not acquire any sovereignty over the territory it occupies. In this respect, it is not entitled to bring about changes in the status and intrinsic characteristics of the occupied territory.

Secondly, the rights exerted by the Occupying Power are merely transitory and are accompanied by the obligation to respect (unless absolutely prevented) the laws in force in the occupied territory, as well as to maintain as normal a life as possible in occupied territory. The law of occupation also requires the Occupying Power to administer the occupied territory for the benefit of the local population while preserving its own security needs. Overall, the main purpose of the limits imposed by IHL upon the Occupying Power primarily aims at providing a minimum of humanitarian protection to the occupied civilian population.

Thirdly, in the exercise of its powers, the Occupying Power must always take into account two fundamental parameters: the fulfilment of its military needs and the respect for the interest of the occupied population. IHL strikes a careful balance (p. 186) between these two. While military necessities in some instances may gain the upper hand, they should nonetheless never result in a total disregard for the needs of the local population. This principle shall apply to all the decisions and policies undertaken by the occupier in the occupied territory.

Fourthly, the Occupying Power must not exercise its authority in order to further its own interests (other than military), or use the inhabitants, the resources, or other assets of the territory it occupies for the benefit of its own territory or population.

When considering issues arising from occupation, these general principles governing occupation ought always to be borne in mind. These principles underpin the main provisions of the law of occupation as reflected in the Hague Regulations and GC IV.

Moving from general principles to specifics: one important feature of occupation law to bear in mind is that it was/is designed to allow the Occupying Power to exercise a temporary power of administration and, while doing so, to take into account its own security needs.⁶ Large parts of the rules on occupation are dedicated to restrictions and limitations in the exercise of that power, as well as to responsibilities for the welfare of the population in occupied territory incumbent upon the Occupying Power. Responsibilities include matters such as: humane treatment, satisfaction of the occupied population's needs, respect for private property, management of public property, functioning of educational establishments, ensuring the existence and function of medical services, allowing relief operations to take place as well as allowing impartial humanitarian organizations such as the ICRC to carry out their activities. In turn, and in order to fulfil those important responsibilities while ensuring its own security, the Occupying Power is granted important rights and powers, which may also take the form of measures of constraint over the local population when necessity so requires. These prerogatives, however, do not alter or detract the foreign forces from their core responsibility according to which the Occupying Power shall ensure that the basic needs of the occupied population are effectively met.

Consequently, the law of occupation is both permissive (accepting that an occupier exercises certain powers) and prohibitive (putting limits on the occupier's actions). Despite some critical opinions on whether the existing rules are sufficient to provide answers to all issues arising in specific cases of contemporary occupations, it is submitted here that the rules of the law of occupation are flexible enough to take these specific issues into account, capable of standing the test of time. When working on specific issues of occupation law as a practitioner, the pertinence and detail of responses under the law of occupation to contemporary issues is remarkable. Stated in a general manner, this body of law must still be regarded as a very relevant and useful tool that is, on the whole, adequate to meet (p. 187) the challenges of today's occupations. The extent of the fault line between law of

occupation and the policies carried out in recent occupations should therefore not be overemphasized.

Nevertheless, this assessment does not mean that the provisions regulating situations of occupation law are static and hermetic to any evolving interpretation in line with the aim and purpose of this body of law. In this respect, the ICRC considers that certain practical issues linked to occupation still raise legal questions which deserve to be thoroughly examined. In order to illustrate this, legal issues relating to the beginning and end of occupation, to the relationship between IHL and human rights law through the lens of use of force in occupied territory and eventually to transformative occupation, will be discussed below. This selection of themes is not meant to be an exhaustive list of legal challenges for the law of occupation, but allows for consideration of how this body of law responds to challenges raised by contemporary occupations.

3 The Beginning and End of Occupation

When referring to fresh interest in the law of occupation over the past decade, the attention of the legal community has focused primarily on a number of substantive rules rather than addressing issues raised by the conditions of the establishment and termination of occupation. Surprisingly, relatively little interest has been paid to the standards used to determine when a case of occupation begins and when it comes to an end.⁷ This is regrettable since the question as to whether an occupation is established or not is central for the application of occupation law and must be answered before any substantive questions can be addressed. Hence, this question is of fundamental importance.

Past practice demonstrates that most Occupying Powers have devised claims for the inapplicability of occupation law while maintaining effective control over a foreign territory or part thereof. States are reluctant to be perceived as Occupying Powers. This situation is all the more aggravated by the fact that IHL instruments do not provide clear standards for determining when an occupation starts and terminates. Not only is the definition of occupation vague under IHL, but other factual elements—such as the continuation of hostilities and/or the continued exercise of (p. 188) some degree of authority by local authorities or by the foreign forces during and after their phasing out—may render the legal classification of a situation very complex. This exemplifies the need for more precise guidance regarding when and how the law of occupation applies.

If the contours of the occupation concept have been sketched in Article 42 of the Hague Regulations, the absence of any clear-cut criteria in treaty law requires a careful examination of the interpretation given to this provision over time.

Despite its vagueness, Article 42 of the Hague Regulations continues to be the cornerstone against which any determination as to whether a situation amounts to an occupation has to be made. The pivotal role of this specific provision of the Hague Regulations has been recognized and reconfirmed in recent international jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ).⁸ This confirms that this norm still provides the core elements of the notion of effective control, a notion which lies at the core of the determination as to whether a territory can be considered as occupied for the purposes of IHL. Indeed, the notion of effective control, while not found in treaty law, has been associated very early on with the concept of occupation and has been developed in the legal discourse pertaining to occupation in order to describe the circumstances and conditions under which the existence of a state of occupation could be determined.⁹

The test of effective control—which has been developed and articulated by international jurisprudence,¹⁰ some army manuals,¹¹ and in doctrine¹²—has established the fundamental importance of the exercise of authority by foreign forces in lieu of the territorial sovereign through their non-consensual and continued presence in the concerned territory as the key elements to take into account for the determination as to whether a situation amounts to an occupation for the purposes of IHL or not. These three elements (ie (1) foreign military presence, (2) the ability of the foreign forces to exert authority in the concerned territory in lieu of the local government, and (3) its non-consensual nature) are directly derived from the terms of Article 42 of the Hague Regulations. Cumulatively taken, these elements also reflect the tension of interests between the local government, the Occupying Power, and the (p. 189) local population, which always characterizes a situation of belligerent occupation.¹³ In light of the consensus surrounding the three elements, the latter should be established as prerequisites for the effective control test—or put in other words: they should be considered as the constitutive and cumulative conditions of the concept of occupation for the purposes of IHL.

When pointing out that these cumulative conditions are indispensable for establishing a situation of occupation, the crux remains that these conditions still need further clarification and interpretation in order to define as tightly as possible a determination of the existence of an occupation.

A. The necessary presence of foreign forces

This criterion is generally seen as the only way to establish and exert firm control over a foreign territory. It is for this reason that the presence of foreign forces is viewed as a prerequisite for the establishment of an occupation since it makes the link between the notion of effective control and the ability to fulfil the obligations incumbent upon the Occupying Power.¹⁴ It is also widely recognized that an occupation cannot be established or maintained solely through the exercise of power from outside the boundaries of the occupied territory. Rather, it calls for at least some foreign ‘boots’ on the ground. Therefore, only effective control on land would characterize military occupation within the meaning of IHL. However, the prerequisite of foreign troops on the ground does not mean that effective control requires their presence on each square metre of the occupied territory. On the contrary, the size of the foreign forces cannot be pre-determined and could vary according to the circumstances. Particularly relevant circumstances are the geographical characteristics of the territory, the density of the population or the degree of resistance encountered on the ground. In this respect, effective control can perfectly well be enforced by positioning foreign troops in strategic places within the occupied territory rendering the Occupying Power capable of sending troops within reasonable time in order to make its authority felt in the concerned area.(p. 190)

B. The exercise of authority over the occupied territory

There is broad agreement that once enemy foreign forces have established a presence in a territory, what counts for the purposes of determining the applicability of occupation law, is the ability of the foreign forces to exert authority in the foreign territory and not the actual and concrete exercise of such authority as recently upheld by the ICJ in December 2006 in the *Democratic Republic of Congo (DRC) v Uganda* case.¹⁵ In this respect, reliance on a test based on the ability of the Occupying Power to exert authority is justified by the fact that this prevents any attempt by the occupier to evade its duties under the law of occupation through the voluntary non-exercise of authority or through the installation of a puppet government. It is also important to specify that occupation law does not require an exclusive exercise of authority by the Occupying Power. It allows for authority to be shared by the Occupying Power and the occupied government, provided the former continues, to bear the ultimate and overall responsibility for the occupied territory. In other words, the continued exercise of power by the local authorities does not mean that occupation has not

been established and maintained, provided the ongoing local government's activities derive from an authorization of the Occupying Power.

C. The non-consensual nature of belligerent occupation

The absence of consent from the state whose territory is subject to the foreign forces' presence has been identified as a precondition for the existence of a state of belligerent occupation. Without this condition, the situation would amount to a 'pacific occupation' not subject to the law of occupation. In this respect, it should be noted that, according to Article 2, paragraph 2 of GC IV, the absence of armed resistance from the territorial sovereign shall not be interpreted as a form of consent barring the application of the law of occupation. As to the characteristics of consent for the purposes of occupation law, it should be genuine, valid and explicit to entail the inapplicability of occupation law. It should be recognized here that the evaluation of those elements is very difficult, particularly in cases of 'engineered consent', which can be defined as a process by which states intervening in a foreign territory would ensure by any means or legal constructions that the presence of their armed forces would appear as being consented to by the host state. Nonetheless, the complexity inherent in the interpretation of the notion of consent would not detract from its overall importance for the purposes of determining occupation law applicability.

It is important to stress that the analysis performed here relating to the criteria permitting a determination of the existence of a state of occupation is based on a (p. 191) concept of a 'classical' case of occupation. For these cases, the establishment of the criteria or the absence of them, would equally apply to the beginning or ending of an occupation. This analysis does not exclude the possibility that the *sui generis* character of some situations may impact on the criteria previously identified by the experts, in particular in terms of the means to exercise effective control.¹⁶

In addition, recent military operations have underlined the necessity to define more precisely the legal criteria determining a state of occupation when such a situation involves multinational forces. Are the criteria for beginning and end of occupation the same in this very case? Who are the Occupying Power(s) among a coalition?

In this respect, it is meanwhile well accepted that occupation law could be applicable *de jure* to multinational operations,¹⁷ including those under UN command and control, provided of course that the conditions for its applicability were met. Therefore, the criteria for assessing a state of occupation involving UN forces ought not to differ from those concerning more classical forms of occupation. As to the criteria for identifying which countries participating in a coalition would be considered Occupying Powers for the purposes of IHL, a functional approach would appear to be the appropriate tool for making these determinations. Concretely this means that those coalition members should be considered as Occupying Powers in cases where national contingents have been assigned with responsibility for and/or would exert effective control over parts of the concerned territory. In other words, it would be the actions performed by the foreign forces and the functions they have been specifically tasked to carry out that render the states to which they belong as Occupying Powers. Those states within a wider coalition performing tasks typical and normally carried out by an Occupying Power within the framework of IHL should be labelled as such and be bound by the rules contained in the relevant occupation law instruments.

Finally, linked to the applicability of the law of occupation is the question of how to determine the legal framework applicable to the invasion and withdrawal phases. On this issue, we simply refer to the ICRC practice, namely a broad interpretation (p. 192)

favouring the applicability of GC IV with the aim of maximizing the legal protection conferred to the civilian population.¹⁸

4 Delimiting the Rights and Duties of the Occupying Power: The Question of 'Transformative Occupation'

When observing the application of the law of occupation over the years and decades, one must conclude that states frequently transgress and interpret occupation law's prescriptions in a self-serving manner in order to reduce constraints on their discretionary powers. This observation may certainly be made more generally with regard to the application of IHL, however it deserves particular mention in the present context. The reasons for this phenomenon may be linked to the particular *rapport de force* in such situations, but it may also be indicative of a pervading scepticism regarding the relevance of the law of occupation to contemporary circumstances.

Occupation law is regularly challenged on the basis that it is ill-suited for contemporary situations. The claim is that states find themselves today in roles which differ considerably from those of classical belligerent occupation and that the law of occupation is not sufficiently equipped to cope with the specificities of these situations.¹⁹

Occupation law does not authorize a foreign power to introduce wholesale changes in the legal, political, institutional, and economic structures of the territory under effective control and this has been invoked as one argument to bolster the claim that the law of occupation is ill-suited to today's situations. Indeed, it has been contended that occupation law places an undue emphasis on preserving the continuity of the socio-political situation of the occupied territory. Further, it has been argued that the transformation of an oppressive governmental system or the rebuilding of a society in complete collapse by means of occupation could be in the interest of the international community and be authorized under *lex lata*.²⁰(p. 193)

Examples of far-reaching political and institutional changes undertaken in recent occupations have brought to light the tension between occupation law's requirement to respect the laws and institutions in place, and the perceived need to fundamentally alter the institutional, social, or economic fabric of the occupied territory. To defuse this tension, some commentators contend that IHL should permit certain transformative processes and recognize the occupier's role in this respect. Such a position raises the question of the limitations posited by IHL with regard to the occupier's rights and duties set forth most notably in Article 43 of the Hague Regulations and Article 64 of GC IV. If occupation law does not give a '*carte blanche*' to the Occupying Power, some contemporary interpretations of the rights and duties tend to grant increasing leeway in the administration of the occupied territory. One conclusion from this observation is that it is necessary to identify more clearly how much or how little room for manoeuvre an occupier actually has in such matters. The answer requires taking a deeper look into the two above-mentioned provisions which constitute the cornerstone of the occupier's powers under the law of occupation.

A. The scope of authority of the Occupying Power

Without engaging in an exhaustive analysis,²¹ it is generally accepted that Article 43 of the Hague Regulations combined with Article 64 of GC IV grants the Occupying Power broad authority over foreign territory under its effective control. If, in the past, the role played by Occupying Powers implied minimal interference in life in the occupied territory, current IHL obligations and recent practice suggest that occupiers have adopted a much more interventionist approach and are generally involved in almost all aspects of life in the occupied territory. In this respect, Articles 43 of the Hague Regulations and 64 of GC IV should be interpreted broadly to allow the Occupying Power to fulfil its duties under

occupation law, in particular the administration of the occupied territory for the benefit of the local population while ensuring the security of its own armed forces.

While Article 43 appears to contain two interrelated parts (the obligation to restore and maintain public order and security, and the duty to respect the laws in force in occupied territory), the *travaux préparatoires* of this instrument and subsequent state practice indicate that this provision comprises in reality two separate obligations, which delimit generally the occupier's scope of authority under IHL. On the one hand, it is considered that the positive obligation to restore and (p. 194) maintain public order and safety is essentially aimed at protecting the local population from the breakdown of orderly civil life in occupied territory and entails—as a minimum—an obligation to take necessary measures to stop or prevent a collapse in civil life. On the other hand, the second part of Article 43 constitutes a general rule about the legislative powers of the occupier. It must, however, be mentioned that an argument can be made that these two obligations are not in fact so hermetically disconnected insofar as the first part of Article 43 of the Hague Regulations helps identify the subject matters on which the Occupying Power could legislate under the provision's second part.

As to the interpretation of the clause on the obligation to 'restore and ensure public order and safety' contained in the first part of Article 43, it must be noted that the English version differs substantially from the authoritative French text, which refers to the restoration and maintenance of '*l'ordre et la vie publics*'. It is therefore submitted that Article 43 of the Hague Regulations, as reflected in the French version, imposes on the Occupying Power an obligation 'to restore public order and *civil life*' (emphasis added), whose meaning is much broader than the term 'public safety' used in the English version.

Whereas 'public order' means security or general safety, the meaning of 'civil life' has been described in the International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874) as including the social functions and ordinary transactions that constitute daily life in the occupied territory. In this respect, this broad interpretation of the concept of 'civil life' is still relevant and in fact represents the only interpretation corresponding to the evolution of the Occupying Power's role over time. Consequently, the role of an Occupying Power can no longer be regarded as a disinterested invader but rather as a fully-fledged administrator. In addition, the ever-increasing role of the Occupying Power in occupied territory has been expressly recognized by Article 64 of GC IV, which has replaced the negative test proposed in Article 43 of the Hague Regulations²² with a positive authorization, whereby the occupier could subject the population of the occupied territory to provisions which are essential to enable it to exert its functions under occupation law.

As to the clarification of the terms 'unless absolutely prevented' contained in the second part of Article 43 of the Hague Regulations, which is generally interpreted as delimiting the scope of the occupier's legislative powers, it can be asserted that the expression is referring to the exception of necessity. This means that the clause should not be restricted to military necessity but be interpreted as referring to 'necessity' broadly defined, which would justify an expansion of the grounds (p. 195) permitting changes to local laws. In this regard, it is submitted here that the concept of necessity comprises three strands: military, legal, and material necessity allowing the Occupying Power to legislate on almost all aspects of life in the occupied territory.

The clause 'unless absolutely prevented' contained in Article 43 of the Hague Regulations should nonetheless not be interpreted as conferring upon the Occupying Power a blank cheque in the field of legislation. Therefore, the notion of necessity for the purposes of Article 43 requires further elaboration. To that end, it is Article 64 of GC IV that helps in delineating more precisely the meaning and scope of the terms 'unless absolutely prevented'. Following the terms of Article 64, paragraph 2 of GC IV, the concept of necessity for the purposes of Article 43 of the Hague Regulations would encompass the duty

of the Occupying Power to fulfil its obligations under GC IV,²³ namely to maintain orderly government in occupied territory as well as its ability to ensure its own security. In those three areas, the Occupying Powers could change the pre-existing legal system in occupied territory and issue its own legislation. In other words, Article 64, paragraph 2 of GC IV posits some clear limits to the general rule on the occupier's legislative powers set forth in Article 43 of the Hague Regulations.

After having provided clarification on some elements of Articles 43 of the Hague Regulations and 64 of GC IV, it is still necessary to attempt to circumscribe more precisely the scope of the occupier's legislative powers. What appears not to be an issue of disagreement is the Occupying Power's entitlement to legislate in order to fulfil its obligations under GC IV or to enhance civil life in occupied territory. A more controversial issue is whether an Occupying Power could legislate with the aim of implementing human rights law in the area under its effective control.

On this issue, it should be recalled that a proposal aimed at giving the Occupying Power the right to repeal local legislation contrary to international human rights law was defeated during the negotiations of GC IV. The rejection of this Mexican proposal was mainly due to the embryonic character of human rights law at the time of the negotiations. Considering the development and importance of human rights law today and the recognition of its applicability in situations of occupation,²⁴ there is a strong trend in the literature to argue that the Occupying Power does not have to and should not respect local legislation that is contrary to human rights law.²⁵ Furthermore, it might also be contended that the implementation of human (p. 196) rights law in occupied territory is not only legitimate but also very relevant where occupation law is silent, for instance, on questions such as freedom of opinion and freedom of the press, or where occupation law is rather vague, such as on the right to education or the right to health.

With regard to human rights law, one must distinguish between the recognized fact that human rights law sets forth obligations that Occupying Powers are bound to respect *vis-à-vis* the local population and the occupier's role in legislating in the field of human rights. The ability of the Occupying Power to legislate needs to be carefully delimited insofar as the implementation of human rights in occupied territory might amount to an agenda for societal reforms, which could be at odds with the conservationist principle underlying the law of occupation and could go beyond what the Occupying Power is permitted to do under occupation law. A means of delimiting such legislative ambitions would be that the resulting changes must pass the test that they are absolutely necessary under the Occupying Power's human rights obligations and must stay as close as possible to local standards as well as to local cultural, legal, institutional, and economic traditions.

The necessity to delimit with more precision the scope of the powers assigned by IHL to the Occupying Power takes on its full importance when it comes to addressing the issue of so-called 'transformative occupation'. This notion, which was at the core of the discussions surrounding the recent occupation of Iraq, can be described as an operation with the main objective of overhauling the institutional and political structures of the occupied territory.

B. The case of 'transformative occupation'

The notion of transformative occupation has been promoted by a number of authors as a progressive interpretation of the law of occupation or as necessary evolution requiring an update of this *corpus juris*.²⁶ It is suggested here that one needs to take a very cautious approach *vis-à-vis* a concept that entails important risks and is contrary to occupation law's basic premises. Transformative occupation as defined above has no legal basis and does not find any justification under current IHL. The underlying rationale for this assertion is that the Occupying Power does not acquire any sovereign rights over the occupied territory and is therefore not entitled to bring about changes in the occupied territory or to undertake reforms (p. 197) that could not be reversed by the legitimate government once the

occupation is over. In the same vein, the transitory character of the rights and duties incumbent upon the foreign administrator preclude bringing definitive and large-scale changes into the institutional structures of the occupied territory.²⁷

Indeed, the idea behind occupation law is to prevent the Occupying Power from modelling the governmental structure of the occupied territory according to its own needs or perceptions, thus disregarding the intrinsic characteristics of the occupied society. Irrespective of the legitimacy or legality of the operations that led to the occupation, it can be stressed that the Occupying Power cannot be considered a neutral entity acting only in the interest of the occupied territory and therefore should not engage in institutional reforms. In this respect, the importance of the conservationist principle lying at the heart of occupation law needs to be underlined and promoted. This principle reflects the dictates of prudence and the basic legal premises on which the international community is built, according to which fundamental decisions about a territory's institutional structures should be made by the legitimate sovereign institutions and not by outsiders such as Occupying Powers.²⁸

All this said, the position held which holds 'transformative occupation' is unlawful under IHL is without prejudice to the possibility that the Security Council, by application of Articles 25 and 103 of the UN Charter, decides to override IHL strictures, in particular those flowing directly from the conservationist principle, and to mandate—through an explicit resolution—an Occupying Power to overhaul the institutions of an occupied territory.

It is furthermore important to emphasize that it is necessary to differentiate between fully-fledged transformative projects entailing disruptions of sovereignty, and smoother changes that aim, for example, to ensure that the basic infrastructure of the occupied society operates in accordance with the relevant occupation law norms. Illegality of the transformative occupation concept under IHL should not be confused with a general prohibition against carrying out changes in the occupied territory.

Respect for the conservationist principle does not mean that the situation in an occupied territory should be completely frozen for the period of the occupation. On the contrary, compliance with the obligation to restore and maintain public order and civil life could even call for some transformations/changes and oblige the occupier to engage in important reforms. Circumstances warranting such changes would include cases where local laws in force are contrary to IHL provisions or (p. 198) prevent the Occupying Power from fulfilling its duties under occupation law. In this respect, some arguments could be put forward as possible justifications for *some* transformations during occupation: respect for IHL and human rights law; consent of the local population; the particular characteristics of prolonged occupation; and the case of occupied failed states.

5 The Relationship Between the Law of Occupation and Human Rights Law in Light of the Issue of the Use of Force in Occupied Territory

Human rights law can play an important role in delimiting the Occupying Power's rights and duties, particularly in relation to the population in the occupied territory. Indeed, the creation of a robust human rights law regime has significantly altered international expectations with regard to the treatment of inhabitants of occupied territory in particular since this body of law has been, over time, widely recognized as applicable in situations of occupation.²⁹ Therefore, human rights law may arguably impose formal obligations on the occupier in the course of its administration of the occupied territory.³⁰

Recently, the ICJ underlined the relevance of human rights law in times of occupation and the occupier's legal obligation to take human rights law into account with regard to both its actions and policies in the occupied territory.³¹ Consequently, the argument was made that human rights law could serve as a basis for changing (p. 199) existing local laws³² or even be used to justify transformative objectives.³³ This illustrates that contemporary occupation contexts cannot be considered without addressing the issue of human rights law. Undoubtedly, actions of the occupier must be examined not only through the lens of IHL but also through that of human rights law. Consequently, the question at stake is no longer whether human rights law applies or not in occupied territory but rather to identify how, and to what extent, this body of law applies in such circumstances.³⁴

The key word for the purposes of examining the relationship between occupation law and human rights law is *complementarity*. Cordula Droege has pointed out that:

complementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually. In this sense, complementarity reflects a method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which stipulates that, in interpreting a norm, *any relevant rules of international law applicable in the relations between the parties* shall be taken into account. This principle, in a sense, enshrines the idea of international law understood as a coherent system. It sees international law as a regime in which different sets of rules cohabit in harmony. Thus human rights can be interpreted in the light of international humanitarian law and vice versa.³⁵

Complementarity in this understanding also means that human rights law and IHL, in particular the law of occupation, are mutually influencing. The proposed approach for the interaction between IHL and human rights law is therefore based on both complementarity and cross-interpretation, the latter meaning that the two bodies of law have to be interpreted *vice versa*. The interpretation would therefore mean that not only could human rights law be interpreted in light of IHL, as highlighted in the ICJ jurisprudence, but IHL could also be interpreted in light of human rights law. In this regard, the *lex specialis derogat legi generali* principle would be turned into a *lex specialis compleat legi generali* principle.³⁶ In light of the latter position, the *lex specialis derogat legi generali* principle would not disappear entirely but would only intervene when a clear conflict between two norms of occupation law and human rights law arises.(p. 200)

In order to illustrate the relationship described, the following example of the use of force in occupied territory may render this particular issue more concrete.

One of the most important challenges in contemporary occupations is to determine how and when law enforcement rules as well as conduct of hostilities rules apply in relation to the use of force by the Occupying Power.³⁷ Under Article 43 of the Hague Regulations, the Occupying Power has an obligation to provide—as far as possible—security in occupied territory through maintenance of public order. The latter task can range from managing riots and disturbances to enforcing the law against criminal acts. In other words, the Occupying Power not only exercises its military authority over enemy forces, but actually must fulfil the duty to exercise a policing function in the territory under its effective control.³⁸

What we have observed in recent occupations is that the regulation of the use of force *vis-à-vis* civil unrest and ongoing armed opposition is not a clear-cut matter.³⁹ Although the occupier is supposed to ensure security by means of law enforcement, uncertainty persists with regard to the applicable legal regimes, in particular in relation to situations where it is

difficult to distinguish hostilities from civil unrest, or where the Occupying Power is confronted by both at the same time in the entire, or parts of, the occupied territory.⁴⁰

As it stands, the law of occupation leaves a significant degree of uncertainty when it comes to determining whether a specific action is guided by law enforcement rules and standards or whether one is clearly in a situation governed by the IHL rules applicable to the conduct of hostilities. This situation inevitably opens the door for different interpretations on how the use of force may be exercised in occupied territory, in what circumstances, and according to which body of law. We are therefore once again back to the question of the application of human rights law in relation to the use of force in occupied territory.

In light of past practice, it appears that the use of force by the Occupying Power can be based on two alternative models. The first relates to law enforcement activities carried out within the framework of Article 43 of the Hague Regulations. This law enforcement paradigm presupposes a relatively secure grip by the foreign authority over the occupied territory. The second model, which applies exclusively to the conduct of hostilities, is based on the premise that violent actions carried out by organized armed groups or by the remaining occupied forces still endure or have resumed.(p. 201)

Based on the fundamental distinction between these two models, it could be argued that their correlative rules and standards governing the use of force are also inherently distinct. Within the framework of the law enforcement paradigm, stricter standards apply as a consequence of the prohibition for the Occupying Power to arbitrarily deprive individuals of their right to life. This means that the use of lethal force by the Occupying Power while assuming its policing functions is only authorized under very strict circumstances. Concretely, the Occupying Power would only be able to use lethal force when strictly unavoidable in order to protect life and when less extreme means are insufficient to achieve that objective.⁴¹

The second paradigm—which relates to the conduct of hostilities—provides more leeway to the Occupying Power when engaged in the use of force. In the case of hostilities, the occupying forces are normally authorized to attack enemy combatants as well as civilians participating directly in hostilities. The law of armed conflict also allows—albeit under strictly pre-established conditions—a certain level of civilian losses, often referred to in a generic way as ‘collateral damage’.⁴² As such, this second model constitutes the realm of IHL as the *lex specialis*.

The real challenge in situations of occupation lies in the fact that there is no or little further guidance in order to determine when a factual situation falls into one or the other of these paradigms—law enforcement or conduct of hostilities—nor does it explain how to switch from one paradigm to the other.⁴³ This uncertainty has very serious implications, since such a determination is essential when it comes to the use of force in occupied territory because the two paradigms may apply concurrently or simultaneously. Depending on the choice made, the consequence can be very different.⁴⁴

Indeed, the Occupying Power may well be engaged in the conduct of hostilities (for instance against remaining enemy armed forces or other organized armed groups), but may also carry out, at the same time, law enforcement tasks as required by the law of occupation (such as quelling spontaneous demonstrations by the civilian population). In such circumstances, the challenge ahead will be to identify when (p. 202) each model applies and when it becomes necessary to switch from one to the other in light of the situation prevailing in the occupied territory.

An additional challenge posed by the issue at stake arises from the necessity to identify the exact content of the rules governing law enforcement in a situation of occupation. In this respect, one would have to determine whether the rules and standards governing the use of

force in law enforcement operations derive from human rights law as applicable in peacetime, IHL or from a complementary combination of these two bodies of law.

One position advocates that the human rights law regime would be the relevant or even prevalent one bearing in mind its ability to govern the use of force in all circumstances. The starting point for this position lies in the fact that while IHL and human rights law apply simultaneously in occupied territory, the former should not necessarily be considered as the *lex specialis* derogating from the latter in its entirety. On the contrary, it has been contended that IHL should only be considered as a complementary body of law since human rights law would generally provide adequate and sometimes more precise answers to issues linked with the use of force in occupied territory.⁴⁵

The supporters of this theory stress that a comparison between IHL and human rights law would demonstrate that the difference in tools and reasoning would not result in substantially different outcomes. Although the human rights law regime would generally go a bit further in terms of protection—as it is based on a peacetime paradigm—the variations between the two legal regimes would only be a matter of degree. Furthermore, these slight differences would even tend to disappear progressively under the decisions of the human rights bodies, in particular the ECtHR. Such prevalence has in fact developed a set of human rights provisions applicable in situations of armed conflict, adjusted to the specificities of such a situation. The supporters of this theory therefore believe that the human rights law regime would apply also to belligerent relationships.

Those who believe that human rights law prevails in occupation situations find the argument compelling that this legal regime governs simultaneously the activities of law enforcement and military operations, both being generally conducted by the Occupying Power while enforcing its effective control of the foreign territory. According to the supporters of human rights law's prevalence in situations of occupation, the latter is mainly due to the flexibility of human rights law, meaning that the rules and standards could be easily adjusted to the large variety of situations faced by the Occupying Power.⁴⁶ This flexibility is notably characterized by the (p. 203) fact that the resort to force under human rights law is assessed in light of the level of control exerted by the occupying forces over a specific situation and the level of threat faced. Resort to human rights law would thus prove particularly useful when the occupying forces were not in a position to establish with certainty whether a hostile act or intent threatening them did or did not have a nexus with the armed conflict.

Despite the efforts made by some in promoting the central role of human rights law in situations of occupation, the arguments put forward in relation to the use of force are, however, not convincing.

The emphasis placed on the similarities between human rights and IHL regimes by the promoters of the theory of the prevalence of human rights law in relation to the use of force, not only in terms of governing principles, but also in terms of practical results, is a false premise. It is not difficult to point out that IHL and human rights law contain important differences, be they at the level of their general rationale or at the level of their core rules. In particular, the point made here is that the logic governing the use of force under a human rights law-based law enforcement paradigm cannot be compared with the conduct of hostilities paradigm since they differ significantly due to the different realities the respective norms were intended to address: armed conflicts for IHL and peacetime for human rights law. The two regimes also vary significantly in how they address the issue of the use of force. While human rights law considers the use of force from an individualized

perspective, IHL's logic is based on a broader and collective approach for the use of force—the reason being that it has in mind the juxtaposition of two or more parties.

Furthermore, some important differences still exist between the rules and standards governing the two paradigms and legal regimes. The use of force paradigm appears to be more limited in its application by placing an important emphasis on limiting the use of force to situations of absolute necessity. As a result, under this paradigm the use of force could never be regarded as necessary unless it was clear that there is no feasible possibility of protecting the prospective victim by apprehending the suspected perpetrator. Looking at this matter from an IHL angle, the use of lethal force is inherent to waging war and aims to avoid or limit death, particularly of persons protected against direct attack.

For example, the issue of proportionality illustrates the differences between the two paradigms. The aim of the IHL principle of proportionality is to limit incidental damage to protected persons and objects, while nevertheless recognizing that an operation could be carried out even if such casualties were likely, provided of course that it would not be excessive in relation to the concrete and direct military advantage anticipated. In contrast, the aim of the principle of proportionality under human rights law is to prevent harm from happening to anyone but the person against whom force is being used and under human rights law, even such a person would have to be spared lethal force if there was another, non-lethal way of achieving the aim of the law enforcement operation.(p. 204)

In light of the above, the thesis according to which the law enforcement regime would provide adequate rules and standards in order to quell threats stemming from insurgent groups in occupied territory is not convincing. It is also submitted that the legal test such as proposed in the *McCann* or *Issayeva* jurisprudence of the ECtHR would not prove sufficient to allow the occupier to undertake efficient military operations.⁴⁷ It is hard to imagine or unlikely that states exerting effective control over a foreign territory would consider embarking on military operations against the enemy in occupied territory under the law enforcement regime. The latter would always be more constraining in terms of preparation, execution, and *ex post facto* assessment than IHL in relation to the targeting of individuals. The human rights law regime would certainly not provide all the answers on the issue of the use of force in an occupied territory.

In contrast to the human rights are prevalent theory, it is argued here that human rights law would only be a good fit with respect to the activities falling strictly under the occupier's duty to ensure public order and safety in the occupied territory (policing activities).

The position according to which human rights law is the only referral body of law for law enforcement operations carried out within the framework of the Occupying Power's obligation to restore and maintain public order and safety, as reflected in Article 43 of the Hague Regulations, is not justified. This position simply disregards the provisions contained in IHL. It is important in this context to correct the misconception that occupation law per se could not provide a valuable legal framework regulating the use of force in law enforcement operations. In fact, the law enforcement paradigm can actually be applied in occupied territory not as a matter of human rights law, but as a matter of the law of occupation as set forth in key provisions of the Hague Regulations and GC IV.

The opinion of the present author is that the combination of Article 43 of the Hague Regulations, and Articles 27 and 64 of GC IV therefore form the backbone of the law enforcement role of the occupier. These provisions provide the essential elements of a legal framework permitting the regulation of the use of force in an occupied territory. However, while insisting that standards governing the use of force in law enforcement are based on the law of occupation, they could effectively be supplemented by standards stemming from human rights law. IHL, and occupation law in particular, would thus provide the principal legal basis, while human rights law would operate as a complement with additional

standards such as precaution and proportionality. Such an approach to law enforcement in (p. 205) occupied territory is very likely a concept more acceptable to many states, because rooting law enforcement rules in IHL takes more fully into account the particular realities of occupation situations, and offers a way around the difficulties of one particularly contentious issue, the extraterritorial application of human rights law.⁴⁸

Footnotes:

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¹ See for a short overview on this phenomenon of reluctance and the particular 'odium' attached to the word occupation over the last decades, see Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), 9-12.

² As stated by the US Military Tribunal in the famous *Hostages* case, 'international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory [...] Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject', US Military Tribunals at Nuremberg, *USA v Wilhelm List et al (The Hostages Trial)*, Trials of War Criminals before the Nuremberg Military Tribunals, vol.11 (1950), 1247.

³ M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (The Hague: Kluwer Law International/Martinus Nijhoff Publishers, 1999), 111ff.

⁴ Dinstein (n 1), 33ff.

⁵ C. Greenwood, 'The Administration of Occupied Territory in International Law', in E. Playfair (ed), *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992), 241-66; E. Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1992), 7-31.

⁶ Benvenisti (n 5), 7-31; H.P. Gasser, 'Belligerent Occupation', in D. Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford: Oxford University Press, 2008), 270-311.

⁷ However, a detailed analysis of the issue has been published recently, T. Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law', 94(885) *International Review of the Red Cross* (2012) 133-63.

⁸ ICTY, *Prosecutor v M. Naletilić and V. Martinović*, Judgment, Case no IT-98-34-T, Trial Chamber, 31 March 2003, §§ 215-16; ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, § 78; ICJ, *Armed Activities on the Territory of the Congo (DRC v Uganda)*, decision of 19 December 2005, §§ 172-7.

⁹ Dinstein (n 1), 43-4.

¹⁰ See n 7.

¹¹ See notably, United Kingdom, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), point 11.3 at 275; United States of America, *US Field Manual 27-10 'The Law of Land Warfare'*, 1956, § 355.

- ¹² Y. Shany, 'Faraway So Close: The Legal Status of Gaza after Israel's disengagement', 8 *Yearbook of International Humanitarian Law* (2005) 369–83 at 374ff; E. Benvenisti, 'The Law on the Unilateral Termination of Occupation', in T. Giegerich (ed), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference* (Berlin: Duncker & Humblot, 2009), 371–82 at 371–5.
- ¹³ M. Bothe, "'Effective control"—a situation triggering the application of the law of belligerent occupation', background document, ICRC Project on occupation and other forms of administration of foreign territory, 1st Expert Meeting, ICRC Report on occupation and other Forms of Administration of Foreign Territory, Report prepared and edited by T. Ferraro, ICRC Geneva, April 2012, 3. See also M. Zwanenburg, 'The Law of Occupation Revisited: The Beginning of an Occupation', 10 *Yearbook of International Humanitarian Law* (2007) 99–130 at 109–10.
- ¹⁴ See the ICRC, Report on Occupation and Other Forms of Administration of Foreign Territory (11 June 2012).
- ¹⁵ ICJ, *DRC v Uganda*, § 173.
- ¹⁶ According to a rule of thumb proposed by Adam Roberts, foreign forces have foreign territory under control when they see the occupied population eye to eye. See A. Roberts, 'What is a Military Occupation?', 55 *British Year Book of International Law* (1984) 249–305 at 250. In line with this viewpoint one could, for example, argue in some situations that the small size of a territory and with the technology at hand such control can be established from some distance. See P. Spoerri, *Die Fortgeltung Völkerrechtlichen Besatzungsrechts während der Interimsphase palästinensischer Selbstverwaltung in der West bank un Gaza* (Frankfurt am Main: Europäische Hochschulschriften, 2001), 237. See also Ferraro (n 13), 157–8.
- ¹⁷ T. Ferraro, 'The Application of the Law of Occupation to Peace Forces', in Dr G.L. Beruto (ed), *International Humanitarian Law, Human Rights Law and Peace Operations, 31st Round Table on Current Problems of IHL*, San Remo, 4–6 September 2008, International Institute of Humanitarian Law, 120–39.
- ¹⁸ On this specific issue, see the debate between M. Zwanenburg, M. Bothe, and M. Sassoli, 'Is the Law of Occupation Applicable in the Invasion Phase?', 94(885) *International Review of the Red Cross* (2012) 29–50.
- ¹⁹ D.J. Scheffer, 'Beyond Occupation Law', 97 *American Journal of International Law* (2003) 842–60; G.T. Harris, 'The Era of Multilateral Occupation', 24 *Berkeley Journal of International Law* (2006) 1–78; D.P. Goodman, 'The Need of Fundamental Change in the Law of Occupation', 37 *Stanford Law Review* (1985) 1573–1608.
- ²⁰ M. Patterson, 'Who's Got the Title? Or, the Remnants of Debellatio in Post-Invasion Iraq', 47 *Harvard International Law Journal* (2006) 467–88.
- ²¹ M. Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *European Journal of International Law* (2005) 661–94; C. McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq', 10 *Journal of Conflict and Security Law* (2005) 43–74.
- ²² Article 43 of the Hague Regulations: 'the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country*' (emphasis added).

²³ The reference made to the fulfilment of the Occupying Power's obligations under GC IV should be interpreted more broadly so that it not only comprised all IHL obligations but also the Occupying Power's obligations under public international law at large.

²⁴ See, for instance, the ICJ jurisprudence, notably the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 8), and *DRC v Uganda*, (n 8).

²⁵ Sassòli (n 22), 676–8; A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *American Journal of International Law* (2006) 580–622 at 588–9; Y. Dinstein, 'Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding', in *Humanitarian Policy and Conflict Research, Occasional Paper Series*, Fall 2004, Harvard University, 6; C. McCarthy, 'Legal Reasoning and the Applicability of International Human Rights Standards During Military Occupation', in R. Arnold and N. Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (The Hague: Martinus Nijhoff Publishers, 2008), 101–20.

²⁶ J. Yoo, 'Iraqi Reconstruction and the Law of Occupation', 7 *University of California Davis Journal of International Law and Policy* (2004–05) 7–22.

²⁷ G. Fox, 'The Occupation of Iraq', 36 *Georgetown Journal of International Law* (2005) 195–297; V. Koutroulis, 'Mythes et réalités de l'application du droit international humanitaire aux occupations dites "transformatives"', 40 *Revue Belge de Droit International* (2007) 365–400; G. Fox, 'Transformative Occupation and the Unilateralist Impulse', 94(885) *International Review of the Red Cross* (2012) 237–66.

²⁸ Roberts (n 25), 580–622.

²⁹ However, divergent views still exist and continue to support the position that human rights law is not applicable in occupied territory. See, for instance, M.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *American Journal of International Law* (2005) 119–41. The state of Israel still considers that human rights law has no extraterritorial application and therefore is not binding upon an Occupying Power, see O. Ben Naftali and Y. Shany, 'Living in Denial: The Application of Human Rights in Occupied Territories', 37 *Israel Law Review* (2003–04) 25–40.

³⁰ One should notice that a proposal aimed at giving the occupier the right to repeal local legislation contrary to human rights law was rejected during the negotiation of GC IV. The rejection of this Mexican proposal was mainly due to the embryonic character of human rights law at the time of the negotiations.

³¹ ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 8), §§ 102ff; ICJ, *DRC v Uganda* (n 8), § 178.

For the relationship between international human rights law and international humanitarian law, see the Chapter by D. Jinks in this volume.

³² Sassòli (n 22), 673–5.

³³ Roberts (n 25), 580–622.

³⁴ The present author holds the view that human rights law obligations apply in territory or parts thereof over which foreign forces have effective control as understood by IHL. In this respect, it is submitted here that effective control under IHL is of a higher threshold than effective control for the purposes of human rights law. Therefore, when foreign forces

enforce effective control over foreign territory, this state of fact suffices to trigger human rights law obligations incumbent upon the Occupying Power.

³⁵ C. Droege, 'Parallel Application of IHL and International Human Rights Law: An Examination of the Debate', 40(2) *Israel Law Review* (2007) 468–660 at 521–2.

³⁶ N. Lubell, 'Elective Affinities? Human Rights and Humanitarian Law', 90(871) *IRRC* (2008) 501–48, 655; see also R. Kolb and G. Gaggioli, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights', 37 *Israel Yearbook on Human Rights* (2007) 115–63, 118ff.

³⁷ R. Kolb and S. Vité, *Le droit de l'occupation militaire, perspectives historiques et enjeux juridiques actuels* (Brussels: Bruylant, 2009), 347ff.

³⁸ Y. Dinstein, 'The Israel Supreme Court and the Law of Occupation: Article 43 of the Hague Regulations', 25 *Israel Yearbook on Human Rights* (1995) 1–20.

³⁹ Dinstein, *The International Law of Belligerent Occupation* (n 1), 94–105.

⁴⁰ K. Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', 98 *American Journal of International Law* (2004) 1–34. See also, K. Watkin, 'Use of Force During Occupation: Law Enforcement and Conduct of Hostilities', 94(885) *International Review of the Red Cross* (2012) 267–316.

⁴¹ See Droege (n 35), 537–9.

⁴² See, for instance, Art 57(2)(b) of Additional Protocol I: 'an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or *that the attack may be expected to cause incidental loss of civilian life, injury to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated*' (emphasis added).

⁴³ The limited character of this contribution does not allow for an analysis on the interaction between the two paradigms and the identification of criteria which would allow a determination of when and how to swap between the law enforcement model and the conduct of hostilities paradigm. This question is examined in detail in the ICRC Report on Occupation and Other Forms of Administration of Foreign Territory (n 13).

⁴⁴ University Centre for International Humanitarian Law, *Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation*, Report, 2005, 20–9, available at <http://www.adh-geneve.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf>.

⁴⁵ ICRC, Report on Occupation and Other Forms of Administration of Foreign Territory, (n 13).

⁴⁶ The flexibility of the human rights law rules pertaining to the use of force would permit their application in almost all factual situations faced by the Occupying Power, ranging from the enforcement of the law against criminal acts such as robbery or drug trafficking, to open hostilities pitting the occupying forces against insurgent armed groups. This benefit would in itself justify considering the human rights law regime as the central piece of the legal framework governing the use of force in occupied territory.

⁴⁷ ECtHR, *McCann v UK*, Judgment of 27 September 1995, No 18984/91; ECtHR, *Issayeva, Yusupova, and Bazayeva v Russia*, Judgment of 24 February 2005, Nos 57947/00, 57948/00, and 57949/00.

⁴⁸ ICRC, Report on Occupation and Other Forms of Administration of Foreign Territory (n 13).

(p. 299) 13 Occupation

1. Introduction

Since the beginning of human history, force has been used to subdue enemy powers and impose authority upon foreign populations. While this phenomenon has always attracted the interest of scholars and political authorities, formal regulation of war through the adoption of multilateral treaties started in the second half of the nineteenth century and has never stopped since then. Different issues have been addressed, covering all aspects of war, including its legality, the conduct of hostilities, the treatment afforded to the wounded, sick, and shipwrecked, the fate of enemy prisoners, and the fate of civilians.

In this framework, attention has also been paid to 'occupation'.¹ Occupation refers to this particular phase in international armed conflict (IAC) where a belligerent has overpowered the adverse party and taken control of enemy territories, but the final outcome of the war has not yet been decided. Occupation is thus a transition phase between the end of active hostilities and formal conclusion of the conflict. It is a period where foreign armed forces (the Occupying Power) are responsible for the administration of territories belonging to the defeated state. During this transitory period towards peace, international law seeks to ensure that the rights of the territorial state are not infringed and that local populations are protected against any risk of abuse by potentially hostile authorities.

Following the Second World War, the notion and law of occupation largely ceased to draw international attention. For about five decades, this issue was barely discussed, except in relation to the Palestinian territories under Israeli control. This tendency, however, has dramatically changed. Following a number of international crises, including the invasion of Kuwait (1990), the international administrations in Kosovo and East Timor (1999), and the interventions in Afghanistan (2001) and Iraq (2003), the scope and implications of the law of occupation have generated renewed interest among both scholars² and international institutions.

This chapter provides an introduction to the law of occupation. It opens with a short discussion of the legal origin, or sources, of this legal framework. While relevant rules mainly (p. 300) fall under international humanitarian law (IHL), it is recognized today that human rights law is also applicable during occupation. This contribution also addresses the scope of the law of occupation. It explains the meaning of occupation, as it is defined in international law, and highlights a number of questions that are currently being debated. Finally, the bulk of this chapter deals with the substance of the law of occupation. An overview of the main principles and rules is presented.

2. The Law of Occupation: Sources

The law of occupation is a particular branch of IHL. Relevant rules may be considered as *lex specialis*, meaning that they have been specifically tailored to address the challenges and needs resulting from occupation. In addition, since international human rights law applies both in time of peace and armed conflict, it is also relevant in occupied territories. The contemporary law governing occupation is thus a combination of rules pertaining to IHL and human rights law. The interplay between these two legal frameworks, however, is not completely clear. It raises a number of questions that have been discussed mainly in recent years and that, to a certain extent, still remain open.³

A. International Humanitarian Law

The law of occupation has evolved over time. It is composed today of a certain number of treaties that have shaped progressively both the notion of occupation and the rules applicable to it. The first relevant multilateral treaty still in force today is the fourth Hague Convention on the Laws and Customs of War, adopted in 1907, and its annexed Regulations.⁴ More particularly, section III of the Hague Regulations (articles 42–56) specifically applies to occupation, as it deals with ‘military authority over the territory of the hostile State’.⁵ This Convention was ratified by only thirty-seven states, but has been recognized as expressing customary international law,⁶ and as such its norms are binding upon all states.

Rules of IHL governing occupation were later augmented with the adoption of the four Geneva Conventions in 1949. These Conventions apply to all cases of declared war or any other armed conflict occurring between states, including occupation.⁷ They also clarify that their scope of application extends to ‘all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’.⁸ (p. 301) These Conventions have been universally accepted (ratified). All states have formally committed to respect and ensure respect for them.⁹ Provisions especially related to occupation may be found in the fourth Geneva Convention on the Protection of Civilian Persons in Time of War (GCIV).¹⁰

GCIV does not replace the Hague Regulations, but provides supplementary rules.¹¹ Although the provisions of these two instruments largely overlap, those in the Hague Regulations remain applicable.¹² Thus, in order to have full understanding of the international law governing occupation, it is essential to take both instruments into consideration.¹³ To a lesser extent, other more recent treaties of IHL also provide complementary rules.¹⁴

B. International Human Rights Law

Even if the issue is still a source of controversy,¹⁵ there is little question today that international human rights law is applicable to situations covered by IHL, that is, armed conflicts, including occupation. This position has been confirmed by a wealth of international and domestic practice.¹⁶ With regard to occupation, the International Court of Justice (ICJ) explicitly declared that states remain bound by international human rights instruments even when acting outside of their own territory, and stressed that this was valid ‘particularly in occupied territories’.¹⁷ The ICJ applied this position to the occupied Palestinian territory, and to the deployment of Ugandan armed forces in the Democratic Republic of Congo.¹⁸ The United Kingdom has also recognized that ‘an occupying power is ... responsible for ensuring respect for applicable human rights standards in the occupied territory’¹⁹ and further clarified that ‘[w]here the occupying power is a party to the European Convention on (p. 302) Human Rights, the standards of that Convention may, depending on the circumstances, be applicable in the occupied territories’.²⁰

Various legal arguments have been proposed to support this view. It has been put forward, for instance, that IHL as such foresees the application of human rights law in time of occupation. This is a logical consequence of article 43 of the Hague Regulations, which requires the Occupying Power to take all feasible measures ‘to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’.²¹ It may also be recalled that Additional Protocol I (API) explicitly recognizes that some of its provisions applicable in times of occupation are complementary not only to rules of GCIV, but also to ‘other applicable rules of international law relating to *the protection of fundamental human rights* during international armed conflict’.²² Conversely, it has also been argued that human rights law is applicable, regardless of relevant rules of IHL, as soon as a state exercises sufficient territorial control abroad, including in case of occupation.²³ Territorial control in itself is enough to trigger the

applicability of human rights instruments, even when such control is exercised beyond national borders. In addition, even those who do not accept this argument agree that the Occupying Power is bound by local laws implementing the occupied state's international human rights obligations.²⁴

While recognition of the applicability of human rights law in times of occupation is supported by solid international practice, the concrete implications of this evolution still raise a number of questions that remain open for discussion. One of the current, most debated questions relates to the interplay between human rights law and IHL, as rules from each of these legal frameworks are concurrently applicable in situations of occupation and overlap to a certain extent. Addressing this issue in relation to the Palestinian occupied territory, the ICJ confirmed that both of these branches of international law were applicable in this case, but also declared that it would take IHL into consideration as '*lex specialis*'.²⁵ The exact meaning of this statement, however, is not clear and has aroused different interpretations. Some have argued that the rules of IHL must prevail as a matter of principle. Under this understanding, human rights law should apply only when it offers greater protection, or in case IHL is unclear or contains lacuna.²⁶ Others would rather consider that IHL and human rights law are complementary and as such are not exclusive, but 'influence and reinforce each other mutually'.²⁷ In accordance with this interpretation, one of these legal frameworks should prevail over the other, pursuant to the principle of '*lex specialis*', only when two particular rules dealing with the same issue contradict each other.²⁸

(p. 303) 3. The Law of Occupation: Scope

Identifying the scope of application of the law of occupation requires a clear understanding of the notion of occupation. This is essential to determine in which situations vulnerable persons may claim protection under this legal framework. While this notion was defined initially in the Hague Regulations, and later clarified in the Geneva Conventions and through international practice, the extent to which relevant rules are applicable in practice is not always clear. Discussions in this regard have recently focused on the criteria that should be used to identify the beginning and end of occupation.

A. Definition of Occupation

Pursuant to article 42 of the Hague Regulations,²⁹ 'territory is considered occupied when it is actually placed under the authority of the hostile army'.³⁰ This provision is usually considered as providing the core definition of the notion of occupation.

Article 42 shows that this notion relies on factual criteria.³¹ There is occupation in a given situation as soon as the conditions in article 42 are 'actually' realized. As such, the existence of an occupation does not suppose formal acceptance by the parties to the conflict or recognition by other states. It does not depend on a subjective assessment of the situation, but is based on objective elements. This was confirmed in international jurisprudence and state practice on a number of occasions. The US Military Tribunal at Nuremberg, for instance, clearly stated that 'whether an invasion has developed into an occupation is a *question of fact*'.³² The exclusiveness of the factual criteria in the notion of occupation also means that the origin or causes of the conflict, as well as the motivations of the parties involved in it, are not relevant. The US Military Tribunal at Nuremberg also recalled in this regard that '[i]nternational law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territories'.³³

Another fundamental characteristic of the notion of occupation is that it concerns military operations abroad and supposes interstate confrontation. The Hague Regulations govern 'war on land', meaning armed conflict between opposing sovereign entities. Section III of this instrument, which governs occupation, confirms that it applies to '[m]ilitary authority over the territory of the hostile *State*'.³⁴ Similarly, the Geneva Conventions characterize occupation as a form of armed conflict between 'High Contracting Parties', meaning between states.³⁵

The above implies that the notion of occupation does not cover non-international armed conflicts (NIACs).³⁶ In those situations, the re-establishment of authority by government (p. 304) armed forces over national territory following temporary loss of effective control does not trigger the applicability of the law of occupation. In this case, domestic law and other rules of international law, including human rights law, will apply. Similarly, territorial control exercised by non-state armed groups (NSAGs) may not be legally classified as occupation. In these situations, these groups are bound by rules of IHL governing NIACs, namely Common Article 3 of the four Geneva Conventions, Additional Protocol II (APII) of 1977 when applicable, and relevant customary international law.

Finally, it may be inferred from article 42 that the notion of occupation entails basically two conditions: (i) a foreign power is in a position to exercise effective control over a territory, which does not belong to it (the territory is placed 'under its authority'); and (ii) the intervention has not been approved by the legitimate sovereign (territorial control is exercised by a 'hostile army'). While this understanding is generally accepted, the interpretation and practical consequences of each of the two constitutive elements have raised doctrinal debate.

1. *Effective territorial control*

A first question relates to the level of territorial control required to trigger the application of the law of occupation. A number of provisions support the view that this level is relatively high. Article 42 of the Hague Regulations states that '[t]he occupation extends only to the territory where such authority *has been established and can be exercised*'.³⁷ This suggests that the situation in the territory must be relatively stable and that the new authorities are sufficiently organized to be able to meet their responsibilities under international law. This requirement is also implicit in a number of provisions of the Hague Regulations and GCIV. Stability and organization are indeed necessary preconditions, for instance, to ensure the availability of food, to maintain medical and hospital establishments, or to ensure, more generally, proper administration of the occupied territory.³⁸

Article 43 of the Hague Regulations expresses the same idea by stating that an occupation exists where '[t]he authority of the legitimate power [has] in fact *passed into the hands of the occupant*'.³⁹ The ICJ has recalled in this regard that occupation is characterized by a shift of power. In the *Armed Activities* case, when contemplating whether the armed forces of Uganda were to be considered as an Occupying Power in the Democratic Republic of the Congo, the ICJ declared that it would need to be demonstrated that these forces 'were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government'.⁴⁰ In other words, the ICJ considered that there is 'effective control', and thus occupation, when (i) the ousted government is no longer in a position of exercising its authority; and (ii) the foreign troops have substituted their own authority for that of the government.⁴¹

This rather strict understanding of the notion of 'effective control', however, does not mean that the notion of occupation is incompatible with some forms of disturbance (p. 305) or armed violence in the country. The International Criminal Tribunal for the former Yugoslavia (ICTY) recalled in this regard that 'sporadic local resistance, even successful, does not affect the reality of occupation'.⁴² To a certain extent, the law of occupation does take into consideration this concern. It indicates that the Occupying Power has the

obligation to ensure law and order in the territory.⁴³ In most cases, this requires law enforcement measures governed by human rights standards. However, in situations involving high-intensity confrontations against organized armed groups, rules of IHL governing the conduct of hostilities may also become applicable.⁴⁴

2. Lack of consent

The law of occupation aims to preserve the rights of the territorial sovereign and to protect local populations against risks of abuse by foreign forces. These risks are particularly acute when the presence of foreign forces is not agreed to by local authorities. This is why lack of consent to this presence is a fundamental characteristic of the notion of occupation. Article 42 of the Hague Regulations specifies in this regard that there is occupation when the territory is under the authority of a '*hostile army*'.⁴⁵ These situations are traditionally called '*belligerent occupation*'.⁴⁶ In other words, the notion of occupation implies imposition of effective control '*by coercive, military, means*'.⁴⁷

The Geneva Conventions, while reiterating this original approach, have also clarified the scope of the notion of occupation.⁴⁸ They apply to '*all cases of partial or total occupation of the territory of a High Contracting Party*', thus referring to the conceptual framework of the Hague Regulations, but also specifying that this must be the case '*even if the said occupation meets with no armed resistance*'.⁴⁹ Thus the existence of an occupation does not necessarily suppose active hostilities on the ground.⁵⁰ Absence of reaction to the deployment of foreign troops on national territory does not imply consent. If such consent is not explicitly given by the local government, the troops will be considered as an Occupying Power.⁵¹ Conversely, when foreign forces enter a country upon the invitation or with the agreement of the local government, their presence may not be considered as '*hostile*', and therefore the specific legal protections under the law of occupation do not apply. These situations are usually characterized as '*pacific occupation*'⁵² and are governed by other legal frameworks, including human rights law.

In practice, it may be extremely difficult to assess whether consent to the presence of foreign armed forces is genuine and valid. History shows numerous examples of states manipulating '*puppet governments*' abroad in order to impose, under fictitious agreements, control over foreign territories. Under general international law, consent must be given by (p. 306) authorities entitled to express themselves on behalf of the state,⁵³ and must not be obtained under duress, that is, by the threat or use of force in violation of international principles and rules.⁵⁴

B. Beginning and End of Occupation

The notion of occupation, as defined by the Hague Regulations and clarified by the Geneva Conventions, provides the legal concepts necessary to determine the beginning and end of occupation. There may be an occupation in a given situation only when the two components of this notion—namely effective territorial control and lack of consent—are fulfilled. Conversely, an existing occupation comes to an end when one of these components does not exist anymore.⁵⁵ In other words, '*the criteria for establishing the end of an occupation should mirror the ones used to determine its beginning*'.⁵⁶ However, this logical approach raises a number of practical questions.⁵⁷

1. Beginning of occupation

As to the beginning of occupation, it has been debated what should be the minimum level of control required to trigger the application of the relevant legal framework. This question is especially sensitive in relation to the invasion phase of the armed conflict, during which the forces of one party have entered a foreign country but have not yet been able to impose stable authority over any part of the territory. In this scenario, the civilians concerned may

not be in a position to claim protection under the law of occupation, since the minimum requirement of territorial control is not realized.

In these situations, the ICRC has proposed a flexible approach. In order to guarantee minimum protection to civilians at risk, it has advocated that some rules of GCIV governing occupied territories should apply as soon as foreign troops are in contact with local populations, even though the minimum level of control required for the existence of an 'occupation' has not been reached.⁵⁸ In other words, the ICRC suggests that the notion of occupation in GCIV has a 'wider meaning' than it has in the Hague Regulations, and thus the former has a broader scope of application than the latter.⁵⁹

This position finds some support in international practice. ICTY has considered, for instance, that rules providing individual protection under the law of occupation should apply each time that a person comes within the power of foreign troops, even though these (p. 307) troops do not exercise effective control over the concerned area.⁶⁰ 'Otherwise', explained the Tribunal, 'civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established'.⁶¹

This approach, however, has been criticized by a number of governments and experts on the basis of the plain meaning of the two components of the notion of occupation.⁶² As expressed by the US Military Tribunal at Nuremberg:

The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organised resistance and the establishment of an administration to preserve law and order. To the extent that the occupants' control is maintained and that of the civil government eliminated, the area will be said to be occupied.⁶³

Supporters of a strict interpretation also consider that nothing in GCIV nor subsequent practice indicates that rules governing occupation in this Convention have a different scope of application than under section III of the Hague Regulations.⁶⁴

2. End of occupation

The end of occupation may occur following two main scenarios. First, the Occupying Power may lose control over the territory. This usually happens through the withdrawal of its troops, either on a voluntary basis, or forced by local resistance. Second, the occupation may also come to an end when these troops, while remaining in the country, are not considered as 'hostile' anymore, but are authorized to stay by the local authorities.⁶⁵ It is generally agreed, for instance, that the occupation of Iraq was terminated in June 2004 following a process determined by mutual consent between the local authorities (the Iraqi Governing Council) and the temporary administrative structure established by the Occupying Powers (the Coalition Provisional Authority). The UN Security Council adopted a resolution endorsing this process and the transfer of governmental responsibilities. It also recognized the creation of 'a sovereign Interim Government of Iraq' and proclaimed the end of the occupation, despite the continuing presence of foreign armies on Iraqi territory.⁶⁶

In practice, however, termination of occupation by consent may not be obvious. In those situations where local authorities do not enjoy sufficient autonomy from the Occupying Power, the validity of the process of giving consent risks being challenged. In such cases, the process may also be contrary to article 47 of GCIV, which provides that protected persons (p. 308) must not be deprived of the benefits of the Convention 'by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the

occupied territories and the Occupying Power ...'. This is why it is crucial that consent to foreign presence be genuine and given by effective local authorities.

While in principle the end of occupation must be determined on the basis of the same criteria as those used for its beginning, GCIV contains an exception to this purely logical approach. When occupying forces remain in the country more than one year after the 'general close of military operations', the Convention ceases to apply except for a number of explicitly listed provisions.⁶⁷ These provisions include, for instance, those related to the treatment of individuals, such as the obligation to respect honour, family rights, and religious convictions, as well as the prohibition of murder and torture.⁶⁸ Concerning states that are parties to API, however, this rule does not apply. For these states, relevant provisions of GCIV and API remain applicable until the termination of occupation. In this case, the symmetrical interpretation of the beginning and end of occupation is followed. However, API introduces one exception 'for those persons whose final release, repatriation or re-establishment takes place [after the occupation]'.⁶⁹ These persons must indeed benefit from relevant protections until their personal situation is solved, even after the formal end of occupation.⁷⁰

C. Selected Issues

Even though occupation was defined in article 42 of the Hague Regulations, and further clarified through subsequent legal developments, the exact scope of this notion remains, to a certain extent, subject to controversy due to new uncertainties arising in practice. As Adam Roberts points out, 'the core meaning of the term is obvious enough; but as usually happens with abstract concepts, its frontiers are less clear'.⁷¹ Two scenarios have been particularly debated: (i) territorial control exercised by a state from abroad, that is, without military presence on the ground; and (ii) territorial control exercised by international organizations.

1. *Territorial control without presence on the ground*

This issue was especially discussed in relation to the situation of the Gaza Strip following the total withdrawal of Israeli armed forces in September 2005, after almost forty years of continuous presence and control in this area. This operation was part of a 'Disengagement Plan' adopted by the Israeli government on 6 June 2004 and endorsed by Parliament on 25 October of that same year.⁷² By virtue of that plan, the authorities' intention was to put an end to their responsibilities vis-à-vis the people living in the Gaza Strip.⁷³ Should it (p. 309) therefore be concluded that those measures marked the end of the occupation of the territory? In other words, was the physical withdrawal of the Israeli forces enough to admit that effective territorial control characteristic of occupation did not exist any longer?

Some observers have answered that question in the negative. They have recalled that Israel retains substantial authority over the Gaza Strip, although its troops are no longer physically deployed in that area.⁷⁴ The Disengagement Plan clearly stated that Israel was to continue to exercise control over the borders of that territory, as well as over its air space and coastal region.⁷⁵ Moreover, these observers have also stressed that Israel has the advantage of being able to enter Palestinian territory at any time in order to maintain public order. This power is made greater by the small size of the territory of Gaza and the military means available. As provided by article 42(2) of the Hague Regulations, there is occupation when the authority of the hostile army 'has been established and *can be exercised*'. This wording could be interpreted as meaning that potential authority would suffice as evidence of the reality of occupation. These views were shared, for instance, by the UN Secretary General, who declared that 'the actions of IDF [Israeli Defense Forces] in respect of Gaza have clearly demonstrated that modern technology allows an occupying Power to effectively control a territory even without a military presence'.⁷⁶ According to this position, occupation of the Gaza Strip would therefore not have ceased with the withdrawal of troops

in 2005, as Israel could be said to continue to exercise from a distance a power equivalent to the 'effective control' required under the law of occupation.⁷⁷

Other experts, however, consider that a closer study of the treaty texts shows that the ability of an occupier to impose its effective control cannot be separated from its physical presence in the territory concerned.⁷⁸ While article 42 of the Hague Regulations accepts that occupation exists when the adversary's authority 'can be exercised', it makes it clear that that authority must first be 'established'. It thus forges an inseparable link between the establishment of authority, implying the deployment of a presence on the ground, and the ability to extend that authority to the entire territory concerned. Moreover, as explained, effective control becomes apparent as a result of a substitution of powers. Obviously, this threshold of application cannot be achieved if the foreign forces are located outside the region in question. Supporters of this position also argue that it is impossible to conceive of the implementation of most of the rules of occupation unless there is a presence in the territory. It is impossible, for instance, to ensure public order and civil life in a territory, as required by article 43 of the Hague Regulations, from outside.⁷⁹ It would thus be paradoxical to require a state to fulfil its international obligations if it is unable to do so because it is not present in (p. 310) the area concerned. Such an interpretation would run counter to the basic tenets of the law of occupation.

2. Territorial control by international organizations

The increasing development of military operations by international organizations, especially by the United Nations, has raised questions and triggered controversies about the legal framework applicable to such operations. When armed forces under the command of these organizations are deployed in a territory, which in some cases may involve vast administrative power, the question arises as to whether and under what conditions their presence may amount to an occupation, and therefore whether the law of occupation is binding upon them.⁸⁰

While a detailed analysis of this question goes beyond the scope of this chapter,⁸¹ suffice it to say that some observers have answered the question in the negative. Stressing the differences between states and international organizations, they have argued that the latter should not be assimilated to Occupying Powers when engaged in military operations. They consider that such operations do not defend the interests of a particular state, but rather seek to implement mandates received from the international community. As such, they are not based on conflicting interests, which is the characteristic of occupation, but tend to promote cooperation to secure peace and protect local populations.⁸²

These views, however, are not generally supported. It is widely accepted today among scholars that the law of occupation may apply under certain circumstances to international operations.⁸³ The reason is that the existence of an occupation, as explained previously, does not depend on political motivations, but rather on criteria that must be assessed objectively. If these criteria, namely effective territorial control and lack of consent, are met, then the law of occupation must apply, whether the troops deployed on the ground are under the command of a state or an international organization.

However, this conclusion does not mean that all specific rules concerned are relevant in this context. These rules were developed with state structure in mind, at a time when occupation by international organizations was not an issue. Article 49 of GCIV, for instance, mentions the 'territory' or the 'civilian population' of the Occupying Power. Obviously, these notions do not apply to international organizations.

4. The Law of Occupation: Contents

The international legal regime governing occupation is based on three fundamental principles that are illustrated and made more precise through a number of specific rules. While (p. 311) this section proposes a broad overview of this framework, it also provides a more specific analysis of certain issues that have been of particular interest in recent practice.

A. Overview: Fundamental Principles

The three fundamental principles upon which the law of occupation is based require the Occupying Powers to (i) restore and ensure public order and civil life in the occupied territory; (ii) respect the local legal system; and (iii) respect and protect the individuals and property under its control.⁸⁴

1. *Obligation to restore and ensure public order and civil life*

Although expressing distinct obligations, the first two principles are in fact closely connected. They are both included in the same sentence of article 43 of the Hague Regulations, which provides that the Occupying Power ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. This provision, which ‘broadly define[s] the occupant’s scope of authority’,⁸⁵ lays down the basis of the Occupying Power’s responsibilities in the administration of the occupied territory and establishes the legal framework in which such responsibilities are to be implemented.⁸⁶ This provision is thus central in the law of occupation and is part of customary international law.⁸⁷

The first part of this dual rule, namely the obligation ‘to restore, and ensure, as far as possible, public order and safety’, entails vast responsibilities. Contrary to what a plain reading of this text may suggest, the obligation incumbent on the Occupying Power is not limited to law-and-order functions. The original, authentic French version of article 43 makes clear that this obligation extends to measures necessary to restore and ensure ‘civil life’ more generally.⁸⁸ This is further confirmed by more specific rules of the law of occupation addressing various aspects of territorial administration. These are not limited to security concerns and criminal matters,⁸⁹ but also include broader concerns, such as medical care, education, food, clothing, and housing.⁹⁰ In other words, the purpose of these provisions is ‘to protect the civilian population in an occupied territory from a meaningful decline in orderly life’.⁹¹

It may not, however, always be possible for an Occupying Power to fully achieve the results expected under article 43. Specific circumstances, including the military situation on the ground, may affect its capacity to comply with this provision. This is why article 43 allows some flexibility in this regard in order to take into account practical constraints. (p. 312) It stresses that the Occupant’s obligation to ensure proper administration of the territory extends only to measures that are ‘in his power’, and further indicates that this obligation must be implemented ‘as far as possible’. Article 43 does not create an obligation of results, but rather seeks to ensure that the Occupying Power will use all available means to restore and ensure public order and civil life under the prevailing circumstances in each situation.

2. *Obligation to respect the domestic legal system*

As explained, occupation is de facto control over a territory. It does not confer sovereignty upon the Occupying Power,⁹² but consists of a transitory period during which foreign forces assume the responsibility of administering the territory while long-term solutions are being sought. This situation is meant to be temporary.⁹³ It follows from this that the law of occupation tends to preserve the legal system in place. It prohibits the Occupying Power from undertaking changes in the domestic law of the occupied country, except under strict conditions and for determined purposes. Article 43 of the Hague Regulations expresses this

rule by providing that the Occupying Power must respect the laws in force in the country 'unless absolutely prevented' from doing so. While seeking to maintain legal stability in the occupied territory, this provision does not completely exclude modifications under exceptional circumstances.

The concrete implications of this obligation, however, are not always clear. Military operations abroad whose main objective is to introduce fundamental changes in the institutional and political system of the occupied territory (so-called 'transformative occupations') are prohibited.⁹⁴ It is, however, debated in which circumstances an Occupying Power is indeed 'absolutely prevented' from respecting the laws in force in the country, and whether it may therefore adopt derogative measures.

One clear limitation in this regard may be found in article 47 of GCIV. As already mentioned, this article prohibits, among other things, changes in local institutions or governmental structures that would result in the suppression of individual protections recognized by the Convention. Apart from this, modifications in domestic law are not prohibited in an absolute manner. Such modifications may even be necessary in certain circumstances to meet legitimate purposes. Article 47 guarantees that individual protections are not annihilated through institutional transformations, but does not prohibit these transformations as a matter of principle.⁹⁵

Modification of the legal framework may be necessary to implement the obligation, under article 43 of the Hague Regulations, to 'restore, and ensure, as far as possible, public order and safety'. Especially in case of prolonged occupation, it may be necessary to adapt local legislations to evolving social needs.⁹⁶ This obligation, however, as general and vague as it is, does not help much to determine the exact extent of the legislative latitude conferred on the Occupying Power. In practice, it has been interpreted by concerned authorities (p. 313) sometimes extensively, in order to support important legislative powers, and sometimes restrictively, in order to justify limited involvement in the administration of the territory.⁹⁷

To a certain extent, however, article 64 of GCIV helps in resolving this uncertainty. The second paragraph of this article is usually recognized as providing details that may be used to clarify the meaning and implications of article 43 of the Hague Regulations.⁹⁸ This paragraph establishes that the Occupying Power may derogate from its obligation to respect the laws in force in the occupied territory for three purposes, namely (i) to fulfil its obligations under GCIV, which is usually interpreted today more broadly as also including other relevant instruments of IHL and human rights law;⁹⁹ (ii) to 'maintain the orderly government of the territory'; and (iii) to ensure its own security.¹⁰⁰ It is admitted, for instance, that the Occupying Power may decide to suspend local laws concerning conscription, freedom of public assembly, or the bearing of arms.¹⁰¹ The Occupying Power may also have to legislate to implement policies on child welfare, labour, food, and public health.

This list of three exceptions is exclusive,¹⁰² meaning that no other reason may be used to justify changes in the domestic legal order. The legislative room for manoeuvre granted to the Occupying Power is thus circumscribed, even though it is broad enough to allow necessary adaptations to the needs and challenges resulting from the administration of the occupied territory. In addition, concerned authorities must exercise restraint in using this power. Article 64 authorizes only those transformations that are 'essential' to one of the three mentioned purposes.¹⁰³ It thus confirms that legislative status quo must be the prevailing rule in occupied territories, while changing local laws should remain the exception.

3. *Obligation to respect and protect individuals and property*

The third fundamental principle of the law of occupation, which requires the Occupying Power to respect and protect individuals and property in the occupied territory, is directly connected to the two previous ones. The ICJ has confirmed that the two obligations formulated in article 43 of the Hague Regulations comprise ‘the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party’.¹⁰⁴ This principle is far reaching, as, according to the Court, it obliges the Occupying Power to prevent abuses that may be perpetrated not only by its own forces, but also by other actors. The Court also considers that this principle covers potential violations of both IHL and human rights law, thus stressing the complementary nature of these legal frameworks in this context.

More specific rules of IHL, illustrating and detailing this principle,¹⁰⁵ provide for instance that protected persons in occupied territories are entitled to respect for their persons, honour, family rights, and religious convictions and practices.¹⁰⁶ They must be treated (p. 314) humanely ‘at all times’,¹⁰⁷ which includes protection against all forms of violence and prohibition of murder, torture, or corporal punishment.¹⁰⁸ These rules also require special treatment for certain categories of persons, such as women, children, workers, or internees.¹⁰⁹ They also guarantee respect for public and private property,¹¹⁰ and determine strict conditions under which such property may be seized, requisitioned, or used.¹¹¹

IHL governing occupation also seeks to guarantee that the basic needs of the local population are satisfied. The Occupying Power has the obligation, to the fullest extent of its available means, to ensure the provision of food, medical supplies, clothing, bedding, housing, and ‘other supplies essential to the survival’ of the population.¹¹² If the Occupying Power is not in a position to comply with this obligation, it must accept relief operations undertaken by other states or by humanitarian organizations.¹¹³

It is also important to note, in terms of individual protection, that IHL pays particular attention to risks related to movements of populations in situations of occupation. It strictly prohibits forcible transfers and deportations of protected persons to the territory of the Occupying Power or to any other state.¹¹⁴ Evacuations abroad may be allowed only if ‘the security of the population or imperative military reasons so demand’, and only if these evacuations cannot be avoided for ‘material reasons’ and are temporary.¹¹⁵ Conversely, under no circumstances may the population of the Occupying Power be transferred into the occupied territory.¹¹⁶

These are a few examples of legal protections in times of occupation under IHL. As mentioned, applicable instruments of human rights provide essential complementary protections in terms of civil and political rights and economic, social, and cultural rights.¹¹⁷

B. Selected Issues

While the three fundamental principles of the law of occupation are well established, their concrete implications have raised a number of questions. Particular areas of interest include the use of force in the maintenance of law and order, the application of security measures to civilians, and the protection and use of property and resources.

1. *Use of force*

Quite surprisingly, IHL does not provide clear guidance as to when and how force, including potentially lethal force, may be used in occupied territories. While article 43 of the (p. 315) Hague Regulations requires the Occupying Power to guarantee public security and order in areas under its effective control, it does not further specify the rules that must be followed when implementing this obligation. The question is important, because depending on the circumstances the Occupying Power may be confronted with different challenges calling for distinct responses. In some cases, it may have to use police powers, when, for instance, it

has to fight against criminality or quell social unrest. In other cases, military means of action may be more adequate when it is engaged in high-intensity violence against organized armed groups.

This distinction is crucial as each scenario requires the application of specific rules that may result in quite different results as to when and how force may be used. The rules governing law enforcement have been developed and detailed in human rights law, in relation to the right to life.¹¹⁸ They basically provide that lethal force may only be used in very limited circumstances and under strict conditions. Under this legal framework, the use of potentially lethal force is allowed only to achieve a number of essential and narrowly defined objectives, and when less extreme means are insufficient to achieve these objectives.¹¹⁹ In any event, intentional lethal use of firearms is permissible only when 'strictly unavoidable in order to protect life'.¹²⁰ Conversely, the rules applicable to conduct of hostilities in armed conflict are based on IHL. They recognize that some categories of persons may be lawfully targeted in such situations. In IAC, these persons include enemy combatants and civilians taking a direct part in hostilities. With regard to these persons, the Occupying Power enjoys more leeway in using force than it would under the law enforcement model.¹²¹

Distinction between these two forms of armed violence is, however, not always clear-cut in practice. In times of occupation, it may be difficult to draw a clear line between situations requiring law enforcement measures and those amounting to hostilities. It may happen that both situations overlap in the same context or that a police operation evolves into high-intensity fighting against organized groups, and vice versa.¹²² Thus uncertainty may arise as to the identification of the legal regime applicable in such scenarios.¹²³ Nuanced approaches are therefore necessary when determining relevant rules governing the use of force in occupied territories, taking into account a number of factors such as the degree of control exercised by the Occupying Power over a given area and the origin and the nature of armed violence in a given situation.¹²⁴ It is also important that security forces be prepared to meet this challenge. They must be able to apply both legal models, and to switch from one to the other each time that the circumstances so require. As such, they must be trained and instructed accordingly.

(p. 316) 2. Security measures: internment and assigned residence

Complying with the obligation to maintain law and order may be an extremely challenging task in time of occupation. Even though the Occupying Power is able to impose and maintain its authority in the territory under its control, it may be confronted by forms of instability and violence that may require resorting to exceptional means of action. IHL takes this into account by authorizing the Occupying Power to adopt 'safety measures'. These measures have no penal character, meaning that they are not aimed at sanctioning persons having infringed criminal rules, but constitute means of controlling individuals who might pose a serious threat to public security in particularly unstable situations. They may include, 'at the most', assigned residence or internment.¹²⁵

However, as such measures constitute important limitations on the right to liberty, they must only be used in very exceptional circumstances, that is, only if they may be considered as absolutely necessary for 'imperative reasons of security'.¹²⁶ They must be applied only as a last resort—that is, only if other means of control involving less serious restrictions on personal liberty have proved ineffective—and they must be temporary. Persons arrested, detained, or interned for actions related to the conflict must be released 'with the minimum delay possible and in any event as soon as the circumstances justifying [the deprivation of liberty] have ceased to exist'.¹²⁷

The exceptional character of internment or assigned residence also requires the adoption and implementation of procedural safeguards. These measures must be based on a 'regular procedure',¹²⁸ which must include the right to appeal and the right to 'periodical review, if possible every six months, by a competent body set up by the [Occupying Power]'.¹²⁹

GCIV also contains a detailed set of provisions concerning the treatment and welfare of the internees, as well as the administration of internment facilities. This includes rules concerning food, clothing, and accommodation; hygiene and medical care; practice of religion; intellectual and physical activities; personal property and financial resources; camp administration and discipline; relations with the exterior; transfer; and end of internment.¹³⁰

3. Property and resources

IHL protects property and resources in occupied territories¹³¹ against potential risks of abuse by the occupying forces. However, it also recognizes that the administration of these territories involves expenses that may not be entirely covered at the Occupying Power's own expenses. Thus a fair balance must be found between the legitimate use of local property and resources and practices amounting to unlawful appropriation of public and private goods.

As a bottom line, the law of occupation prohibits pillage.¹³² It also provides that private property must be respected; it may not be confiscated.¹³³ This, however, does not preclude the Occupying Power from collecting taxes, dues, and tolls. In this case, it must proceed, as (p. 317) much as possible, in accordance with the existing legislation of the occupied territory and must use the revenue thus obtained for the one specific purpose of covering the expenses of the administration of the territory.¹³⁴ Additional contributions may also be levied if all these expenses are not met or if the maintenance and proper working of the army of occupation so require.¹³⁵ However, taxes and other contributions may not be used for other purposes, such as the economic development of the Occupying Power or its general war effort.¹³⁶

In addition to financial revenues, and subject to certain conditions and limitations, the Occupying Power may also demand contributions in kind and services ('requisitions') from municipalities or inhabitants to meet the needs of the army of occupation.¹³⁷ It may also compel protected persons to work for the welfare of the local population.¹³⁸ Requisitions, however, are not unlimited. For instance, they may not apply to food and medical supplies, unless 'the requirements of the civilian population have been taken into account'.¹³⁹ Civilian hospitals may be requisitioned, but only temporarily and in cases of urgent necessity. In this case, the care and treatment of the patients and proper attendance of the civilian population must be ensured.¹⁴⁰ Contributions in kind must be compensated¹⁴¹ and compulsory work must be remunerated by a fair wage.¹⁴²

The Occupying Power is also allowed to take possession of all movable government property that may be used for military operations, such as cash, means of transport, weapons, and food supplies.¹⁴³ These may be taken without compensation. Subject to certain exceptions, other goods, such as communication and transport appliances and munitions of war, including those belonging to private individuals, may be seized, but must be restored and compensated once the conflict has ended.¹⁴⁴

With respect to immovable government property, such as public buildings, real estate, forests, and agricultural estates, the regime of usufruct is applicable. The Occupying Power is allowed to use the products coming from the exploitation of these properties to cover the expenses of the administration of the occupied territory and to ensure the welfare of the local population,¹⁴⁵ but it must safeguard their capital.¹⁴⁶

Finally, some categories of public property enjoy special protection, and as such must be treated as private property. These include goods belonging to municipalities, as well as to institutions dedicated to religion, charity, education, and the arts and sciences. It is prohibited to seize, destroy, or wilfully damage such property.¹⁴⁷

(p. 318) 5. Conclusion

The international law governing occupation has constantly evolved since the adoption of the Hague Regulations. With the entry into force of GCIV in 1949, essential and detailed provisions for the protection and welfare of the concerned populations were added to the earlier legal framework. More recently, recognition of the applicability of human rights law in situations of occupation has also greatly contributed to strengthening and complementing the existing rules, even though this development has raised a number of questions that remain to be solved. As a result of this evolution, the international law governing occupation today provides a very comprehensive set of rules that address most of the challenges facing Occupying Powers and meet the needs of persons under their control. In addition, to a large extent, these rules are part of customary international law, and as such are universally binding on states.

While the contents of international law governing occupation is globally satisfactory, important uncertainties remain as to the conditions and scope of its application. It may be very difficult in a given situation to clearly identify whether the two components of the notion of occupation—namely the effective territorial control and a lack of consent by the local sovereign authorities—are actually realized. Debates about the beginning and end of occupation, territorial control without military presence on the ground, or the nature of international military interventions are illustrations of these problems. In addition, political reluctance to recognize the existence of an occupation may also block the application of the relevant legal framework, thus depriving concerned populations of crucial protections.

Footnotes:

* At the time of writing this chapter, the author was Lecturer at Bilkent University (Ankara) and he is now Legal Adviser at the International Committee of the Red Cross. The views expressed in the chapter reflect the author's opinion and not necessarily those of these institutions.

1 For a presentation on the historical development of the law of occupation, see Robert Kolb and Sylvain Vit , *Le droit de L'Occupation Militaire: Perspectives Historiques et Enjeux Juridiques Actuels* (Bruylant 2009) 5–58; Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 20–42.

2 Among numerous examples, see Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 303; Yutaka Arai-Takahashi, *The Law of Occupation, Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (Martinus Nijhoff 2009) 758; Kolb and Vit  (above n 1) 482; Benvenisti (above n 1) 383; Hans-Peter Gasser and Knt D rmann, 'Protection of the Civilian Population', in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (OUP 2013) 231–320.

3 See chapter 17 'International Humanitarian Law and International Human Rights Law' in this book.

4 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations).

5 Hague Regulations section III (marginal title).

6 This was confirmed by the Nuremberg Military Tribunal in Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL172, 248–9; and more recently by the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Palestinian Wall* case) para 89.

7 Geneva Conventions Common Article 2(1). See ICRC, *Commentary on the First Geneva Convention* (2nd edn, ICRC 2016) (ICRC Commentary 2016) paras 285–7.

8 Common Article 2(2).

9 *ibid* 1.

10 Most provisions of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) apply to occupation, with the exception of article 3 (armed conflicts not of an international character) and articles 35–46 (aliens in the territory of a Party to the conflict).

11 GCIV article 154; ICRC Commentary 2016 para 296.

12 Jean S Pictet (ed), *Commentary IV, Geneva Convention Relative to the Protection of Civilians Persons in Time of War* (ICRC 1958) 620.

13 Tristan Ferraro (ed), *Occupation and Other Forms of Administration of Territory*, Expert Meeting Report (ICRC 2012) 58.

14 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) article 1(3); Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 1 May 1954, entered into force 6 August 1956) 249 UNTS 240 article 5.

15 Michael J Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99(1) *AJIL* 119–41.

16 See chapter 17 ‘International Humanitarian Law and International Human Rights Law’ in this book. See also, with specific references to occupation, Cordula Droege ‘Elective Affinities? Human Rights and Humanitarian Law’ (2008) 90 *IRRC* 503; Noam Lubell, ‘Human Rights Obligations in Military Occupation’ (2012) 94 *IRRC* 317; Sylvain Vité, ‘The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: the Examples of Food, Health and Property’ (2008) 90 *IRRC* 629.

17 *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 215 (*Armed Activities* case) para 216.

18 *Palestinian Wall* case para 106; *Armed Activities* case para 216. For a contrary position, see US Department of Defense (DoD), *Law of War Manual* (2015) para 11.1.2.6.

19 UK Ministry of Defence (MoD), *The Joint Service Manual on the Law of Armed Conflict* JSP 383 (2004) para 11.19.

20 *ibid*.

21 *Armed Activities* case para 178.

22 API article 72 (emphasis added). See Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva*

Conventions of 12 August 1949 (ICRC/Martinus Nijhoff 1987 (AP Commentary) para 2927 confirming that article 72 refers here to ‘the various instruments relating to human rights’.

23 For an analysis of this particular question, including controversial issues and international practice, see Lubell (above n 16).

24 US DoD (above n 18) para 11.1.2.6.

25 *Palestinian Wall* case para 106. While reproducing a similar statement in the *Armed Activities* case, the ICJ did not reiterate this reference to the principle of ‘*lex specialis*’. It is not clear, however, whether this omission was deliberate, and therefore whether it indicates a change in the ICJ’s approach to this question: para 216.

26 Gasser and Dörmann (above n 2) 265.

27 Droege (above n 16) 521. This approach is supported notably by the United Nations Human Rights Committee ‘General Comment 31’ UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 11.

28 Droege (above n 16) 522–4. On the ‘*lex specialis*’ issue, see also Dinstein (above n 2) 85–8.

29 See Adam Roberts, ‘What is a Military Occupation?’ (1984) 55 *BYBIL* 249.

30 Hague Regulations article 42(1).

31 US DoD (above n 18) para 11.2.1. See Gasser and Dörmann (above n 2) 269; Tristan Ferraro, ‘Determining the Beginning and End of an Occupation under International Humanitarian Law’ (2012) *IRRC* 134–6.

32 *United States v Wilhelm List and others* (1949) 8 LRTWC 34 (19 February 1948) (*Hostage* case) (emphasis added). See also *Armed Activities* case para 173; *Prosecutor v Naletilić and Martinović* (Trial Chamber Judgment) IT-98-34 (31 March 2003) para 211 (*Naletilić* case).

33 *Hostage* case 59.

34 Emphasis added.

35 Common Article 2.

36 US DoD (above n 18) para 11.1.3.3. See Gasser and Dörmann (above n 2) 267.

37 Hague Regulations article 42(2) (emphasis added).

38 Ferraro, ‘Determining the Beginning and End of an Occupation under International Humanitarian Law’ (above n 31) 143.

39 Emphasis added.

40 *Armed Activities* case para 173. The ICTY has also proposed in this regard some indicators that may be used in order to assess whether this shift of power has actually occurred in a given situation: see *Naletilić* case para 217.

41 See also UK MoD (above n 19) para 3; US DoD (above n 18) para 11.2.2.2.

42 *Naletilić* case para 217. See also UK MoD (above n 19) para 11.7.1.

43 Hague Regulations article 43.

44 See Dinstein (above n 2) 99–101. For further details, see below section 3.B.1 ‘Beginning of occupation’.

45 Emphasis added.

- 46** See eg Michael Bothe, 'Occupation, Belligerent', in *Encyclopedia of Public International Law*, Vol 3 (Elsevier 1997) 763–6.
- 47** Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (above n 31) 152.
- 48** Common Article 2.
- 49** *ibid.*
- 50** ICRC Commentary 2016 para 288.
- 51** Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 21.
- 52** See Bothe, 'Occupation, Belligerent' (above n 46) 766–8.
- 53** Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) article 7.
- 54** *ibid* article 52. See further Kolb and Vité (above n 1) 152–5; Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 20–3.
- 55** US DoD (above n 18) para 11.3.1.
- 56** Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 28; Gasser and Dörmann (above n 2) 274.
- 57** For a detailed analysis on the beginning and end of occupation, see Vaïos Koutroulis, *Le Début et la Fin de L'Application du Droit de L'Occupation* (Pedone 2010).
- 58** Pictet (above n 12) 60–1.
- 59** *ibid* 61. This approach was more recently reaffirmed by the ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (ICRC 2011) 27. In this sense, see also Marco Sassòli, 'A Plea in Defence of Pictet and the Inhabitants of Territories under Invasion: The Case for the Applicability of the Fourth Geneva Convention during the Invasion Phase' (2012) 94 *IRRC* 42.
- 60** *Naletilić* case paras 219–22.
- 61** *ibid* para 221. In the meeting of experts organized by the ICRC in 2012, most participants (but not all) supported this view, arguing that 'such a broad interpretation of the concept of occupation, one that would include the invasion phase, was necessary in order to avoid protection gaps, and was the only legal construction that would ensure that the basic needs of the civilian population were met': Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 25. For a contrary view on this question, see *ibid* 25–6.
- 62** US DoD (above n 18) para 11.1.3.1.
- 63** *Hostage* case 55–6.
- 64** Marten Zwanenburg, 'Challenging the Pictet Theory' (2012) 94 *IRRC* 30–6.
- 65** For further details on the end of occupation, see Roberts, 'What is a Military Occupation?' (above n 29) 257–60.
- 66** UNSC Resolution 1546 UN Doc S/RES/1546 (8 June 2004) paras 1–2. For a detailed analysis of this case, see Adam Roberts, 'The End of Occupation: Iraq 2004' (2005) 54(1) *ICLQ* 27–48. See also Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2004) 47 *German YB Int'l L* 293–342.
- 67** GCIV article 6(2).

- 68** *ibid* article 6(3).
- 69** API article 3(b)
- 70** *ibid*.
- 71** Roberts, 'What is a Military Occupation?' (above n 29) 249.
- 72** Israeli Prime Minister's Office, Cabinet Resolution Regarding the Disengagement Plan: Addendum A—Revised Disengagement Plan—Main Principles (6 June 2004).
- 73** *ibid*.
- 74** See UNGA, 'Note by the Secretary-General: Situation of Human Rights in the Palestinian Territories Occupied since 1967' UN Doc A /61/470 (2006) para 6. See also UNHCR, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967' UN Doc E/CN.4/2006/29 (2006) para 6ff.
- 75** Israeli Prime Minister's Office (above n 72), ch 1.
- 76** UNGA (above n 74) para 7. See also UNHCR, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967' (above n 74).
- 77** This argumentation is also supported by the ICRC, which refers to it as the 'functional approach' to the application of the law of occupation: 'International Humanitarian Law and the Challenges of Contemporary Armed Conflict' (32nd International Conference of the Red Cross and Red Crescent, Geneva, October 2015) 12.
- 78** See Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement' (2006) *Hebrew University of Jerusalem Intr'n'l Law Forum Research Paper 12-06*, 19 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923151. See also Roberts, 'What is a Military Occupation?' (above n 29) 300.
- 79** Other examples include GCIV articles 55–56, 59.
- 80** See Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 33: [s]ome experts also pointed out that certain UN missions entailed the exercise of functions and powers over a territory that could be compared to those assigned to an occupant under occupation law: they cited the UN's operations in Cyprus, Cambodia, Eastern Slavonia, East Timor, Kosovo and the Congo (in the 1960s).
- 81** For a more detailed overview of this debate, see Benvenisti (above n 1) 62–6.
- 82** See eg Daphna Shraga, 'The UN as an Actor Bound by International Humanitarian Law', in Luigi Condorelli, Anne-Marie La Rosa, and Sylvie Scherrer (eds), *The United Nations and International Humanitarian Law* (Pedone 1996) 326–8.
- 83** See eg Roberts, 'What is a Military Occupation?' (above n 29) 289–91; Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 33–4; ICRC Commentary 2016 paras 333–336.
- 84** US DoD (above n 18) para 11.5.
- 85** Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 56.
- 86** On this provision, see Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 *EJIL* 661–94; M Bothe, 'The Administration of Occupied Territory', in Andrew Clapham, Paolo Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 1455.
- 87** *Palestinian Wall* case para 89.

- 88** The French version of article 43 provides that the Occupying Power has an obligation ‘de rétablir et d’assurer l’ordre et la *vie publics*’ (which may be translated as ‘to restore and ensure public order and *civil life*’ (emphasis added)). See Dinstein (above n 2) 91.
- 89** GCIV articles 64–75, 78–135.
- 90** See further *ibid* articles 29, 47–135.
- 91** Dinstein (above n 2) 92. Michael Bothe also suggests that these provisions, taken as a whole, entail a ‘duty of good governance’: Bothe, ‘The Administration of Occupied Territory’ (above n 86) 1467.
- 92** See *Affaire de la Dette Publique Ottomane* (Sentence) (18 April 1925) I Recueil des Sentences Arbitrales 555. API also makes clear that ‘[n]either the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question’: article 4. See also UK MoD (above n 19) para 11.9.
- 93** UK MoD (above n 19) para 11.9.
- 94** Gasser and Dörmann (above n 2) 275.
- 95** Pictet (above n 12) 274.
- 96** Dinstein (above n 2) 116–20.
- 97** Benvenisti (above n 1) 78.
- 98** Pictet (above n 12) 335.
- 99** Gasser and Dörmann (above n 2) 284; Sassòli, ‘Legislation and Maintenance’ (above n 86) 675–8.
- 100** GCIV article 64(2). See also *ibid* article 27(4): ‘the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war’.
- 101** See UK MoD (above n 19) para 11.25.
- 102** Pictet (above n 12) 337.
- 103** GCIV article 64(2).
- 104** *Armed Activities* case para 178.
- 105** For a detailed presentation of these rules, see Dinstein (above n 2) 146–237.
- 106** GCIV article 27(1).
- 107** *ibid*.
- 108** *ibid* article 27(1); Hague Regulations article 46. For concrete implications of the obligation of humane treatment, see also GCIV articles 27–34; API article 75.
- 109** See GCIV articles 27(2), 50, 51–52, 79–135.
- 110** Hague Regulations article 46.
- 111** See below, section 4.B.3 ‘Property and resources’.
- 112** GCIV article 55(1); API article 69. With regard to medical care, health, and hygiene, see also GCIV article 56(1) and API article 14(1).
- 113** GCIV article 59; API articles 69–71.
- 114** GCIV article 49(1).
- 115** *ibid* article 49(2).

116 *ibid* article 49(6).

117 See eg International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

118 See ICCPR article 6.

119 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) principle 9.

120 *ibid*.

121 Ferraro, *Occupation and Other Forms of Administration of Territory* (above n 13) 109.

122 Kenneth Watkin, 'Use of Force during Occupation: Law Enforcement and Conduct of Hostilities' (2012) 94 *IRRC* 311.

123 Ferraro *Occupation and Other Forms of Administration of Territory* (above n 13) 110.

124 Examples and an analysis of such a nuanced approach to the use of force are available in Watkin (above n 122) 311–14.

125 GCIV article 78(1).

126 *ibid* article 78(1).

127 API article 75(3).

128 GCIV article 78(2).

129 *ibid* article 78(2).

130 *ibid* articles 79–135.

131 Dinstein (above n 2) 195–237.

132 Hague Regulations article 47.

133 *ibid* article 46.

134 *ibid* article 48.

135 *ibid* article 49. These contributions must be based on a written order and must be collected under the responsibility of a commander-in-chief, following local laws as much as possible: *ibid* article 51.

136 UK MoD (above n 19) para 11.31; Gasser and Dörmann (above n 2) 290.

137 Hague Regulations article 52(1).

138 These persons must be over eighteen and may also be used to work 'for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country': GCIV article 51(2).

139 *ibid* article 55(2).

140 *ibid* article 57(1).

141 Hague Regulations article 52(3).

142 GCIV article 51(3).

143 Hague Regulations article 53(1).

144 *ibid* article 53(2).

145 Gasser and Dörmann (above n 2) 292.

146 Hague Regulations article 55.

147 *ibid* article 56.

(p. 248) Chapter 10 The Law of Neutrality

1 Introduction

IN today's world, the term 'neutrality' is used and understood as a concept of foreign policy rather than a legal norm. In common language it means not taking sides, being impartial or even indifferent to one party's side or cause. More often than not, it is also associated with political isolationism which gives it a negative connotation. While neutrality, as generally understood, may cover a wide range of behaviour, the *law* of neutrality is not only narrower, but also more precise in its scope. First, the duties and rights of neutrality only apply to sovereign states and not to any other subjects of international law. Secondly, they only apply in a situation of an international armed conflict between two or more states. Thirdly, they impose a limited set of obligations upon the state, these will be explained further in this Chapter. In essence, the core duty of a neutral state is to refrain from supporting, through militarily means, warring parties in an international armed conflict.

2 Definition and Content

The term 'neutrality' stems from the Latin expression '*ne uter*', meaning neither the one nor the other. According to the *Max Planck Encyclopaedia of Public (p. 249) International Law*, 'NEUTRALITY' means the particular status, defined by international law, of a state not party to an armed conflict.¹ The two Hague Conventions of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (HC V), and of Neutral Powers in Naval War (HC XIII) respectively, which constitute the main body of the law of neutrality, do not contain any definition of neutrality, but they codify to a large extent the applicable rights and obligations of neutral states. In essence, these obligations are threefold.

The first and foremost obligation of a neutral state is not to involve itself militarily in an armed conflict between states.² Secondly, the neutral state is prohibited from providing military assistance to the warring parties, eg through putting its own troops, arms, or its territory at the disposal of either party. Because of this latter obligation, a neutral state must undertake the appropriate measures to protect its land, sea, or air space from intrusion from a belligerent party. Finally, but not less importantly, the neutral power has a duty of equal treatment of belligerents. This principle becomes relevant if it adopts certain restrictions against the parties in conflict.

In return, the neutral state can rightfully require states in conflict to respect its neutrality, including its neutral territory. It is also entitled to continue its political, commercial and other relations with the warring parties. In principle, this even includes the right to export armaments and ammunition from private stocks which is an important exception from the obligation not to support states at war by military means. If, however, the neutral state decides to restrict or to prohibit the private export of military goods then it must apply these measures equally to all parties in conflict.

3 Origins and History of the Law of Neutrality

The concept of neutrality is closely tied to war. It seems natural that peoples, principalities, kingdoms, or states wanted to be able to keep out of a military conflict whenever (p. 250) wars occurred. The underlying motives for being neutral were usually based on national security interests. By maintaining neutrality the neutral power tried to protect its territory, its population and its economy from the consequences of an armed conflict which normally

took place somewhere in the neighbourhood. It is therefore no coincidence that militarily weaker powers embraced the principle of neutrality.

Scholars disagree on the origins of neutrality or neutral behaviour.³ The first agreements on non-participation in warfare are found in the Middle Ages. Hugo Grotius uses the term neutrality in one of his books on the law in times of peace and war, but he only gives it a very brief description.⁴ The concept of neutrality slowly took shape during the eighteenth century when the Dutch lawyer Bynkershoek and his Swiss counterpart Emer de Vattel started to define the rights and duties of neutrals.⁵ In essence, neutrality in early times meant impartiality and equal treatment towards both belligerents. However, the concept of *bellum iustum* (the 'just' war) questioned the principle of neutrality since a state could not remain neutral if the cause for war was rightful.

The first major treaty on neutrality was concluded on the initiative of Russia in 1780 and was known as the 'First Armed Neutrality'. The treaty sets rules on the treatment of neutral ships and contraband in sea warfare and it was signed by Denmark, Sweden, the Netherlands, Austria, Portugal, Prussia and others. In 1800, a 'Second Armed Neutrality' was concluded between Russia, Sweden, Denmark, and Prussia as a consequence of the naval blockade of Great Britain against Napoleonic France when the British navy refused to exempt neutral ships from visit and search. It is thus fair to say that the laws of neutrality have been influenced as much through the wars at sea as through the wars on land, if not more so. The Paris Declaration respecting Maritime Law of 1865⁶ confirmed certain rights of neutral shipping,⁷ but it was more than another forty years before a major codification of the laws of neutrality was achieved. The Hague Conventions of 18 October 1907 on the Rights and Duties of Neutral Powers in War on Land and in Naval War contain the core body of rules on neutrality which are still relevant to this day. The two treaties complement (p. 251) the Hague Regulations on Land Warfare of 1899, which already mentioned some obligations and rights of neutral powers, especially in the field of humanitarian law. One should note, however, that the codification of the laws of neutrality is not complete as no rules on neutrality in air warfare have been adopted.

Neutrality reached its high point at the end of the nineteenth century, and, in strict legal terms, we could end the history of the laws of neutrality in 1907 since no major revision of these rules has occurred since.⁸ However, the two World Wars and their consequences for international relations have fundamentally changed the ways in which neutrality is perceived. As a consequence of World War I the League of Nations was created and the major powers signed the so-called 'Briand-Kellogg-Pact' of 1928 on the renunciation of war. In the aftermath of World War II the United Nations (UN) with its system of collective security was established. While neither the Treaty on the League of Nations nor the UN Charter specifically mentioned neutrality, it was clear from the outset that the concept of collective security left little or no room for a neutral attitude. Since going to war was banned as a means of national foreign policy, there seemed no need to remain neutral from a conceptual viewpoint. Accordingly, the attitude of major international powers regarding neutrality changed considerably. Another important factor which substantially diminished the political and practical relevance of neutrality was the increase of armed conflicts or violence involving non-state actors for which the Hague Conventions offer no legal answer. While doctrine considers neutrality to be far from becoming obsolete⁹ considering relevant state practice, certain authors see the law of neutrality eroding.¹⁰

4 Sources of Law

As mentioned above, the main sources of the laws of neutrality are the two 1907 Hague Conventions on the Rights and Duties of Neutral Powers in War on Land and in Naval War. Only 32 states are parties to the former Convention and only 28 states have joined the

latter. Both treaties have not been amended since their adoption over a hundred years ago, and the last state which acceded to both Conventions was Ethiopia in 1935.(p. 252)

Since the treaty law has now been left unchanged for over a hundred years, one would imagine that customary international law would play a considerable complementary role for developing the law of neutrality. But although this source of law indeed remains important¹¹ it has only developed to a limited extent. In 1923, a Commission of Jurists tried to codify the rules on air neutrality in the Hague Rules for Aerial Warfare,¹² but these rules never came into effect.¹³ More recently, the San Remo Institute for International Humanitarian Law (IIHL) developed a 'Manual on International Law applicable to Armed Conflicts at Sea' (1994)¹⁴ and a 'Handbook on Rules of Engagement' (2009),¹⁵ both of which contain some references to neutrality on sea and in the air. Also, certain national manuals on the law of armed conflict contain references to the law of neutrality applicable to aerial combat.¹⁶ Although not binding under international law, these and other documents constitute useful guidelines which complement both Hague Conventions and allow us to identify the scope of customary neutrality law. The International Court of Justice, in its Advisory Opinion of 1996 on the threat and use of nuclear weapons and in its judgment on the 'Nicaragua case',¹⁷ recognized the validity of the law of neutrality as part of customary international law. Besides, the sovereign right of each state to choose neutrality as a means of foreign policy has been reaffirmed by the UN General Assembly in its Resolution 58/80 of 1995 recognizing Turkmenistan's neutrality. Although the Resolution is not legally binding itself, it can be qualified as an expression of *opinio juris* on the existence and legitimacy of the institution of neutrality. Finally, several field manuals of national armed forces extensively deal with issues of neutrality, which also serve as proof of its continued validity.¹⁸ Despite these reconfirmations in principle, it remains that the law of neutrality contains lacunae which leave considerable room for doubt when applying the rules in modern warfare. To cite just two examples, the extent of the rights and duties of neutrals in missile warfare, especially the definition of aerial space regarding long-distance or ballistic missiles, is largely left open. The same can be said of the whole complex (p. 253) of cyber war,¹⁹ which of course the drafters of the Hague Conventions could not even contemplate.

5 The Rights and Obligations of Neutrals and Belligerents

A. Conditions for and duration of the applicability of the law of neutrality

The law of neutrality is only applicable when an armed conflict between two or more states occurs. In contrast, it is not applicable in situations of non-international conflict or even to transnational conflicts between armed forces of state and non-state armed actors.²⁰ Neither is it applicable in peace operations of the United Nations which includes enforcement through military means according to Article 42 of the UN Charter.

The obligations of the law of neutrality start in principle with the outbreak of an international armed conflict although certain legal obligations may arise in peacetime for permanently neutral states. Since the times are well past when war was officially declared between states, the question arises for the neutral power which kind of conflict qualifies as a war in the sense of the Hague Conventions and from what moment on it is obliged to apply the law of neutrality. The threshold test which is applied in international humanitarian law (IHL) may offer an indication, although for the sake of the protection of victims, this threshold is fairly low and does include surgical strikes or skirmishes which do not qualify as a war in the sense of the laws of neutrality.²¹ Thus, there exists no automaticity between the application of IHL and neutrality law. Literature and state practice suggest that the applicability of the law of neutrality is conditioned to a 'generalized state of hostilities'.²² Switzerland, for instance, considered the Second Gulf War of the Allied Forces against Iraq in 2003 (p. 254) as war according the law of neutrality, and officially declared its applicability as from the beginning of the aerial attacks on Iraq on 20 March 2003.²³

Conversely, the obligations under neutrality law end with the cessation of hostilities. Unless a formal armistice or peace agreement is signed between the warring parties, the determination of the appropriate moment to cease applying the law of neutrality is left to the appreciation of the neutral power. In the case of the Iraq war Switzerland considered this moment to have come on 16 April 2003 when the Iraq army was seen as defeated, and lifted the measures taken in application of the Hague Conventions of 1907. The issue of military occupation is left unanswered by the Hague Conventions. One may find arguments for and against the continued applicability of the law of neutrality: the fact that occupation is a direct consequence of the armed conflict and is still a military act speaks in favour. On the other hand, occupation is also the consequence of military defeat of the occupied power. Since the hostilities between the former belligerents have come to an end (at least provisionally), the law of neutrality which is intended for active war is no longer applicable.²⁴

B. Content of the rights and obligations under the law of neutrality

(i) The protection of the neutral sovereign territory

The Hague Conventions oblige the belligerents to respect the sovereignty and territory, including the territorial waters, of the neutral power (Article 1 of HC V and HC XIII). The Exclusive Economic Zone (EEZ) of a coastal state does not constitute neutral waters²⁵ since this zone is not part of the sovereign territory of the state.²⁶ The neutral airspace is protected solely by customary international law²⁷ since both Hague Conventions are silent on this issue. In essence, belligerents (p. 255) are prohibited from penetrating neutral territory for military purposes, or from establishing military installations such as recruitment centres, army, navy, or air force bases on neutral ground. Regarding transit through neutral territory, there seems to exist an interesting difference between the rules applicable on land and on sea. While Article 2 of the Hague Convention on neutrality in case of war on land clearly forbids the movement of troops, or convoys of munitions of war or supplies, across the territory of a neutral power, Article 10 of HC XIII states that '[t]he neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents'.²⁸ In contrast, such shortcuts are not allowed in airspace, according to the wording of Rule 40 of the Hague Rules of 1923 on Aerial Warfare which prevents belligerents from penetrating the jurisdiction of the neutral state. Doctrine and state practice suggest that this principle has become part of customary law.²⁹ Also, the Hague Convention on neutrality in naval warfare is quite specific under which circumstances, and for how long, warships may enter neutral territorial waters or stay in neutral ports. As a general rule, a limited number of warships are allowed to stay in neutral waters or ports for a maximum of 24 hours to accomplish necessary repairs to make a ship seaworthy (Articles 12–20 of HC XIII).

(ii) The prohibition assisting the belligerents

As a counterpart to the protection of its territory the neutral power is prohibited to intervene directly in an ongoing conflict or to support the military campaign of either belligerent by providing armed forces, or armament and ammunition coming from its own arsenals. It must further prevent acts which violate its neutrality from occurring on its territory (Article 5 of HC V, Article 25 of HC XIII). In practice this could require the establishment of an adequate defensive capacity commensurate with the potential threats and the likelihood of a war in the neighborhood. While the view seems to prevail among scholars that a neutral state needs to be able to defend its neutrality militarily,³⁰ the Hague Conventions on Neutrality do not formally oblige a neutral state to have armed forces.³¹ Indeed, the wording of Article 25 of HC XIII according to which the neutral power is obliged to 'exercise such surveillance as the means at its disposal to prevent any violation of the provisions of the above Articles', does not suggest a legal obligation to intervene by force. However, HC V clearly states that the forcible resistance by the neutral power to combat

violations of its neutrality cannot be deemed as a hostile act (Article 10). Here again, HC XIII is somewhat less specific in its wording (p. 256) (Article 25), but essentially means the same. Costa Rica, for instance, considers itself a neutral state and does not possess any military, and this fact has so far not been contested.³² Ultimately, the question whether or not the neutral state needs to have armed forces to defend its neutrality is not so much a matter of law,³³ but of credibility which is a critical political and strategic asset for the neutral power. In the eyes of potential aggressors a credible defence force strengthens the resolve of the neutral state to defend its neutrality at all costs. It also avoids the risk of countermeasures from one of the belligerents, acting in self-defence, against an opponent who has penetrated neutral territory.³⁴

(iii) Economic and commercial rights and obligations of neutral states

In general, the law of neutrality allows neutral states to maintain their commercial ties with the belligerents during an armed conflict. This is made clear by Article 7 of HC V which states that '[a] neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet'. Article 7 of HC XIII contains an analogous provision. Also, the neutral power is not obliged 'to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals' (Article 9 of HC V). If freedom for the private economy applies to goods or services of strategic nature it is obvious that it must be all the more true for any other product, service, or commodity. Neutral states are entitled, however, to restrict the commercial relations of their subjects with belligerents. But in doing so they must apply such restrictions equally to all parties to the conflict (Article 9 of HC V and XIII). Anyhow, the distinction made in Article 7 of HC V between the delivery of armament, and ammunition from either private or governmental sources seems artificial nowadays as many states have enacted laws which control private arms exports. If the state regulates such commerce the delivery of armament and ammunition to a belligerent is not compatible with the status of neutrality.³⁵ Yet, neutral states may adopt economic sanctions, either unilaterally or collectively (p. 257) with other nations, against another state without violating the law of neutrality as long as the targeted state is not engaged in an active military conflict. On the other hand, the neutral power would be required to apply the principle of equal treatment if the sanction concerns goods or services 'which can be of use to an army or a fleet' (Article 9 of HC V) and the measure is directed against a belligerent.³⁶

(iv) Obligation of equal treatment

Apart from the above-mentioned specific obligations, under the rules of neutrality, a core principle is that the neutral state must treat the belligerents equally. Partial behaviour, through which the neutral state offers a military advantage to one or the other warring party, violates the law of neutrality and fundamentally undermines the credibility of the neutral power. As explained above, the principle of equal treatment applies especially if the neutral state decides to restrict the commercial or economic relations of individuals or companies with the belligerents. In naval warfare a neutral power 'must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters of belligerent war-ships or of their prizes' (Article 9 of HC XIII). However, the principle of equal treatment only applies to acts of the neutral state which are of military relevance to the belligerents. It does not require the neutral to treat them impartially or equally in other areas, such as politics, human rights, or the media.³⁷ For instance, a neutral state may criticize one party for resorting to armed force or for not respecting the laws of armed conflict without violating its neutrality.

C. Neutral persons, ships, and aircraft

According to Article 15 of HC V '[t]he nationals of a state which is not taking part in the war are considered as neutrals' as long as they do not actively engage in hostilities against one of the belligerents, namely by voluntarily joining the armed forces of one of the parties to an international armed conflict. While the neutral state must (p. 258) prohibit the establishment of, or publicity for, 'volunteer corps' on its territory,³⁸ the fact that individuals of a neutral state offer their services to one of the belligerents does not engage the responsibility of the state (Article 6 of HC V). In that regard, the trend to rely more and more on Private Military Companies (PMCs) poses challenging legal questions from the viewpoint of the law of neutrality. These companies may offer a wide range of services. But to comply with its obligations, the neutral state must prevent them from assisting the belligerents as 'corps of combatants' or 'recruiting agencies' according to Articles 4 and 5 of HC V.³⁹ While neutral persons may not be treated as enemies as long as they do not engage in hostile acts, individuals joining the armed forces of a belligerent forfeit their neutral status and are regarded as combatants (Article 17 of HC V). Although the Hague Conventions do not spell out the consequences of neutral status, it follows that neutral persons or enterprises are protected from any measures such as internment or confiscation which a belligerent could otherwise take against subjects of the enemy.⁴⁰ Save for specific situations (Article 18 of HC V) neutral persons or companies are also allowed to continue supporting a belligerent through private economic or financial activities.

The status of sea and air vessels flying the flag of a neutral state is not governed by the Hague Conventions, but rather by customary international law. Flying the flag of a neutral state is *prima facie* evidence of the neutral character of a vessel,⁴¹ but re-flagging ships has become a contentious issue, namely during the Iran-Iraq war.⁴² In general, neutral vessels, both military and civil, enjoy the right of transit and passage through international straits and archipelagos even in times of armed conflict.⁴³ At least civil vessels may generally also enter the territorial waters or the airspace of belligerent parties. However, there are two important exceptions: first, neutral vessels are obliged to respect naval blockades⁴⁴ or its equivalent in the air, so-called 'no-fly-zones'. Secondly, the belligerent may intercept and inspect these (p. 259) vessels if it has reason to believe that they are engaged in activities contrary to the law of neutrality, especially if they are suspected of carrying contraband.⁴⁵ If inspection proves that neutral vessels are engaged in illicit acts they lose their neutral status and may be treated like an enemy merchant vessel.⁴⁶ Under certain circumstances a neutral civil vessel may be exempt from inspection, namely if it is accompanied by a military aircraft or warship which warrants that the vessel is not carrying any contraband.⁴⁷

6 Temporary and Permanent Neutrality

As has been shown, neutrality is closely linked to the existence of a state of international armed conflict, and it usually begins with the outbreak of hostilities, and ends with their cessation. In general, neutrality is therefore a temporary condition, and the Hague Conventions on neutrality have been drafted with such situations in mind. The concept of permanent neutrality, as is practised by Switzerland and other states, is neither mentioned in these Conventions nor in any other international treaty. Switzerland's permanent neutrality has, however, been recognized by the major powers in the Conferences of Vienna and Paris of 1815. The same was true when Switzerland joined the League of Nations in 1920. But none of these proclamations define the content of or the obligations under permanent neutrality. Also, the United Nations General Assembly recognized the neutrality of Turkmenistan in its Resolution 58/80 and declared it to be in the interest of international peace and security although this recognition is not legally binding. The main difference between occasional and permanent neutrality is that, in the first case, a state can choose, each time a military conflict occurs, to be neutral or not. A permanently neutral state, on the other hand, stipulates to remain neutral in any possible future war. As a consequence

permanent neutrality deploys certain legal effects during peacetime which derive from the principle of good faith or *pacta sunt servanda*. Since no universally agreed definition of permanent neutrality exists the exact scope and extent of legal obligations arising from permanent neutrality in peacetime remain imprecise. In any event, obligations that bear upon a permanently neutral state must be interpreted in a restricted (p. 260) way since they constitute limitations to the state's sovereignty. In short, a permanently neutral state should not subscribe to any international legal commitment in peacetime which would prohibit the fulfilment of its obligations under the laws of neutrality in a situation of international armed conflict. The main restriction generally associated with the status of permanent neutrality is that a neutral state cannot join a military or defence alliance⁴⁸ such as NATO since an attack upon one member triggers a right to military assistance by the whole alliance.⁴⁹ One would also argue that the long-term establishment of foreign army bases is incompatible with the status of permanent neutrality, but this view may be subject to debate. The example of Ireland which traditionally affords landing and refuelling facilities to the US air force in Shannon seems to indicate that it is possible to reconcile such arrangements with neutrality.⁵⁰ One thing is clear, however: any legal restrictions that may result from the status of permanent neutrality only concern the military domain. Apart from the very limited exceptions mentioned above the neutral state remains entirely free to conduct its foreign, economic, and security policy in its own best interest. If a permanently neutral state nevertheless decides to limit its freedom of action beyond the strict limits required by neutrality law this is a consideration of its own neutrality policy only.⁵¹ Besides, permanent neutrality does not mean perpetual neutrality: the state is entitled to change its policy according to its needs and may also decide unilaterally to terminate its status.⁵² In the latter case, the principle of good faith would require, however, that the neutral state gives due notice to other interested states and does not abruptly change its status immediately before or during an international armed conflict without being attacked itself.(p. 261)

7 Neutrality, Collective Security, Collective Defence

A. Neutrality and the United Nations

To understand the relationship between neutrality and the system of collective security of the United Nations one needs to recall that the concept of neutrality dates back to times when war was considered legitimate or, as Clausewitz put it, the pursuit of politics with other means.⁵³ Historically, the main motive for a state to choose neutrality was to shield itself from the effects of a war waged in the proximity in order not to become involved in it. Before the invention of the idea of collective security the law of neutrality offered a sort of security guarantee under which the belligerents promised to respect the territorial integrity and sovereignty of the neutral power in return for complete military abstention and equal treatment without distinguishing between aggressors and aggressed.

As a consequence of World War I war was banned by the Briand-Kellogg-Pact of 1928. The prohibition of armed aggression became part of the fundamental norms of international law. The existence of such a norm entails an obligation *erga omnes* not to support an aggressor and not to recognize the effects of a military aggression. This raises the question how the idea of neutrality can coexist with the prohibition of aggression? First, the prohibition of assisting an aggressor militarily does not apply only to a neutral power but to any state. Secondly, the prohibition of aggression puts into question the principle of equal treatment of belligerents is one of the cornerstones of the law of neutrality. History has shown, however, that the outlawing of war and the prohibition of aggression did not have the desired effect of ending all wars, and the law of neutrality has retained its practical relevance. Institutionally, things started to improve only with the adoption of the United Nations Charter in 1945. Article 2(5) of the Charter stipulates that '[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United

Nations is taking preventive or enforcement action'. In accordance with Articles 24 and 25 of the Charter, the Security Council has been given the primary responsibility for the maintenance of international peace and security and the members of the United Nations are obliged 'to carry out the decisions of the Council' in accordance with the Charter.

The emergence of the principle of collective security has important consequences for the law of neutrality: while there is not a fundamental contradiction between the (p. 262) notion of neutrality and the principles of the UN Charter, the system of collective security, if it worked effectively, simply would leave no room for neutrality. This is already evident from a conceptual point of view: the law of neutrality has been conceived to allow the neutral power to remain outside an international armed conflict between two or more belligerents, each of them pretending to have a good cause for going to war. Such a situation is fundamentally different from the effective application of collective security where the international community as a whole acts against a threat to international peace and security through the Security Council of the United Nations. Accordingly, there exists general agreement among scholars that the laws of neutrality do not apply to measures of collective security adopted under Chapter VII of the UN Charter.⁵⁴ The neutral power is therefore entitled to participate in all necessary measures, including the use of force, which the Security Council may have adopted or authorized to restore the international order, peace, and security. Besides, the neutral power is, as a UN member, not only allowed to disregard its obligations under the law of neutrality, but obliged to comply with resolutions adopted by the Security Council since Article 103 of the UN Charter stipulates that the provisions of the Charter prevail over any other treaty obligation. There is no duty under international law to participate actively in a peace operation mandated under Chapter VII of the UN Charter, but the neutral state must not impede the operation and it is entitled to assist it, for instance by granting transit or overflight rights to participating armed forces, if necessary for the fulfilment of the mandate.⁵⁵ State practice confirms this conclusion. When the UN General Assembly reaffirmed Turkmenistan's right to neutrality,⁵⁶ it did so with the understanding that it 'does not affect the fulfillment of its obligations under the Charter and will contribute to the achievement of the purposes of the United Nations'. The security policy doctrines of neutral states such as Switzerland,⁵⁷ Austria,⁵⁸ or Ireland are unanimous in stating that the law of neutrality does not apply to measures taken by the Security Council in accordance with the UN Charter to restore international peace and security. Accordingly, neutral powers have granted overflight and other transit facilities to troops mandated by the United Nations under Chapter VII of the Charter. Besides, neutral states like Austria⁵⁹ and Ireland⁶⁰ are traditional troop contributors to United Nations' peace operations. Sweden went so far as providing (p. 263) fighter airplanes to support the mission in Libya mandated by Security Council Resolution 1973 (2012). Even Switzerland, which has long maintained a very prudent approach, amended its Federal Military Act in 2000 allowing armed participation in operations under UN mandate provided that its troops do not engage in combat action for peace enforcement.⁶¹

B. Neutrality in the context of the European Union

In its Maastricht (1993), Amsterdam (1997), and Lisbon (2009) Treaties the European Union (EU) has gradually developed a Common Foreign and Security Policy (CFSP) with the ultimate goal a common European defence. This raises the question for the neutral EU member states of how to reconcile respect for the law of neutrality with their obligations of solidarity under European treaty law. The most problematic clause from a neutrality law point of view seems to be Article 42(7) of the Treaty on European Union which stipulates that member states 'shall have an obligation of aid and assistance by all the means in their power', in accordance with Article 51 of the United Nations Charter, towards a member state which becomes the victim of armed aggression on its territory. This clause basically establishes a system of mutual assistance whereby an attack against one is considered an attack against all. Yet, the laws of neutrality clearly prevent a neutral power from

intervening by armed force on behalf of another state or from offering any form of military assistance, regardless of the reasons. While this contradiction may be more theoretical in nature since the solidarity clause will hopefully never have to be put to the test, other elements of the CFSP raise more practical problems from a neutrality viewpoint. This is especially so for the so-called 'Petersberg tasks' which have been codified in Article 42(1) and Article 43 of the TEU. According to these provisions, the Common Defence and Security Policy (CDSP), which forms part of the CFSP, shall provide the Union 'with an operational capacity drawing on civilian and military assets' which the 'Union may use [...] on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'. These tasks 'shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories' (Article 43 of TEU). In analysing these 'out of area' mandates under the aspect of the law of neutrality one should distinguish between civilian and military (p. 264) operations. While civilian missions do not pose any problems for neutrality, mandates which foresee the (potential) use of force need to be examined more carefully. From a neutrality perspective, it does not matter whether the purpose of a military operation of the European Union is humanitarian, rescue, crisis management, or peace-making. The two determining factors are whether (a) the military operation is likely to pass the threshold of an armed conflict in the sense of the law of neutrality⁶² and (b) if so, whether or not the operation is mandated or authorized by the UN Security Council. Although Article 42 specifies that out of area operations of the European Union are to be undertaken 'in accordance with the principles of the United Nations Charter', it cannot be excluded that the European Union decides on the use of military force without the approval of the Security Council. Some even argue that such an option should be retained.⁶³ A participation of a neutral EU member in a military intervention leading or amounting to an international armed conflict, without such Security Council approval or the consent of the state concerned, would constitute an 'unneutral' service. One could even ask the question whether neutrality is not already infringed by subscribing in principle to the obligations under the CFSP/CSDP since Article 24(3) of TEU provides that '[t]he Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.' The strong emphasis on solidarity also resonates in the decision-making process on CFSP matters. Such decisions are to be taken unanimously which would in principle allow the neutral EU member the opportunity to block an EU action incompatible with its neutrality obligations. But in practice, it would be very difficult for a neutral state to block an EU action entirely. Abstention seems to offer an elegant way out, but Article 43 of TEU requires abstaining member states to 'refrain from any action likely to conflict with or impede Union action'. Accordingly, even abstention would not solve the dilemma between solidarity and neutrality since the neutral EU member state could not behave in a completely impartial way. Given the formulation of these provisions and the specific nature of the European Union, the duty of solidarity appears to prevail over the obligations of neutral EU members under the law of neutrality.

However, the European Union made an effort, to the extent possible, to accommodate the interests of neutral EU members when developing the CFSP. Already the Maastricht Treaty, as the first EU instrument to establish a common foreign and security policy, tried to deal with the split between the two conflicting requirements of European solidarity and neutrality by introducing in Article J.4 paragraph 4 the *caveat* that the CFSP 'shall not prejudice the specific character of the security and (p. 265) defence policy of certain

Member states'. This clause has subsequently been used and reused in all later amendments of the TEU and it is mentioned twice (Article 42(2) and Article 42(7) of TEU).

The meaning of the CFSP and of the solidarity clause in particular was further specified when Ireland obtained 'legal guarantees' from the European Council in 2009, after its rejection of the Lisbon Treaty in a popular referendum. In fact, the Council declared that the 'Treaty of Lisbon does not affect or prejudice Ireland's traditional policy of military neutrality'.⁶⁴ More generally, the Declaration adopted by the European Council repeated that the CSDP 'does not prejudice the security and defence policy of each Member State, including Ireland or the obligations of any Member State'. Section C of the said Declaration further continued that '[i]t will be Member States—including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military neutrality—to determine the nature of aid or assistance to be provided to a member state which is the object of a terrorist attack or the victim of armed aggression on its territory'. Finally, the formulation of Article 42(7) of TEU requiring EU members to assist a fellow member in case of an armed aggression 'by all means in their power' legally leaves open the option of unarmed solidarity.

Neutral EU members interpret these 'special situation' clauses and declarations differently according to their attachment to neutrality. Ireland, which was at the origin of the 2009 Declaration, stated that the European Union had effectively recognized its military neutrality. But the fact that Ireland also considers the permanent granting of transit right for US military aircraft in Shannon as compatible with its notion of 'military neutrality', leads to the conclusion that Ireland has a rather narrow interpretation of neutrality which is not fully in line with the law of neutrality, as laid down in the Hague Convention and international customary law. Austria, on the other hand, came to the conclusion that its foreign policy had commuted from neutrality to European solidarity with the unreserved acceptance and support of the CFSP/CSDP. By an amendment to its constitutional law (Article 23f) Austria ensured that its participation in CFSP/CSDP actions, including full participation in the decision-making process, was not impeded by its neutrality law. With this step, Austria terminated its status as a permanently neutral power⁶⁵ and has to be regarded rather as an alliance-free state.⁶⁶ Sweden and Finland, too, do not consider themselves as 'neutral' in the sense of the rules of neutrality but rather as states which pursue a policy of non-participation in military alliances.⁶⁷ (p. 266) In its policy brief on security policy, the Swedish Government declares that 'Sweden's security is built on solidarity, together with others. Threats to peace and security are countered in partnership and cooperation with other countries and organisations', and it continues to state that 'Sweden will not take a passive stance if another EU Member State or other Nordic country suffers a disaster or an attack. We expect these countries to act in the same way if Sweden is affected. Sweden should therefore have the capability to provide and receive military support'. The country also played an active role outside of Europe, for example by providing jet fighters to the NATO operation 'Unified Protector' in Libya authorized by Security Council Resolution 1973 (2011).

To sum up, the concept of a unified Europe based on the principle of mutual solidarity and equipped with a common foreign, security and defence policy seems hardly compatible with the obligation of a neutral power as stipulated by international law. As a logical and coherent conclusion Austria, Finland, and Sweden have therefore effectively exchanged their status of neutrality for a more flexible position of non-participation in a military alliance. Time will tell if they will have to abandon even this posture should the European Union ultimately establish a common defence, as stated in Article 42(2) of TEU. Ireland maintains—more for domestic political reasons as it seems—its position that the TEU is compatible with its policy of military neutrality. But since its understanding of neutrality is

quite restrictive in itself, it can hardly be used as a case in point for the coexistence of neutrality and European solidarity obligations.

8 Neutrals as Opposed to Non-Belligerent, Non-Aligned or 'Bloc Free' States

There seems to exist some confusion between the terms 'neutral', 'non-belligerent', 'non-aligned', and 'bloc free'. Let us start with the terminological distinction between neutrality and non-belligerence. Is a state not participating in an armed international conflict automatically a neutral power? Doctrine and practice do not seem to sustain such a conclusion. While the status of neutrality implies certain rights and duties, non-belligerence is a (non-legal) factual statement that a state is not participating in an armed conflict between two or more states.⁶⁸ But such a state (p. 267) cannot claim the rights under the law of neutrality for itself and its subjects if it does not comply with the respective obligations.⁶⁹

What is then the difference between a truly neutral and a non-aligned or bloc free state? At first glance there seem to exist similarities since politically the positions of these states may well overlap.⁷⁰ However, if we look closer we are able to separate neutrality from being non-aligned (or bloc free) from a conceptual viewpoint. The main differences could be described as follows: first, neutrality—as we have seen—is based upon a defined legal concept clearly related to the notion of war. It imposes a duty of abstention from military assistance to warring parties. In contrast, the terms 'non-aligned' or 'bloc free' denote political principles.⁷¹ While a neutral state is thus obliged to respect certain rules of international law, the commitments of a non-aligned state are of a purely political character. Historically, the Non-Aligned Movement (NAM) was created in the 1950s by mainly developing countries as a manifestation against imperialism and colonization.⁷² In its origins, it was strongly influenced by the Cold War. The NAM takes its *raison d'être* from its opposition to the major military or political blocs which emerged at the time. The group thus clearly defends an anti-hegemonic stance and one may question whether such an attitude could be described as 'neutral' even in political terms. On the other hand, countries such as Sweden have transformed their former status of neutrality into a *sui generis* form of bloc free policy with the understanding that this policy means non-membership in military blocs or alliances.

9 Conclusion

The law of neutrality is a law emanating from the nineteenth and early twentieth centuries. It has never been formally adapted since the Hague Conventions of 1907. Although it has to a certain extent been developed by state practice, namely in the field of air and missile warfare, it leaves several legal questions unanswered, for instance the subject of cyber war. More and more armed conflicts are taking place within and not between states, and the protagonists are increasingly non-state (p. 268) armed groups. The banning of war and the concept of collective security seem to question the validity and legitimacy of the law of neutrality itself. Does this mean that the law of neutrality has become obsolete? That would probably be too simplistic a conclusion. The fact of the matter is that wars—or international armed conflicts as they are called nowadays—still remain a reality, despite their delegitimization by the UN Charter. The war between Iran and Iraq, for instance, raised numerous questions regarding neutral shipping,⁷³ and the second Iraq war of 2003 is another case in point. The spectre of future inter-state wars is not simply a theoretical one: the consequences of climate change and competition over the water, arable land, and precious natural resources contain the risk of new armed conflicts between states. For states wanting to keep out of such conflicts, neutrality offers a useful instrument to do so. Whether or not the warring parties respect the neutrality of the third state will to an extent depend on the credibility of that state with regard to upholding its neutrality. The better the

neutral state complies with its duties of neutrality, the stronger claim it can make on warring powers to respect its neutrality. In that sense, the law of neutrality still offers an important and very useful legal framework and guideline for the behaviour of both the neutral power and the states at war. This being said, a continued development of the law through state practice would help to maintain its relevance in the future.

But looking beyond its purely normative aspects, how does neutrality stand the test of time from a moral and political perspective? We must recognize that the idea as such has been criticized since its inception. From the concept of '*bellum justum*' of the Middle Ages to President George W. Bush's phrase in September 2001 'Every nation [...] now has a decision to make. Either you are with us or you are with the terrorists',⁷⁴ those who feel righteous about their cause for war do not accept a neutral attitude. Not taking sides is often perceived as a sign of cowardice, indifference, egoistic isolationism, or all of these taken together. Neutrality will have a better chance of long-term survival if it is perceived as being useful to the international community. As a political idea, it may take a fairly broad variety of meanings. Some forms clearly have an isolationist undertone, but not necessarily all. While, for example, US neutrality before World War II clearly had isolationist motives,⁷⁵ countries like Austria, Finland, and Sweden had a fairly active and (p. 269) engaged foreign policy, even when they still considered themselves formally neutral. Besides, neutrality is an evolving concept which needs to adapt itself to the existing geopolitical environment.⁷⁶ In this context, it is important to differentiate between the law and the policy of neutrality. While the legal obligations only apply with respect to a war between states, either an ongoing one in the case of occasional neutrality, or any future war for permanently neutral powers, the policy of neutrality describes the measures which the neutral state adopts in peacetime in order to be able to strengthen the credibility of its neutrality. In order to define such a national neutrality policy, the law of neutrality offers the basic yardstick to determine what is required to be a neutral power and what not. In essence, the laws of neutrality prohibit military assistance or interference, but leave other parts of the neutral's foreign policy untouched. Thus, a permanent neutral state fully respects its obligations if it practises a military neutrality and a 'political' neutrality is not required. As an example, a neutral power is entirely free to recognize other states, to establish diplomatic relations or not, and to take positions on violations of human rights or international humanitarian law.⁷⁷ The neutral power may even be obliged, under certain peremptory norms of international law, to take non-violent measures against a state which is gravely violating certain fundamental obligations, such as the prohibition of genocide, crimes against humanity, or war crimes.⁷⁸

In sum, neutral powers, especially permanent neutral ones, can be useful to the international community mainly in two ways: first, they contribute to international predictability and stability. Their commitment to neutrality is a commitment not to resort to armed violence. Even nowadays, and regardless of the obligations under the UN Charter, such an undertaking by a state constitutes a positive contribution to international peace and security. Secondly, experience shows that the world still needs neutral powers which can mediate and play a useful role as honest brokers.⁷⁹ Switzerland's longstanding tradition of good offices is a telling example.⁸⁰ If the neutral power understands neutrality not as a pretext for isolationism, but as an instrument of peace, and accordingly practices a policy of active neutrality, it can play not only an important role as a useful member of the international community,⁸¹ but also promote its own security interests. By using its comparative advantage as being internationally recognized as an 'inoffensive' power, a permanently neutral state can—and should—promote initiatives which reduce international tensions and prevent conflicts. If it engages in creating a framework where peace, security, human rights, humanitarian law, and the rule (p. 270) of the law prevail as the foundations of international order, it contributes at the same time to creating an international environment which is conducive to preserving its own national security and well-being.

While neutrality has been born out of war, its future lies in its potential as an instrument for peace.

Footnotes:

* This Chapter contains strictly personal opinions and does not reflect the position of the Swiss government.

¹ M. Bothe, 'Neutrality, Concept and General Rules', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), <<http://www.mpepil.com>>, (hereafter *MPEPIL*).

² P. Hostettler and O. Danai, 'Neutrality in Land Warfare', in *MPEPIL*, margin number (mn) 7.

³ Stefan Oeter offers an excellent overview over the historical development of the laws of neutrality: S. Oeter, 'Ursprünge der Neutralität—Herausbildung der Instituts der Neutralität im Völkerrecht der frühen Neuzeit', 48 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) (1988) 447–88 at 470ff.

⁴ '[...] it is the Duty of those that are not engaged in the War, to sit still and do nothing, that may strengthen him that prosecutes an ill Cause, or to hinder the Motions of him that hath Justice on his Side...'. Hugo Grotius, *The Rights of War and Peace*, vol III (R. Tuck (ed), Indianapolis: Liberty Fund, 2008), Ch XVII: Of Neuters in War, <<http://oll.libertyfund.org/title/1427/121250->>.

⁵ E. de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (B. Kapossy and R. Whitmore (eds) Indianapolis: Liberty Fund, 2008), Ch VII: 'Of Neutrality—and the Passage of Troops through a Neutral Country'.

⁶ <<http://www.icrc.org/ihl.nsf/FULL/105?OpenDocument>>.

⁷ M. Torrelli, 'La neutralité en question', XCVI *Revue générale de droit international public* (1992), 5–43 at 8.

⁸ M. Bothe, 'The Law of Neutrality', in D. Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford: Oxford University Press, 2008), 571–604 at 574.

⁹ C. Greenwood, 'The Concept of War in Modern International Law', 24 *International and Comparative Law Quarterly* (1987) 283–306 at 299.

¹⁰ Torelli (n 7), 9.

¹¹ Bothe (n 8), 573; Torelli (n 7), 9.

¹² Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists in the Hague, December 1922–February 1923 (Hague Rules), <<http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument>>.

¹³ Some rules became part of customary international law, however see (n 3), 9.

¹⁴ <<http://www.icrc.org/ihl.nsf/full/560?opendocument>>.

¹⁵ <<http://www.iihl.org/iihl/Documents/ROE%20handbook%20ENG%20May%202011%20PRINT%20RUN.pdf>>.

¹⁶ See, for instance, UK Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) (hereinafter 'UK Manual').

- ¹⁷ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, 226. ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, 14.
- ¹⁸ Among others the Field Manual FM 27-10 'The Law of Land Warfare' of the US Department of the Army <http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm27_10.pdf>.
- ¹⁹ J. Kelsey, 'Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare', 106(7) *Michigan Law Review* (2008) 1427-51. Hostettler and Danai (n 2), mn 24.
- ²⁰ There are some scholars, however, who argue the applicability of neutrality to non-international conflicts as well: T. Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda', 85 *New York University Law Review* (2010) 1186-1224 at 1213.
- ²¹ Bothe (n 8), 578.
- ²² G. Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to Neutrality', 31 *Vanderbilt Journal of Transnational Law* (1998) 575-616 at 605.
- ²³ Report of the Swiss Federal Council (government) to the Parliament: 'La neutralité à l'épreuve du conflit en Irak, Synthèse de la pratique suisse de la neutralité au cours du conflit en Irak en réponse au postulat Reimann et à la motion du groupe UDC, 2 décembre 2005' Feuille fédérale (FF) 2005, 6535, <<http://www.admin.ch/ch/f/ff/2005/6535.pdf>>; English abstract available at <<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/cintla.Par.0029.File.tmp/NeutralitaetspraxisSchweizIrak-Konflikt.en.pdf>>.
- ²⁴ According to the Swiss Federal Council, the occupation of the Palestinian territories by Israel does not qualify as an international conflict in the sense of the law of neutrality: 'Rapport de politique étrangère, juin 2007, du 15 juin 2007'; Annexe 1 Neutralité, FF 2007, 5286.
- ²⁵ Bothe (n 8), 590.
- ²⁶ United Nations Convention on the Law of the Sea (1982), Arts 2(1), 55, and 56.
- ²⁷ *HPCR Manual on International Law Applicable to Air and Missile Warfare* of 15 March 2009 (hereinafter HPCR Manual), <<http://www.ihlresearch.org/amw/manual/category/section-x-neutrality>>, Canadian Forces, Office of the Judge Advocate General, Law of Armed Conflict at the Operational and Tactical Level, Chapter 13 Rights and Duties of Neutral Powers, Rule 1304 <http://www.ficnl.org/uploads/media/Canadian_LOAC_manual_2001.English.pdf>, Hague Rules (FN 4), Ch VI.
- ²⁸ See also Rule 20 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994 (hereinafter San Remo Manual), <<http://www.icrc.org/ihl.nsf/full/560?opendocument>>.
- ²⁹ See namely Rules 14 and 18 of the San Remo Manual. Rule 167(a) of the HPCR Manual (FN 10), see also Commentary to Rule 167(a), <<http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>>.
- ³⁰ Bothe (n 8), 581, 584. Torrelli (n 7), 33.
- ³¹ Hostettler and Danai (n 2), mn 12.
- ³² H. Gros Espiell, 'La neutralidad permanente de Costa Rica y el sistema interamericano', 39 *Revista española de derecho internacional* (1987) 7-22 at 13. A. André Tinoco, 'Völkerrechtliche Grundlagen dauernder Neutralität. Die dauernde aktive und

demilitarisierte Neutralität Costa Ricas unter der Satzung der Vereinten Nationen' (Baden-Baden: Nomos Verlagsgesellschaft, 1989), 191, 211.

33 The Swiss Government argues that the neutral power has an international duty to defend its territory through military means: see 'Neutrality Under Scrutiny in the Iraq Conflict', Summary of Switzerland's neutrality policy during the Iraq conflict in response to the Reimann Postulate (03.3066) and to the Motion by the SVP. In contrast to Switzerland, Austria seems to understand the duty to defend its neutrality rather as a *national* obligation. In its Federal Constitutional Law on Neutrality of Austria of 26 October 1955 it 'declares herewith its permanent neutrality which it is resolved to maintain and defend with all the means at its disposal'.

34 UK Manual, 20.

35 Bothe (n 8), 585.

36 In the Kosovo conflict of 1998/99 Switzerland was struggling between its moral and political duty to show solidarity with the international community to combat ethnic cleansing and other atrocities committed in the region and its obligations under the laws of neutrality when NATO decided to intervene without a mandate of the UN Security Council. While Switzerland participated in EU economical sanctions against former Yugoslavia up to the beginning of the Kosovo conflict, it applied the laws of neutrality with regard to measures of a strategic nature such as oil. See the report of an inter-agency working group of 20 August 2000 following the Kosovo conflict published by the Federal Department of Foreign Affairs: <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/cintla.Par.0028.File.tmp/Bericht_zur_Neutralitaetspraxis_Kosovo_2000_e.pdf>.

37 D. Schindler, 'Neutrality and Morality', 14 *American University International Law Review* (1998) 155-70 at 168.

38 Bothe (n 8), 587.

39 It seems that Switzerland is associating PMCs to such corps or agencies if they recruit combatants to participate directly in hostilities. See the explanatory report of the Swiss Department of Justice of 5 September 2011 (in French) on the draft Federal Law on Private Security Companies, <<http://www.ejpd.admin.ch/content/dam/data/sicherheit/gesetzgebung/sicherheitsfirmen/vn-ber-f.pdf>>. See also: F. Schreier and M. Caparini, 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies', Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No 6, March 2005, 103, <<http://dspace.cigilibrary.org/jspui/bitstream/123456789/27442/1/Privatising%20Security%20-%20Law,%20Practice%20and%20Governance%20of%20Private%20Military%20and%20Security%20Companies.pdf?1>>.

40 Neutral persons are protected by the laws of neutrality first, and only fall under the purview of GC IV relative to the Protection of Civilian Persons in Time of War of 1949 if they are in the territory of a belligerent which has no diplomatic relations with the state of origin of these persons (Art 4 and 11 of GC IV).

41 UK Manual, 330.

42 Bothe (n 8), 597.

43 San Remo Manual, Rule 26.

44 See esp Art 7, 9, and 11 of the London Declaration of 1909 concerning the Laws of Naval War, <<http://www.icrc.org/ihl.nsf/FULL/255?OpenDocument>>.

45 For more details, see HPCR Manual, Section X on Neutrality. UK Manual, 320.

- ⁴⁶ Article 46 of the London Declaration of 1909 concerning the Laws of Naval War.
- ⁴⁷ UK Manual, 331.
- ⁴⁸ Bothe (n 8), 1 at mn 17. See also: Report of the Swiss government 'Neutrality under Scrutiny in the Iraq Conflict Summary of Switzerland's neutrality policy during the Iraq conflict in response to the Reimann Postulate (03.3066) and to the Motion by the SVP Parliamentary Group (03.3050)' of 2 December 2005 (English abstract), 1-17 at 8.
- ⁴⁹ However, agreements with allied states on military training, joint exercises or the sale of armament or ammunition are compatible with permanent neutrality.
- ⁵⁰ During the second Iraq War of 2003 Ireland continued its long-standing practice of granting the United States overfly and transit facilities through Shannon airport. The then Minister of Foreign Affairs maintained the viewpoint that this practice was compatible with Ireland's policy of military neutrality. See Minister Cowen's statement of 20 March 2003 on the situation regarding Iraq, <<http://www.dfa.ie/home/index.aspx?id=26100>>.
- ⁵¹ Report of the Swiss Government (n 48), 9.
- ⁵² Swiss 'White Paper on Neutrality', Annex to the Report on Swiss Foreign Policy for the Nineties of 29 November 1993, 1-29 at 6, <http://www.eda.admin.ch/eda/en/home/topics/intla/cintla/ref_neutr.html>.
- ⁵³ C. von Clausewitz, 'On War' Book 1, vol I, title 24 (trans Colonel J.J. Graham, new and revised edn), e-book edn 2006, <<http://www.gutenberg.org/files/1946/1946-h/1946-h.htm#2HCH0001>>.
- ⁵⁴ Bothe (n 8), 575. Hostettler and Danai (n 2), mn 21.
- ⁵⁵ Schindler (n 37), 162.
- ⁵⁶ UN General Assembly Resolution 58/80, 12 December 1995.
- ⁵⁷ Swiss 'White Paper on Neutrality' (n 52), 28.
- ⁵⁸ Heinz Gaertner and Otmar Hoell, 'Austria', in E. Reiter and H. Gärtner (eds), *Small States and Alliances* (Heidelberg and New York: Springer Verlag, 2001), 157-68, <http://www.bmlv.gv.at/pdf_pool/publikationen/05_small_states_14.pdf>.
- ⁵⁹ Austria is currently active in Kosovo and Bosnia <<http://www.bmlv.gv.at/english/introle/introle.shtml>>.
- ⁶⁰ Ireland's defence forces serve in several UN Missions, among others in MINURSO (Western Sahara), MONUC (Democratic Republic of Congo) and UNIFIL (Lebanon), <<http://www.military.ie/overseas/current-missions>>.
- ⁶¹ Articles 66 and 66a de la Loi fédérale sur l'armée et l'administration militaire, 3 February 1995, <http://www.admin.ch/ch/f/rs/510_10/index.html>.
- ⁶² Petrochilos (n 22), 605.
- ⁶³ M. Ortega, 'Military Intervention and the European Union', *Chaillot Paper 45*, Western European Union, Institute for Security Studies (Paris, March 2001), <<http://www.iss.europa.eu/uploads/media/cp045e.pdf>>.
- ⁶⁴ Council of the European Union, Brussels European Council 18/19 June 2009. Presidency Conclusions, Doc 11225/2/09 Rev.2 CONCL 2.
- ⁶⁵ J. Niederberger, 'Österreichische Sicherheitspolitik zwischen Solidarität und Neutralität', Bulletin 2001 zur schweizerischen Sicherheitspolitik.
- ⁶⁶ Österreichische Sicherheits- und Verteidigungsdoktrin, 2001.

- ⁶⁷ H. Himanen 'Finland', in H. Ojanen (ed), *Neutrality and Non-alignment in Europe Today*, Report 6/2003 of the Finnish Institute for International Affairs (Helsinki, 2003), 20-6 at 21; in the same publication: Anders Bjuner 'Sweden', 41-6 at 42.
- ⁶⁸ Torrelli (n 7), 14.
- ⁶⁹ Hostettler and Danai (n 2), mn 4. According to Schindler, however, 'all the rights of neutrals can be claimed by all the States not participating in an armed conflict': D. Schindler, 'Transformation in the Law of Neutrality Since 1945', in A. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict, Challenges Ahead: Essays in Honor of Frits Karlshoven* (Dordrecht/Boston/London: Martinus Nijhoff, 1991), 367-86 at 380.
- ⁷⁰ S.K. Singh, 'Non-Alignment and Neutrality', in P.A.N. Murthy and B.K. Shrivastava, *Neutrality and Non-Alignment in the 1990s* (New Delhi: Radiant Publishers, 1991), 1-9 at 2.
- ⁷¹ Bothe (n 8), 572; Torrelli (n 7), 14.
- ⁷² Singh (n 70), 4.
- ⁷³ M. Bothe, 'Neutrality in Naval Warfare', in A. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict, Challenges Ahead: Essays in Honor of Frits Karlshoven* (Dordrecht/Boston/London: Martinus Nijhoff, 1991), 387-405 at 402-3. A. de Guttry and N. Ronzitti (eds), *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare* (Cambridge: Grotius Publishers, 1993), 253. Greenwood (n 9), 300.
- ⁷⁴ Speech of the US President on 20 September 2001 before the Joint Congress, <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>>.
- ⁷⁵ US Department of State, Office of the Historian, 'American Isolationism in 1930s', <<http://history.state.gov/milestones/1937-1945/AmericanIsolationism>>.
- ⁷⁶ Swiss 'White Paper on Neutrality' (n 52), 5, 7.
- ⁷⁷ Swiss 'White Paper on Neutrality' (n 52), 27.
- ⁷⁸ Schindler (n 37), 169.
- ⁷⁹ Hostettler and Danai (n 2), mn 24.
- ⁸⁰ Swiss (n 52), 27.
- ⁸¹ Torrelli (n 7), 30.

(p. 602) 18 The Law of Neutrality

I. General

18.01

Neutrality (derived from the Latin *neuter*: neither of each) is defined in international law as the status of a state which is not participating in an armed conflict between other states. Neutral status gives rise to rights and duties in the relationship between the neutral state on one hand and the parties to the conflict on the other.

1. 'Neutrality' describes the particular status, as defined by international law, of a state not party to an armed conflict.¹ This status entails specific rights and duties in the relationship between the neutral and the belligerent states. On one hand, there is the right of the neutral state to remain apart from, and not to be adversely affected by, the conflict. On the other hand, there is the duty of non-participation and impartiality.²

2. The right not to be adversely affected means that the relationship between the neutral and belligerent States is governed by the law of peace, which is modified only in certain respects by the law of neutrality. In particular, the neutral State must tolerate certain controls in the area of maritime commerce.³ The duty of non-participation and impartiality are a necessary corollary to the right not to be adversely affected. The duty of non-participation means, above all, that the state must abstain from supporting a party to the conflict. This duty not to support also means that the neutral state is under a duty not to allow one party to the conflict to use the resources of the neutral state against the will of the opponent. Therefore, the defence of neutrality is part of the duty of non-participation. The scope of those duties is described in more detail in the following provisions.

3. The duty of impartiality does not mean that the state is bound to treat the belligerents in exactly the same way. It entails a prohibition of discrimination, *i.e.* it forbids only differential treatment of the belligerents which in view of the specific problem of the armed conflict is not justified. This duty of impartiality, too, will be defined more precisely below.

(p. 603) 4. As impartiality does not entail a duty of exactly equal treatment, a neutral state is under no duty to eliminate differences in the commercial relations between itself and each of the parties to the conflict existing at the time of the outbreak of the armed conflict. The neutral state is entitled to continue existing commercial relations (the principle of the so-called *courant normal*). A change in commercial relationships favouring one of the belligerents would, however, constitute taking sides in a manner incompatible with the status of neutrality. In more general terms, impartiality means that the neutral state must apply the specific measures it takes on the basis of the rights and duties deriving from its neutral status in a substantially equal way as between the parties to the conflict (Article 9 HC V, Article 9 HC XIII). This regime of rights and duties of the neutral state is an important international legal tool for restraining conflicts. By establishing a clear distinction between neutral states and states parties to the conflict, international law prevents more states from being drawn into the conflict. Neutral states may help parties to a conflict to maintain or establish relations which may mitigate the suffering of victims (e.g. by conducting relief operations or exchanging information) and which may finally smooth the path to peace (e.g. by arranging ceasefires). It is incompatible with this conflict-restraining function of neutrality that states should try to evade the duties flowing from

their neutral status by styling themselves non-belligerents.⁴ This, however, has often happened in the past.

5. The US considered itself as a non-belligerent before entering the Second World War, but not as neutral because it supported Great Britain in a way which was incompatible with the duty of non-participation under the law of neutrality.⁵ More recently, during the 2003 US–British intervention in Iraq, Italy issued a proclamation of non-belligerency.⁶ Other European states also gave assistance to the intervening states which were incompatible with the law of neutrality⁷ without becoming parties to the conflict (e.g. Germany), but they did not make a similar declaration—leaving a legal explanation of their behaviour open. Although there are, thus, a number of cases of declared or undeclared non-belligerency, there is no sufficiently uniform general practice which would justify the conclusion that non-belligerency has become a notion recognized by customary international law. The cases of non-belligerency either arose in the absence of a conflict of sufficient scope to require the application of the law of neutrality (or in a conflict which was not considered as such) or were simply violations of the law of neutrality. If a ‘non-belligerent’ state violates the law of neutrality it must bear the consequences, for instance reprisals. A claim of non-belligerent status may not be used as a justification for a breach of the laws of neutrality. The consequences of such violations are discussed below.⁸ Even support given to the victim of aggression may constitute a violation of the law of neutrality, and even when it does not amount to participation in the conflict. It may, thus, be (p. 604) answered by countermeasures.⁹ Neutrality is not optional, in the sense that each state is free to violate single duties of the law of neutrality as it will, or to declare them irrelevant, without having to fear a countermeasure taken by the adversely affected state.

6. The situation is different if and to the extent that the law of neutrality is modified by the Charter of the United Nations, in particular by a binding decision of the Security Council (*see below*, Section 18.03). Consequently, newer treaties use the term ‘neutral or other states not party to the conflict’ (Article 2, lit. c, AP I). Such a formulation clarifies that a provision is to be applied to any state not participating in the conflict, without the need to enter into any controversy over the status of neutrality, and also where there is a conflict not sufficiently great in scope to trigger the application of the law of neutrality.¹⁰

18.02

The sources of the international law of neutrality are customary law and, for certain questions, international treaties (HC V; HC XIII).

1. The essential aspects of neutrality have been developed through state practice in modern times.¹¹ As a legal status of non-participation, its basic scope was fixed by the end of the eighteenth century. The development continued during the nineteenth century in two ways. On one hand, greater protection of neutral commerce from belligerent acts was achieved. On the other hand, a legal duty of permanent neutrality as an essential element of the maintenance of peace and the balance of powers in Europe was established (by the recognition of the neutrality of Switzerland, Belgium, and Luxembourg). During the First and Second World Wars, and also in a number of later conflicts, the law of neutrality retained its significance.¹² The development of the international legal prohibition of the use of force, however, offered reasons to differentiate between the aggressor and the victim of aggression, a fact which calls into question the classical principle of the impartiality of the neutral state. In addition, the political polarization after the Second World War, which had an impact on many conflicts, made the impartiality of the neutral state a politically doubtful rule. Some details of this development are discussed below. The development of the earlier state practice gave rise to customary law which is still the essential source of the law of neutrality. Following certain modifications of state practice, the customary law of neutrality has undergone changes and introduced distinctions. These changes have only resulted in

modifications of single specific rules of the law of neutrality, not in a general revocation of this whole body of law.

2. Essential parts of the law of neutrality were codified during the nineteenth and the early twentieth centuries. Important steps in this development were the Paris Declaration of 1856¹³ and the Hague Conventions of 1907, namely Conventions V respecting the rights and duties of neutral powers and persons in case of war on land and XIII concerning the rights and duties of neutral powers in naval warfare. Other treaties relating to the laws of war contain specific provisions concerning the rights and duties of neutral states, in particular the four Geneva Conventions of 1949 and Protocol I Additional (p. 605) thereto of 8 June 1977. There has, however, been no comprehensive codification of the law of neutrality since the Hague Conventions of 1907. These rules of 1907 have in part been rendered obsolete by later practice. The need for a new codification is urgent. The different bases of the rules of the law of neutrality will be indicated in the commentaries below. An important part of the law of neutrality, namely neutrality in naval warfare, has recently been formulated in private restatements, namely in the *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, adopted in 1994 by a group of experts convened by the International Institute of Humanitarian Law,¹⁴ and in a set of rules formulated by a committee of the International Law Association.¹⁵

18.03

The Charter of the United Nations and decisions of the Security Council based on the Charter may in certain circumstances prevail over the traditional law of neutrality. Therefore, enforcement measures taken by the United Nations are governed by particular rules different from the traditional law of neutrality. The general law of neutrality, however, has not been revoked by the Charter of the United Nations.

1. The Charter of the United Nations completed the development of the international legal prohibition of the use of force and established a system of collective security, by the reaction of the international community against breaches of peace. The traditional law of neutrality with its duty of impartiality, that is the prohibition of discrimination between the parties to the conflict, could be considered to be incompatible with this development which outlaws the aggressor. However, this is not generally the case. Also under the UN Charter, neutrality during international armed conflicts is permissible and possible.¹⁶ States expressly rely on the law of neutrality.¹⁷ The International Court of Justice¹⁸ as well as national courts¹⁹ have recently upheld the continued validity of the law of neutrality. The International Law Commission, in its 2011 Draft articles on the effects of armed conflicts on treaties, also treats the law of neutrality as a valid and relevant body of law.²⁰ The impartiality of the neutral state retains its important functions at least as long as there is no possibility of a binding decision concerning the question of who in a given conflict is the aggressor and who is the victim. Although the Charter provides for a binding decision by the Security Council on the question of whether there has been an armed attack and which state is the aggressor, decisions of this kind have long been politically impossible in view of the polarization between the superpowers. After the end of the East-West conflict, the Security Council has been in a better position to take decisions, but it has as a rule refrained from legally characterizing situations as breach of the peace or act of (p. 606) aggression and from designating a specific state as being an aggressor. It can thus not be taken for granted that the Security Council will always exercise its powers in this respect.

2. Furthermore, it is stressed that the UN Charter provides a right of collective self-defence, that is a right of all states to assist a victim of aggression, but not a duty to do so. Thus, it is by no means unlawful if a state abstains from supporting a victim of aggression, that is remains impartial and neutral.²¹ The situation is different only if and to the extent that the Security Council uses its powers under Chapter VII of the Charter to oblige states

to conduct enforcement measures (Articles 41, 42, 43, and 48 UN Charter). This means that the traditional duty of non-participation and impartiality has not in a general way been excluded by the Charter, but only that it may in particular cases be suspended by a binding decision of the Security Council. When taking such a decision, the Security Council may also differentiate the duties of support imposed upon particular states.²² In this respect, one has to distinguish between enforcement measures *stricto sensu* undertaken by the United Nations under the direction of the Security Council and military operations undertaken by one or more states and authorized by the Security Council. Many commentators considered the military operation to liberate Kuwait as not constituting an enforcement action undertaken by the United Nations, but simply as collective self-defence authorized by the Security Council. A distinction must be made, however, between the authorization to conduct military operations against Iraq, an authorization given only to the states 'co-operating with the government of Kuwait', which clearly implies the legal admissibility of non-participation, and non-military enforcement measures against Iraq, in particular the interruption of commercial relations and of monetary transactions imposed as a duty on all members of the United Nations. In this case, states were clearly under a duty to deviate from the principle of *courant normal*,²³ to that extent there was a modification of the rules of neutrality. The authorization given by the Security Council to take military action against Iraq also modified the duty of non-participation, but it did not exclude the possibility of neutrality, as no state was obliged to make use of that authorization. But in the light of this authorization, it could not be considered unlawful to grant to the states taking military action assistance which otherwise would be a violation of neutrality. In the case of the US-British intervention in Iraq 2003, the intervening states also claimed that they acted under an authorization by the Security Council, which however, is subject to controversy. The assistance given to the intervening states by a number of other states, including Germany, could be justified under the law of neutrality if the US-British justification of the intervention was correct.²⁴ If not, the law of neutrality had to be applied and the assistance was unlawful.

(p. 607) **3.** The duty of non-participation as well as that of impartiality may, thus, be restricted by decisions of the Security Council.²⁵ But it must be ascertained in each particular case how far this has been the case.

18.04

Every state is free to participate in an armed conflict, but only on the side of the victim of an armed attack (collective self-defence), not on that of the aggressor.

1. Traditional international law left to each state the sovereign decision of whether, at the outbreak of a conflict between other states, it would participate or remain neutral. Thus neutrality, as a matter of principle, was a question to be decided ad hoc by each state when a conflict broke out. Therefore, there was a practice of pronouncing 'declarations of neutrality' at the outbreak of a conflict.

2. As explained above, this is still true but only in a limited sense. At the outbreak of a conflict between two other states, a state is still free to participate or to remain neutral. Modern international law, however, limits the freedom of decision as to the side on which a state may become involved. Support granted to an aggressor is illegal, participation on the side of the victim of aggression, being collective self-defence, is permissible.

3. The decision to participate or to remain neutral is a political, not a military, decision. Where the law of neutrality requires decisions to be taken by military command, the

government concerned must give political guidance and clarify the position which it takes in relation to a particular conflict.

18.05

Permanent neutrality is a status under which a state undertakes in peacetime a legal obligation to remain neutral in case of an armed conflict between two or more other states. This status requires the neutral state in peacetime not to accept any military obligations and to abstain from acts which would render the fulfilment of its obligations of neutrality impossible should the armed conflict occur. A distinction must be made between such a legal obligation to remain neutral and a neutrality policy.

1. The legal neutralization of certain states was one of the political tools used to maintain a balance of power in Europe under the European Concert during the last century. The states which still possess a legally based status of permanent neutrality are Switzerland and Austria.²⁶ The permanent neutrality of Switzerland is based on mutual unilateral declarations made by Switzerland and by the most important European powers, in connection with the Vienna Congress in 1815. The international legal basis of the permanent neutrality of Austria is also a unilateral act, namely the Austrian notification of the Federal Constitution Act of 26 October 1955. Whether, and to what extent, both states are under an international legal duty to maintain this status of permanent neutrality is not clear.

2. A permanently neutral state may not, in time of peace, accept any obligation which would render it impossible to fulfil, in times of armed conflict, its duties of neutrality. Therefore, a permanently neutral state may not become a member of a military alliance. In relation to Austria, there was a lively discussion as to whether the economic obligations involved in Austrian membership of the EC would be incompatible with its status of permanent neutrality. Whether this was true in the context of the division of Europe into two blocs is a question which no longer needs an answer. The political changes in (p. 608) Europe have rendered the question of the significance of economic ties for the status of permanent neutrality irrelevant in the European context.²⁷

3. In a more general way, permanent neutrality means a renunciation of the right of collective self-defence, that is the right to grant assistance, but not a renunciation of the right to accept help from others if the permanently neutral state is itself attacked. In most other cases where states declared themselves as permanently neutral, the declarations were not of a legal, but of a political nature. Legal acts establishing permanent neutrality of the kind adopted by Switzerland and Austria are lacking in the case of states which during the past years had followed a policy of neutrality (Sweden, Finland, Ireland). In these cases, there may have been some legal underpinning of neutrality in the principle of estoppel, namely where political declarations had created a situation of confidence in which other states may have relied on the state making such a declaration to remain neutral and where, due to that reliance, they had abstained from making defence preparations in relation to that state. Such situations are, however, subject to progressive development.²⁸

18.06

Except for those rules which, in a legally based permanent neutrality, apply in times of peace, neutrality begins with the outbreak of an armed conflict of significant scope between two other states.

1. The status of neutrality as defined by international law becomes effective with the outbreak of an armed conflict between two other states.²⁹ Thus, the question arises of what constitutes an armed conflict within the meaning of the law of neutrality; in other words, what is the threshold of application of the law of neutrality? The law of neutrality leads to considerable modifications in the relationships between the neutral and the belligerent states, for instance as to the admissibility of exports, the sojourn of warships of the parties to the conflict in neutral waters, and the control of neutral trade. These fundamental changes are not triggered by every armed incident, but require an armed conflict of a certain duration and intensity. Thus, the threshold of application of the law of neutrality is probably higher³⁰ than that for the rules of the law of war relating to the conduct of hostilities and the treatment of prisoners,³¹ which are applicable also in conflicts of less intensity.

2. There is a traditional thesis, still defended in literature and by state organs, to the effect that the application of the law of neutrality requires the existence of 'a war in the legal (p. 609) sense'.³² Whether and to what extent this thesis is a correct statement of the current state of customary law depends on the definition of 'war in the legal sense' under current international law. There is still a widespread opinion that, in addition to the objective existence of armed hostilities, there must be a subjective element: the intent to conduct a war (*animus belligerendi*). If this were correct a state could, simply by declaring that it did not intend to conduct a war, evade all the restraints imposed upon a party to the conflict by the law of neutrality. For states not party to the conflict this construction would provide an excuse not to respect the prohibition of supporting a belligerent. It is exactly in this sense that the interpretation has been used time and time again. However, the threshold of the application of the law of neutrality must be prevented from becoming in this way a question for the subjective discretion of the states involved. Therefore, the threshold must be determined according to the object and purpose of the law of neutrality. This means that the law of neutrality must be applied in any conflict which has reached a scope which renders its legal limitation by the application of the law of neutrality meaningful and necessary. It is, however, impossible to establish this threshold in a general way. One can only say that there must be a conflict of a certain duration and intensity.

3. On closer analysis, all those defending a 'subjective' notion of war come to a similar result if and to the extent that they tie the intent to conduct a war to a series of objective criteria relevant for the character of the relationships between the parties to a conflict as well as between these parties and neutral states. For them, the decisive question is whether and to what extent states use legal instruments typical for the existence of a state of war; for instance the severance of diplomatic relations, the treatment of nationals of the other party as enemy aliens, the exercise of control over the commerce of third states, and similar measures.

4. It is apparent from the above that the determination of whether a particular conflict has reached the threshold of application of the law of neutrality is a matter of complex legal construction both for the parties to the conflict and for third states. In the interest of legal clarity, it is therefore desirable that states expressly clarify their position in this respect. This legal construction is a matter to be decided by governments, not by military command. Therefore, declarations and notifications of a state's construction of the status of the conflict are relevant, but by no means constitutive for the characterization of the conflict. The law of neutrality is applicable without a specific declaration on the part of the state not party to the conflict being necessary. The difficulties described, however, have frequently led to situations in which different states evaluated the legal status of the same conflict in a

different way (e.g. the Gulf War between Iran and Iraq³³), a fact which has led to considerable legal insecurity.

5. States not parties to a conflict which has not reached the threshold of application of the law of neutrality are not neutral in the legal sense, *i.e.* they are not bound by the particular duties of the law of neutrality. In those fields where the rules of international humanitarian law have a lower threshold of application than the law of neutrality, the use of the term 'other state not party to a conflict' is the logical consequence of this situation.³⁴

(p. 610) 6. The application of the law of neutrality requires the existence of an international conflict. There is no neutrality in relation to non-international conflicts. Third states are subject to other legal restrictions in relation to internal armed conflicts taking place on the territory of other States. According to a traditional rule of international law, support given to insurgents constitutes unlawful interference in the internal affairs of another state. If it reaches a certain intensity, this support is considered equivalent to an unlawful armed attack, thus a question of the *ius contra bellum*. The result will most often be an international armed conflict between an intervening State and the State where the armed conflict takes place to which the law of neutrality applies. Support given to an established government, in whatever form, is generally considered as legal, each state being free to request the assistance of other states for the purpose of maintaining its internal order (intervention by invitation).³⁵ This, however, is not uncontroversial, in particular because there have been a number of cases where the legitimacy of the government requesting the assistance was subject to doubt (e.g. Afghanistan,³⁶ Vietnam³⁷). Yet according to the prevailing view, the foreign intervention on the side of the established government does not change the status of the conflict under international humanitarian law—it remains a non-international armed conflict, to which the law of neutrality does not apply.³⁸ Yet a prohibition of interference in an internal armed conflict must not be confused with the duty of non-participation under the law of neutrality. Only where foreign intervention, whether lawful or not, changes the status of an internal conflict and render it an international one, the law of neutrality is applicable.

18.07

Neutral status ceases with the end of an armed conflict or by the neutral state becoming a party to the conflict. However, neither limited actions of armed defence of neutrality nor breaches of single duties of neutrality by the state alone necessarily result in that state becoming a party to the conflict.

1. The status of neutrality (except, of course, those rules of permanent neutrality which apply in times of peace) ends with the armed conflict. This obvious rule raises a number of practical problems similar to those concerning the beginning of neutral status. Under today's conditions, the end of a conflict can not always be clearly determined. The actual cessation of hostilities does not always lead to a modification in the relations between the parties to the conflict which would render the law of neutrality inapplicable. Restraints imposed by the law of neutrality remain relevant in this situation, as for instance the resumption of arms exports during an armistice might even prompt the resurgence of the armed conflict and thus render futile a positive effect of the law of neutrality. On the other hand, an armistice may lead to the pacification of the situation which, after several years, can no longer be distinguished from normal peacetime relations. For this question, too, there are no sufficiently clear criteria of general validity. Within the meaning of the law of neutrality, a conflict must be considered as terminated where, after the cessation of active hostilities, there is a certain degree of normalization of the relations between the (p. 611)

parties to a conflict.³⁹ There are specific rules for certain norms of the law of neutrality (e.g. Article 111 GC III).

2. In the course of the conflict, a neutral state may become a party to the conflict. Whether and under what circumstances this occurs is not always easy to determine. Different cases must be distinguished.

3. The first possibility is that either a party to the conflict or the neutral state by unequivocal acts or declarations change the existing status, for example Germany and Italy during the Second World War by their declaration of war against the US (which was neutral, but not behaving according to the law of neutrality) or Germany by its invasion of Norway. The question of whether this triggering of an armed conflict is or is not a violation of international law is irrelevant for the other question of whether the neutral status is ended. As long as states do not legally characterize their acts by declarations, the mere fact that hostilities are present between a neutral state and a party to the conflict must be evaluated in a differentiated way. Thus, the massive support given by the US to the states at war with Germany did not render the US a party to the conflict until the declaration of war just mentioned. Only where a hitherto neutral state participates to a significant extent in hostilities is there a change of status.

4. This becomes obvious if the duty of the neutral state to defend its neutrality, if necessary by the use of arms, is also considered. Where a party to a conflict tries to occupy parts of the neutral territory for use as a base for hostilities, the neutral state is bound to take military countermeasures. If it complies with this obligation, it cannot be considered as losing all the advantages of neutral status. It remains neutral despite the fact that it is engaged in hostilities with one of the parties of conflict.⁴⁰

5. The question of whether a change of a neutral status is effected where a hitherto neutral state is drawn into the conflict must be distinguished from the different question of whether or not this change of status is brought about lawfully. In this respect, the change of status effected by a party to the conflict and by the neutral state itself must be distinguished. In addition, two levels of legal evaluation must be differentiated, namely the evaluation under the law of neutrality and that under the law relating to the international prohibition of the use of force.⁴¹ Where a hitherto neutral state violates the law of neutrality by supporting a party to the conflict or in any other way, the affected party to the conflict is entitled to take reprisals, which are then subject to the general rules concerning reprisals, in particular the principle of proportionality.⁴² According to traditional international law, reprisals could have involved the use of military force against the state violating the law. In this respect, the Charter of the United Nations requires a differentiated view. Armed reprisals are generally unlawful.⁴³ As a consequence, a reaction against violations of neutrality which would involve the use of force against another state is permissible only where the violation of the law triggering that reaction itself constitutes an illegal armed attack. If this rule is applied in the context of an existing armed conflict, the (p. 612) question arises of whether the violation of neutrality is to the advantage of the aggressor or the victim. Support of the aggressor is illegal not only under the law of neutrality, but also under the law prohibiting the use of force. Illegal support for an aggressor, however, is not necessarily equivalent to an armed attack. Therefore, the victim of aggression reacting to a non-neutral service in favour of the aggressor is still subject to the prohibition of the use of force.⁴⁴ In this case, it is therefore not necessarily legal to attack a state violating the law of neutrality and to make it, by that attack, a party to the conflict.

6. Supporting the party to a conflict is a violation of the law of neutrality even if the supported party is a victim of aggression. This follows from a general principle of the law of war which also applies to the law of neutrality, namely the principle of equality of the parties regardless of the justification of the conflict.⁴⁵ Like international humanitarian law, the law of neutrality can effectively fulfil its function of restraining conflicts only if the

question of which party is the aggressor and which the victim remains irrelevant for the evaluation of certain acts in the light of the law of neutrality. Any party to the conflict damaged by the unneutral support given by a neutral state may take countermeasures. The situation is only different if there is a binding decision of the Security Council enjoining States to support the victim of aggression. The law of neutrality, however, does not exclude the right of collective self-defense. If a neutral state uses this right, it would become a party to the conflict and the status of neutrality would be terminated.

II. The Rights and Duties of Neutral States

1. General Provisions

18.08

The territory of a neutral state is inviolable. It is prohibited to commit any act of hostility whatsoever on such territory (Article 1 HC V).

1. This rule formulates the fundamental right of the neutral state to remain outside the armed conflict and not to be adversely affected by it. Above all, this means that the armed forces of the parties to the conflict may not enter neutral territory. They may not in any way use this territory for their military operations, or for transit or similar purposes. It must again be stressed that this rule applies regardless of whether a party to the conflict is the aggressor or the victim of aggression. The right of self-defence does not legitimize the use of any means contrary to the laws of war. Nor does it legitimize military measures against states which have not themselves committed aggression, even if the use of their territory were useful or necessary for the exercise of the right of self-defence to be militarily effective. The right of self-defence does not constitute a comprehensive right of self-help against innocent third states. The inviolability of neutral territory applies not only to neutral land but also to neutral waters (internal waters, territorial sea, *see* Section 18.17) and airspace (*see* Section 18.49). As far as sea areas are concerned, this right is limited by the right of innocent passage. As far as the right of flight over sea areas is concerned, a (p. 613) distinction must be made between the territorial sea generally (no right of overflight) and international straits and shipping lanes through archipelagic waters, for both of which there is a right of overflight.

2. The inviolability of neutral territory also means that the neutral states must not be affected by collateral effects of hostilities. The parties to the conflict have no right to cause damage to neutral territory through hostilities themselves. Therefore, there is no rule of admissible collateral damage to the detriment of the neutral state (for collateral damage generally, *see* Section 7.17). If the effects of attacks directed against targets on the territory of a party to the conflict are felt on neutral territory, they are unlawful. Recognizing this rule, Allied governments paid compensation for damage occurring during the Second World War in Switzerland caused by attacks on targets in Germany which had an impact in Switzerland. In its Advisory Opinion on the legality of nuclear weapons,⁴⁶ the ICJ held that the principle of neutrality, including the inviolability of neutral territory, also prohibits causing transborder damage to the neutral territory by the conduct of hostilities, in particular the use of nuclear weapons. This confirms the principle that the relations between the neutral states and the parties to the conflict are generally governed by the law of peacetime applies.⁴⁷ An exception to this rule applies only where, as for example in maritime warfare, customary law recognizes a certain impact of hostilities on a neutral interest, in particular on neutral navigation, as being lawful (*see* Sections 18.38 *et seq.*). As to land warfare, there is no similar rule of customary law which would lower the normal standard of peacetime protection against transboundary impact. The fact that the use of weapons yielding high explosive power, in particular nuclear weapons, would thus be rendered illegal under the law of neutrality may render respect for this rule difficult in the case of an armed conflict. However, this fact has so far clearly not resulted in a change of

practice and legal opinion which would have modified the traditional rule of the inviolability of the neutral territory.

18.09

The neutral state is bound to repel any violation of its neutrality, if necessary by force (Article 5 HC V; Articles 2, 9, 24 HC XIII). This obligation, however, is limited by the international legal prohibition of the use of force. The use of military force outside the neutral state's own territory for the purpose of defending its neutrality is permissible only if it is legitimate self-defence against an armed attack.

1. The duty of the neutral state to prevent its territory from being used by one of the parties to the conflict as a base for military operations is the corollary of the neutral's right not to be adversely affected by the conflict. Therefore it must prevent any attempt by a party to the conflict to use its territory for military operations, through invasion or in transit, by all means at its disposal.⁴⁸ This duty, however, is limited to the defence feasible for the neutral state under the circumstances. A neutral state is not obliged to destroy itself (see in particular the commentary to Section 18.15).

2. In connection with the duty to defend neutrality, it has been debated whether and to what extent neutrality obliges the neutral state to undertake military efforts. The Austrian (p. 614) and Swiss concept is that of armed neutrality,⁴⁹ based on the idea that neutral states are indeed obliged to undertake military efforts in order to repel a violation of neutrality by the use of armed force. The neutrality policy of Costa Rica, on the other hand, is based on unarmed neutrality. This is certainly unobjectionable as long as no party to the conflict attempts to use the territory of the unarmed neutral state. In the absence of any effort by the neutral state to react to a violation of its territory, however, that state risks no longer being considered to be in breach of its obligations of neutrality by the party to the conflict adversely affected.

3. If the neutral state defends its neutrality it must respect the limits which international law imposes on military violence. There is no specific need for international legal justification of military measures which the state takes on its own territory, for instance if it drives troops out which have invaded its territory. The specific justification as self-defence is only necessary if military measures are employed outside the neutral state's own territory. In this case, they are admissible only to the extent that the preceding violation constitutes an armed attack within the meaning of Article 51 of the UN Charter and if the countermeasure taken constitutes a necessary and proportional reaction to that attack. Article 51 of the Charter, thus, always marks the limits of counter-force the neutral state may legally use.⁵⁰ In other words: the Charter of the United Nations grants a right to use counter-force; the law of neutrality may, under certain circumstances, impose an obligation to exercise this right.

18.10

A neutral state must not assist a party to the conflict. It is especially prohibited to supply warships, ammunition, or other war materials (Article 6 HC XIII). Humanitarian assistance for victims of the conflict does not constitute a violation of neutrality even where it is for the benefit of only one party to the conflict (Article 14 HC V).

1. This rule formulates in a general way the principle of non-participation. The neutral state must abstain from any act which may have an impact on the outcome of the conflict. The second sentence names only a few examples of such forbidden assistance. Massive financial support for a party to the conflict also constitutes non-neutral service. This was the case with a number of Arab states during the conflict between Iran and Iraq who gave

substantial financial support to the war effort of Iraq. The arms supplies by Western states to Iraq, too, were objectionable under the law of neutrality. The prohibition is absolute, and applies also where assistance is given to both parties. Section 1810 constitutes a concretization not of the duty of impartiality, but of the duty of non-participation. Therefore, it is unlawful for a neutral state to compensate an uneven relation of strength between the parties to the conflict by supplying arms or similar support.

2. The supply of any war material is forbidden (as to the definition, *see* comments to Section 1812, also Article 44 HRAW). This rule, however, is among those which lend themselves to be modified where the Security Council adopts measures for the maintenance of peace.

(p. 615) **3.** As far as the humanitarian protection of the victims of the conflict is concerned, the only criterion for such assistance is need, and not equal benefit for the parties to the conflict. This idea was for the first time clearly formulated in Article 70 AP I which states that humanitarian assistance may not be considered as an interference in the conflict. Humanitarian assistance, however, is subject to its own requirements of neutrality. Any assistance whose purpose is not to mitigate the need of victims, but to provide a military advantage to one party is not humanitarian. On the other hand, inequalities of assistance based on a difference in need and requirements do not violate the principle of humanitarian impartiality.⁵¹

18.11

A neutral state may in no circumstances participate in acts of war by a party to the conflict.

This rule names a further example of assistance forbidden according to Section 1110. It may be questionable what is considered to be forbidden participation in a particular case. If the neutral state takes part by engaging its own military forces, this is a clear example. Another example might be the supply of military advisors to the armed forces of a party to the conflict.

18.12

State practice has modified the former rule of both customary and treaty law that a neutral state is not bound to prohibit export and transit of war material by private persons for the benefit of one of the parties to the conflict (Article 7 HC V). To the extent that arms export is subject to control by the state, the permission of such export is to be considered as a non-neutral service.

1. The export by a neutral State of materials which may be relevant for the war effort of a belligerent State three different problem areas must be distinguished:

- export prohibitions imposed by the law of neutrality,
- general export restrictions (arms trade controls, non-proliferation regimes,
- the law relating to contraband.

2. The traditional law of neutrality distinguished between unlawful assistance by the neutral state and assistance by private persons or private enterprises belonging to a neutral state. The latter was not attributed to the neutral state and there was no obligation on this state to prevent it. This rule has resulted in the private arms industry of neutral states

supplying armaments in a relatively unimpeded way to a party to the conflict, and frequently to both sides.

3. The separation of the state and the private armaments industry is nowadays artificial and does not correspond with political reality. Arms production and arms trade are in many ways managed, promoted, and controlled by the state. Therefore it would simply be unrealistic if one did not attribute to the state the exports of that state's 'official' arms industry. Modern state practice accords with the rule of non-separation. Where states took the view that the law of neutrality applied, they did not permit arms exports by private enterprise, nor did they rely on the artificial separation between state and private enterprise. According to the current state of customary law, the (p. 616) correct view is that a state's permission to supply war material constitutes a non-neutral service.⁵²

4. In addition to the question of the scope of application of the law of neutrality discussed above, this raises two additional questions. First, what kind of effort must a state make to prevent the export of war material, and second, what kinds of material constitute war material within the meaning of the rule. As to the first question, one has to assume that besides arms exports controlled by the state, there is a black market which evades state controls. The more stringent the controls, the greater the incentive to undertake transfers to circumvent them. Discussions about the supply of equipment for the production of chemical weapons in Libya and Iraq are examples. As to this question, there is no sufficient practice to produce an *opinio iuris*.

5. The law of neutrality is not the only basis for export prohibitions. Relevant constraints exist for other reasons. They may or may not coincide with export prohibitions flowing from the law of neutrality. Major reasons for controls or prohibition relating to exports of arms and related materials are concerns for peace and the use of weapons for crimes related to armed conflicts and terrorisms. This is the object of non-proliferation regimes concerning weapons of mass destruction⁵³ and of the Arms Trade Treaty.⁵⁴ Concerning the effect of arms exports to instigate conflict, Article 26 of the German Basic Law has established a constitutional duty to restrict the export of weapons. This duty was implemented by the War Weapons Control Act. In addition, the export of materials relevant for armament may be restricted under the Foreign Economic Transactions Act.⁵⁵ Both acts could also serve as a legal basis for the Federal government to prevent exports which are prohibited under the law of neutrality.

6. As to the definition of war materials which, according to the law of neutrality, may not be supplied to the parties to the conflict, the problem must be distinguished from general arms trade law, from the prohibitions of non-proliferations regimes and from the definition of contraband. There is apparently no state practice to the effect that the rule of neutrality prohibiting supply covers more than weapons *stricto sensu*, that is material which is capable of being used for killing enemy soldiers or destroying enemy goods. Non-proliferation regimes in the field of arms control usually cover related materials (technology, construction plans etc.).⁵⁶ Another open question is whether the permission given to an export/import enterprise to grant sub-licenses or the non-prevention of re-exports are equivalent to the permission of exports.

18.13

Citizens of neutral states may, at their own risk, enter into the service of one of the parties to the conflict (Article 6 HC V). In such a case, they must be treated as nationals of the respective party to the conflict (Article 17 HC V). The prohibition against recruiting, using, financing, or training

mercenaries must be respected (Article 47 AP I; Mercenary Convention; see above, Section 5.03).

(p. 617) **18.14**

It is prohibited to recruit and raise troops on neutral territory to assist one of the parties to the conflict (Article 4 HC V).

1. While the troops of a neutral state may not take part in any war operations (see Section 18.11), it cannot be and is not required that the neutral state prevents its nationals from entering the service of a party to the conflict on their own initiative and responsibility. This distinction between private and governmental assistance may, however, be misused. If the state tolerates the establishment of so-called volunteer corps, a not uncommon practice, this amounts to a non-neutral service. The same applies where the neutral state tolerates publicity for the establishment of troops by the parties to the conflict. All acts and omissions of the neutral state are prohibited which further the military effort of a party to the conflict.

2. Further duties of prevention result from the Convention against recruitment, use, financing, and training of mercenaries, opened for signature and ratification by the General Assembly of the United Nations on 4 December 1989. The parties to this Convention are bound to punish the recruitment of mercenaries. It must be taken into account, however, that the members of regular armed forces of a party to the conflict are not mercenaries within the meaning of the Convention. Recruitment for activities within the regular armed forces of another state thus does not constitute an activity which must be punished according to the Mercenaries Convention.

3. Still greater duties of prevention may apply when the Security Council imposes an obligation to abstain from any assistance to an aggressor. This may imply an obligation to prevent private assistance which does not exist under the general law of neutrality nor under the Mercenaries Convention.

2. War on Land

18.15

Troop or supply movements must not be carried out on neutral territory (Article 2 HC V). The neutral state may allow the transit of wounded persons and relief goods (Article 14 HC V).

1. This provision is a consequence of the prohibition of non-neutral services set out in Sections 18.10 and 18.12, and also of the prohibition against using neutral territory for the military purposes of a party to the conflict.⁵⁷ Prohibited transport across neutral territory includes cases where a party to the conflict is granted landing rights for supply flights, a case which has considerable practical importance.⁵⁸

2. During the Second World War, the prohibition of transit was in some cases not respected by neutral states under the pressure of circumstances. Neutral states have granted transit rights to belligerents in different ways. In most cases, this was the first step towards a neutral state being drawn into the conflict. On the other hand, states refusing transit rights were attacked.

(p. 618) 3. The exact definition of forbidden supply movement presents difficulties. Transport of weapons belongs to this category. On the other hand, the movement of medical supplies or of raw materials for the war industry would be considered as permitted.

4. The second sentence establishes an exception to the rule for the transport of wounded persons and relief supplies. There is a general principle of the law of war behind this rule (also expressed in Section 18.10, second sentence) namely that humanitarian assistance to the victims of conflict, as a rule, does not constitute a non-neutral service.

18.16

It is not considered a non-neutral service if a neutral state permits the use by a party to the conflict of generally accessible means of communications on its territory. The neutral state must not, however, install or permit on its territory special means of communication for a party to the conflict (Article 3 HC V).

1. In view of the great importance of telecommunications for modern high-technology warfare, the rules of the law of neutrality relating to neutral telecommunication installations are of particular significance. The relevant rules of Hague Convention V do not address modern problems of telecommunication with the necessary clarity, but they contain principles which remain valid and applicable today. Another element of the delimitation between permissible and impermissible use of neutral telecommunication installations is the idea of *courant normal*, which is of general importance for neutral commercial relations. The outbreak of an armed conflict does not result in an obligation for the neutral state to prevent the use of its telecommunication installations by a party to the conflict which used them or which had access to them before. Existing non-military telecommunication infrastructure, in particular that owned by a public telecommunications enterprise or administration of the neutral state, may be used by the parties to the conflict. In this sense, the Global Positioning System (GPS) is a generally available means of communication. The same holds true for data communication infrastructure, in particular hardware components of the Internet, for example servers situated on neutral territory or under the jurisdiction or control of a neutral state. A neutral state is not obliged to bar the use of such components of the Internet by the parties to a conflict even if that use is of a military nature.⁵⁹

2. Thus, the parties may rent fixed lines for voice and data communication of a military nature and may be granted access from such lines to satellite communications. On the other hand, it is a non-neutral service for a neutral state to place at the disposal of a party to the conflict telecommunication installations not available to it under normal conditions (e.g. its own military telecommunication infrastructure) or if it creates, or acquiesces in the creation of, new telecommunication infrastructure for the particular purposes of a party to the conflict. Furthermore, it is a violation of neutrality (Section 18.10) if a neutral state provides one party to a conflict satellite imagery containing valuable military information concerning the other party.

18.17

Neutral states must intern forces of the parties to the conflict trespassing on neutral territory (Articles 11 and 12 HC V). Escaped prisoners of war who are allowed to remain in the territory of the neutral state may be assigned a specific place of residence (Article 13 HC V).

(p. 619) 1. The treatment of military personnel and war material of the parties to the conflict which are found on neutral territory is unclear in many respects.

2. If whole units of the armed forces of a party to the conflict arrive on neutral territory, it would be a violation of the duty of non-participation if the neutral state permitted them to take part again in hostilities. Therefore, those troops must be interned (Article 11 HC V).

War material, too, has to be withheld until the end of the conflict (e.g. the military aircraft brought into Iran during the Gulf War,⁶⁰ if the law of neutrality was applicable in that case).

3. A logical consequence of this rule would be that the neutral state had to prevent escaped prisoners arriving on its territory from taking further part in the hostilities. Article 13 HC V expressly states that such escaped prisoners must remain free. Certain authors conclude from this that they must be permitted to go back to their home country.⁶¹ However, this is by no means clear. The provisions of the Third Geneva Convention provide for repatriation of prisoners of war on neutral territory only in certain cases and do not regulate the question comprehensively (see Articles 110 and 111 GC III). This question should, whenever possible, be regulated by a specific agreement between the states concerned.

3. Naval Warfare

a. General

18.18

The internal waters, archipelagic waters, and territorial sea of neutral states must be respected (Article 1 HC XIII). It is prohibited to commit any act of war in such waters (Article 2 HC XIII).

18.19

The parties to the conflict may not use neutral ports or territorial waters as a base for naval operations (Article 5 HC XIII).

18.20

Acts of war are prohibited in neutral waters to the same extent as on neutral territory (Article 2 HC XIII). The acts of war which are forbidden include stop, visit, and search, orders to follow a specific course, the exercise of the law of prize, and capture of merchant ships (Article 2 HC XIII).

1. Sections 18.18–18.20⁶² constitute the maritime aspect of the general principle (formulated in Section 18.08) that the territory of a neutral state is inviolable and may not be used for the purpose of conducting hostilities. This rule, however, is somewhat modified for neutral territorial sea, as compared to the rule in land warfare, in that there is a right of innocent passage (Section 18.26).⁶³ The jurisdictional waters to be respected consist of the territorial sea and the internal waters belonging to the sea, that is sea areas on the landward side of the base line from which the territorial sea is measured (see Article 8 of the United Nations Convention on the Law of the Sea). The exclusive economic zone (p. 620) and the sea area above the continental shelf do not constitute neutral waters within the meaning of Sections 18.18–18.20.⁶⁴

2. The status of the waters superjacent the continental shelf is not affected by the exclusive rights of the coastal state over the resources of the shelf (Article 78 UNCLOS). They may thus belong to the high seas or the EEZ. As to the EEZ, third states enjoy all the freedoms of the high seas (Article 58 UNCLOS) except the rights specifically reserved to the coastal state by Part V UNCLOS. Article 88 UNCLOS, which reserves the use of the high seas and the EEZ for peaceful purposes is generally interpreted in the sense that it excludes belligerent activities only to the extent that they violate the Charter of the United Nations, in particular the prohibition of the use of force.⁶⁵ The parties to the conflict must, however, in conducting hostilities have due regard to rights and duties of the neutral coastal state in

whose EEZ hostilities are taking place.⁶⁶ On the high seas, the belligerents must also conduct hostilities with due regard to the relevant rights of neutral states.⁶⁷

3. The acts of war prohibited in neutral waters are not defined with any precision. Mere passage is not a forbidden act of war. Acts of war include shooting at enemy ships, take-off by military aircraft from aircraft carriers, laying mines, and also transmission of intelligence. Section 18.20 clarifies that the exercise of the right of prize is also a prohibited act of war.

18.21

When a ship has been captured by a party to the conflict in the waters of a neutral state, the latter must, as long as the prize is still within its waters, use all means at its disposal to obtain the release of the prize and its crew. The prize crew must be interned (Article 3, para. 1, HC XIII).

Section 18.21 reflects the duty to defend neutrality. If the right of prize is exercised in neutral waters contrary to the laws of neutrality, the neutral state must make an effort to undo this violation by freeing the prize captured in its waters. This liberation of the prize is not inconsistent with the prohibition of the use of force, since it constitutes an exercise of sovereign rights in the state's own jurisdictional area where the justification of self-defence is not required.⁶⁸

18.22

A neutral state may demand the release of a ship captured within its waters even if the ship has already left those neutral waters (Article 3, para. 2, HC XIII).

This rule clarifies the rights of the neutral state in case of an illegal taking of a prize in its waters. It is a secondary obligation derived from the primary rule in Section 18.20: the situation must be re-established as if the violation of neutral waters had not occurred. Thus, the respective party to the conflict must render the prize illegally taken.

18.23

If a ship of a neutral state takes wounded, sick, or shipwrecked persons on board, it must, to the extent required by international law, ensure that these persons take no further part in hostilities (Article 15 GC II).

(p. 621) **1.** Section 18.23 is the maritime aspect of Section 18.17. As a matter of principle, combatants who fall into the power of a neutral state must be prevented from taking further part in hostilities. The reference in Article 15 GC II to general international law is, however, somewhat problematic.

2. In land warfare, the transit of wounded and sick persons through neutral territory is permitted (Article 14, para. 1, HC V). If one were to equate the situation of taking such persons aboard with their transit, it would be lawful to permit them to return to their own party. As a matter of principle, however, one would compare the situation rather with that of reception on neutral territory. Then, the general rule applies that any further participation of military personnel in hostilities must be prevented (Article 14, para. 2, HC V). Only those seriously sick or heavily wounded whose complete recovery is unlikely may be repatriated. The rules concerning disabled prisoners of war (Article 110 GC III) may be applied by analogy.

18.24

As regards the laying of sea mines, neutral states are subject to the same safety regulations as the parties to the conflict (Article 4, para. 1, HC VIII). They must notify the location of minefields to the government of maritime states without delay (Article 4, para. 2, HC VIII).

The neutral state which is bound to defend its neutrality may, as a matter of principle, do so by using the same means of warfare which the parties to the conflict can use. Defensive laying of sea mines therefore constitutes a lawful protective measure. However, the neutral state must then take the same precautionary measures in the interest of third parties which the parties to the conflict are required to take.

18.25

A neutral state is bound to use all means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to be engaged in acts of war against the party to a conflict. It is also bound to prevent the departure of any vessel that has been adapted entirely or partly within its jurisdiction for use in war (Article 8 HC XIII).

Section 18.25 is the maritime version of the general prohibition of assisting parties to the conflict in their military effort. It has to be noted that in the field of naval warfare, the distinction between assistance by the state and by private persons or entities, which had formerly limited the prohibition as far as land warfare is concerned, has never been made. To that extent, the broader prohibition in the field of naval warfare corresponds to modern trends concerning the general regulation of arms exports.

b. Innocent passage through territorial sea and archipelagic waters; transit passage

18.26

Passage through the territorial sea and archipelagic sea lanes of a neutral state by warships belonging to and prizes taken by a party to the conflict does not constitute a violation of neutrality (Article 10 HC XIII). While transit passage through international straits and archipelagic sea lanes passage include the right of overflight (Articles 38 and 53 of the United Nations Convention on the Law of the Sea) and the right of submarine navigation, there are no such rights of innocent passage outside those waterways. The right of transit or innocent passage is subject to the provisions set out in Sections 17.27-17.37.

1. The principle of innocent passage constitutes an exception to the general rule of land warfare that a neutral state may not acquiesce in the presence of armed forces of a party to the conflict in areas subject to its jurisdiction. On the other hand, it confirms the rule (p. 622) that the relation between the neutral state and the parties to the conflict is as a matter of principle subject to the law of peacetime relations which also provides for such rights of passage. This principle entails greater rights of innocent passage than those expressly provided for in Hague Convention XIII. The parties to the conflict also enjoy rights of transit passage through international straits and archipelagic shipping lanes passage granted to their warships in times of peace (see Articles 37 and 53 of the United Nations Convention on the Law of the Sea).⁶⁹

2. The right of transit or innocent passage is subject to a number of specific limitations designed to prevent the exercise of those rights from developing into the use of neutral jurisdictional areas for the purpose of conducting war contrary to the law of neutrality.

18.27

Warships of the parties to the conflict are, as a matter of principle, not permitted to remain in neutral ports, roadsteads, or territorial sea for more than twenty-four hours. The neutral state may prolong this period, but may also altogether prohibit such vessels from remaining in its waters (Article 12 HC XIII). Warships of the parties to the conflict may not extend their stay beyond the permissible time except on account of damage or bad weather. They must depart as soon as the cause of the delay has ceased to exist (Article 14 HC XIII).

1. The 'twenty-four hour rule' is the most important exception to the rule that the rights of passage or transit existing in peacetime apply equally in times of armed conflict.⁷⁰ The rationale is to prevent a party to the conflict from using neutral waters as a refuge from enemy ships. According to the text of the Hague Convention, the twenty-four hour rule applies to the 'stay'. Taking into account the object and purpose of this provision, however, any passage is also covered. This became controversial during the Second World War in the *Altmark* case, where a German auxiliary warship had spent two days passing through the coastal waters of Norway, which at the time was still neutral, in order to avoid being captured by the British fleet. At that time, Norway claimed that the twenty-four hour rule did not apply to mere passage. That view has not prevailed.⁷¹

2. The twenty-four hour rule does not apply to the passage through neutral international straits or archipelagic sea lanes. That passage must proceed without delay⁷² if it is not possible within twenty-four hours. This will be the case particularly for archipelagic shipping lane passage. In that case, the rule is modified to the effect that the time required for the shortest possible passage is permitted.

18.28

In neutral ports and roadsteads, warships of the parties to the conflict may only carry out such repairs as are absolutely necessary to restore their seaworthiness. Restoring the combat readiness of these ships is no cause for extending the permissible duration of their stay. Activities to increase their fighting capability are also prohibited (Article 17 HC XIII).

18.29

Warships of the parties to the conflict may neither complete their crews nor replenish or increase their armament or their military supplies in neutral waters (Article 18 HC XIII).

18.30

Warships of the parties to the conflict may only revictual in neutral ports and roadsteads to bring up their supplies to a normal peacetime level (Article 19 HC XIII).

(p. 623) 18.31

In neutral ports and roadsteads, warships of the parties to the conflict may only ship sufficient fuel to enable them to reach the nearest port in their own country (Article 19 HC XIII). These ships may not again replenish their fuel supplies in a port of the same neutral state before three months have passed (Article 20 HC XIII).

Sections 18.28–18.31 clarify the assistance permissible during a stay of ships of a party to the conflict in neutral waters. They constitute a compromise between the prohibition of assisting armed forces of the belligerents and the requirements of seafaring solidarity. Seafaring solidarity requires granting such help to a ship which is necessary, taking into account the seaworthiness of the ship, navigational difficulty caused by weather, and provision of food and fuel. Assistance must be strictly limited to those essential seafaring requirements.

18.32

If a warship of a party to the conflict stays in a neutral port without being entitled to do so and does not leave this port notwithstanding notification, the neutral state may detain the ship and prevent it from departing for the duration of the armed conflict (Article 24 HC XIII). The crew of the detained ship may also be detained. Its members may be left on the ship or brought either to another vessel or ashore. In any case, a number of personnel sufficient to look after the vessel must be left on board.

A warship of the party to the conflict which stays longer than the time permissible according to the rules stated above (i.e. over twenty-four hours or over the time required in view of the condition of either the ship or the sea) violates the laws of neutrality. The duty to defend neutrality then applies. The neutral state must detain the ship and ensure that it can take no further part in any hostilities.

18.33

A prize may only be brought into a neutral port if it is absolutely necessary on account of unseaworthiness of the prize, bad weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end (Article 21 HC XIII).

18.34

If, after the cause for a stay has ceased to exist, a prize does not leave even after it has been ordered to do so by the neutral authorities, the neutral state must seek to release the prize and its crew. The prize crew must be interned (Article 21 HC XIII). The same rule applies when a prize has entered a neutral port without authorization (Article 22 HC XIII).

Sections 18.33 and 18.35 clarify the preceding rules concerning the stay of prizes in neutral waters. As a general rule, the right of passage also applies to prizes, subject to the twenty-four hour rule. Prizes may not, however, be brought into neutral ports except for reasons of navigational stress. A violation of this rule (as in the cases discussed before) gives rise to the duty of the neutral state to defend its neutrality and to free the prize.

18.35

When warships of several parties to the conflict are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ships belonging to one party and the departure of the ships belonging to the other party (Article 16 HC XIII).

This rule is a variation of the requirement that no assistance must be given which affects the outcome of the conflict, and also reflects the principle of impartiality. The requirement of a fixed period between the departure of warships belonging to different parties prevents confrontations between them immediately after they leave neutral waters. Otherwise, the order of departure may influence the outcome of the conflict.

18.36

A neutral state may allow warships of a party to the conflict to employ its pilots (Article 11 HC XIII). It is bound to prevent, within the means at its disposal, any (p. 624) violation of the rules of neutrality within its waters and to exercise such surveillance as is required for this purpose (Article 25 HC XIII).

This rule further clarifies the limits of the prohibition of non-neutral service. In this case, the prohibition is modified in the interests of navigational safety.

18.37

A neutral state must apply impartially to all parties to the conflict any conditions, restrictions, or prohibitions which it imposes on admission into its ports, roadsteads, or waters of warships or prizes belonging to the parties to the conflict (Article 9 HC XIII). A neutral state may forbid a warship which has failed to comply with its directions or which has violated its neutrality to enter its ports or roadsteads (Article 9 HC XIII).

Again, this rule clarifies the neutral duty of impartiality. Not only in times of peace, but especially in times of armed conflict, the neutral state may regulate passage through its waters and any stay therein by imposing its own rules. In particular, it may limit passage rights. To the extent that it makes such rules, it is bound by the duty of equal treatment, and may not create more advantageous conditions for one party than for another. Nevertheless, in specific geographic circumstances, one party to the conflict may benefit from such rules more than another.

c. Control by the parties to the conflict

18.38

Warships of a party to the conflict are entitled to stop, visit, and search merchant ships flying the flag of a neutral state on the high seas and control the contents and destination of their cargo.

1. The control of neutral commercial shipping by the parties to the conflict was traditionally a very important question until the recent past. The state of international customary law is controversial in many details concerning the extent of this control. The London Declaration of 1909 which codified these rights of control was never ratified, but is considered at least largely to constitute an expression of customary law.

2. In more recent conflicts, too, such rights of control were exercised without meeting objections, although certain specific measures and the status of some conflicts were controversial.⁷³

3. The control by the parties to the conflict of neutral shipping constitutes an essential exception to the principle that the neutral state may not be adversely affected by the existence of an armed conflict. These rights of control, however, are limited, although during the Second World War a tendency to expand those rights was evident.

4. The purpose of such control is to impede the provision of goods important for the war effort to the other party to the conflict. A key position is taken by the right of visit and search, that is the right of warships of a party to the conflict to stop neutral commercial ships and to search them in order to find out whether they have goods aboard which could assist the war effort of the enemy party or parties to the conflict.

(p. 625) **18.39**

Warships of a party to the conflict may use only such force as is necessary against neutral merchant ships to exercise such control. In particular, neutral merchant ships which, although subject to control by a party to the conflict, resist inspection may be damaged or destroyed if it is not possible to prevent them from continuing their voyage by other means. The captain of the neutral ship shall be warned in an appropriate manner. Rescue of shipwrecked persons must be ensured.

As a last resort, the right of control described in Section 18.37 may be exercised by using force.⁷⁴ However, this is limited by a strict principle of necessity. Only such force is permissible which is indispensable to enforce the right of control, in particular to prevent a merchant ship from evading such control. The destruction of the neutral merchant ship is permissible only in exceptional circumstances, because a warship will generally have other means at its disposal to enforce its right of control.

18.40

To simplify inspection, a party to the conflict may, subject to the approval of the neutral state concerned, issue an inspection document (navicert) to the neutral vessel in the port of loading. A navicert issued by one party to the conflict is not binding on the other party. The fact that the ship carries a navicert of another party to the conflict does not justify any more far-reaching measures of control.

1. The 'navicert system' has often been used in practice.⁷⁵ The navicert makes it possible for the neutral ship to prove, in the case of control by a warship of a party to the conflict, by a document issued at the port of loading by that party to the conflict (usually by its diplomatic representative) that it is not carrying contraband. A navicert is only accepted by the party which issued it.

2. During the Second World War, it was argued that carrying a navicert, which places a neutral merchant ship under the partial control of one belligerent, constitutes a non-neutral act because it favours the belligerent exercising this control. If this were so, neutral commerce would be unreasonably endangered because it could not protect itself against conflicting control claims of the parties.⁷⁶ In the end, however, that argument did not prevail, as clearly stated in the last sentence of Section 18.40. It is noteworthy in this connection that the *San Remo Manual*⁷⁷ does not mention the navicert.

18.41

The right of control shall not apply to merchant ships flying neutral flags and escorted by a neutral warship (convoy). In this case, however, a warship

of a party to the conflict may request the commander of the neutral warship to specify the type and destination of the cargo.

1. The right of convoy was long controversial.⁷⁸ The effect of the rule is that warships of the parties to the conflict may control neutral merchant ships but not neutral warships. The question then arises of whether the fact that certain neutral merchant ships are placed under the protection of neutral warships limits the right of control of the belligerents. In the Gulf conflict between Iran and Iraq, convoys of merchant ships flying neutral flags were indeed placed under the protection of warships of neutral states. In that case, the neutral states did not accept the rights of control of the parties to the conflict, essentially of Iran, which they otherwise tolerated. This practice seems to be a last step in the (p. 626) development which has led to the recognition of the right of neutral convoy.⁷⁹ In a lawful convoy, control is exercised by requiring the commander of the neutral warship to provide information concerning the type and destination of the cargo to the warship of the party to the conflict.

2. Whether a neutral state may place only neutral ships flying its own flag under the protection of its warships or whether it may grant such protection to the ships of other neutral states is less clear.⁸⁰ The latter is probably the case. This practice may not, however, be used in order to disguise non-neutral service. Thus, it is problematic if a neutral state allows ships of another state, which has rendered non-neutral service to a party to the conflict, to fly its own flag and places reflagged merchant ships under the protection of its own warships.

18.42

If the cargo contains goods essential for war which are destined for the port of an adversary, such goods may be captured by the warship of the party to the conflict ('absolute contraband'). The parties to the conflict may notify to the neutral states lists of the goods which they deem to be essential for war. Any goods destined for the administration or the armed forces of the opposing party to the conflict will likewise be deemed contraband ('conditional contraband').

As stated above, the rules concerning the control of neutral shipping are intended to prevent essential war goods from reaching the adversary. If control reveals essential war goods destined for the enemy aboard the ship, their further transportation may be prevented, subject to certain procedural rules. The first question arising in this connection is: what kinds of essential war goods are subject to this power to prevent further transportation ('contraband').⁸¹ A distinction must be made between absolute and conditional contraband.⁸² Absolute contraband comprises all essential war goods. Parties to the conflict have some discretion as to the determination of what is to be considered as essential for war. That distinction must always take into account the specific circumstances of the conflict. If the parties to the conflict set out their construction of goods essential for war in lists notified to the adversary, legal clarity is achieved. On the other hand, such lists have tended to be unacceptably wide. Absolute contraband is goods which must by their very nature be considered as essential for war, and must be distinguished from conditional contraband which comprises those goods destined for the administration and armed forces of the adversary, whether or not they otherwise serve essential purposes of war. Thus, equipment which would otherwise not be considered as war essential belongs to this category. Article 24 of the London Declaration of 1909 refers also to food and clothing as conditional contraband. To the extent that such items are shipped for the purpose of

humanitarian relief actions (Articles 23, 59 GC IV; Article 70 AP I), they may, of course, not be considered as contraband. Contraband may be captured by the controlling warship.

18.43

A ship carrying contraband is also subject to capture.

As well as the cargo, the ship carrying such contraband is also subject to capture. Whether and to what extent this applies where only part of the cargo constitutes contraband is somewhat controversial.

(p. 627) **18.44**

A captured ship (prize) must be brought as safely as possible to a port of a party to the conflict or of a state allied with that party. In that port the permissibility of the capture of ship and cargo are to be reviewed by a prize court. Ship and cargo may be confiscated by the order of a prize court.

Capture is a provisional measure only. The legality of the capture must be reviewed in a judicial procedure as soon as possible. The principle '*toute prise doit être jugée*' applies. Only if the prize court finds that the ship was indeed carrying contraband a final determination concerning the ship and cargo is permissible. Cargo may be confiscated only after a prize court judgment.⁸³ The same is true of the ship carrying that cargo and only if the contraband constituted more than half of the cargo, whether by value, weight, volume, or freight (Articles 39 and 40 of the London Declaration of 1909). Bringing the prize to the port of a territory occupied by a party to the conflict is also permissible. The prize court may be established anywhere on the territory of the party to the conflict, in a territory occupied by it, or on the territory of an ally of that party.

18.45

If suspicion that a ship is carrying contraband, which led to control measures, proves unfounded, and if the neutral ship has not given rise to that suspicion, the party to the conflict is obliged to compensate for any damage caused by the delay.

If the capture is not upheld by the prize court, and the cargo not confiscated, the control measure was unjustified. Delay of the shipping may have caused a considerable financial damage. Such expense must be paid by the party which exercised the control.

18.46

The parties to the conflict may not hold prize court proceedings on neutral territory or on a vessel in neutral waters (Article 4 HC XIII).

This rule adds further precision to the principle that neutral territory may not be used for any act which causes damage to the enemy. The establishment of a prize court belongs to this category of activities.

d. Protection of neutral merchant shipping

18.47

Warships of neutral states may escort merchant ships flying the flag of the same or another neutral state.

1. Freedom of neutral shipping, limited only by the rights of control just described, has been challenged, as is shown by the experiences in the conflict between Iran and Iraq in the 1980ies. From a political point of view, impeding neutral shipping, especially oil tankers, has obvious benefits because the adversary will benefit from this shipping, although according to the rules just described those ships were not subject to capture and confiscation. Fuel constitutes contraband only if it is destined for a party to the conflict, not if it comes from a party to the conflict which uses revenue from sales of fuel to finance its war effort.⁸⁴ Nevertheless, in such a situation the temptation for the disadvantaged party to the conflict to impede navigation is great. In this or similar situations, the question arises of how neutral shipping can be protected.

2. The formation of convoys has proved an efficient means of protection. The advantage of convoys in relation to the rights of control concerning cargo and destination have already been described. The formation of convoys also means that those convoys, in a (p. 628) manner of speaking, represent the state, so that attacks against them constitute attacks against a neutral state which trigger its right of self-defence.⁸⁵

3. It is understood that convoys operate within the applicable law of the sea and, in particular, must respect the rules concerning innocent passage and transit passage. The fact that the formation of a convoy also demonstrates military power does not mean that it constitutes a violation of the prohibition of the use of force. This was confirmed by the judgment of the ICJ in the *Corfu Channel* case.⁸⁶

4. The formation of convoys may constitute a non-neutral service if merchant ships of a party to the conflict are placed under the protection of a neutral warship.

5. It is doubtful whether it is possible to place merchant ships of a neutral state under the protection of a neutral warship if the flag state of the merchant ship renders non-neutral services to a party to the conflict. This was the case with the passage of Kuwaiti tankers through the Gulf. Kuwait was certainly guilty of non-neutral services in favour of Iraq. This would have justified the taking of reprisals by Iran against Kuwaiti navigation. The US placed Kuwaiti tankers under their protection, but only after reflagging the tankers with the American flag. Whether such reflagging could shield ships which would otherwise be a permissible object of reprisals is open to doubt.⁸⁷

18.48

On international shipping routes and on the high sea, warships of neutral states may sweep mines to the extent necessary to protect and maintain neutral shipping. Such minesweeping operations do not constitute a non-neutral service for the benefit of the adversary of the minelaying party.

1. Sweeping mines on the high seas and in sea areas subject to transit rights is a means for neutral states to protect themselves, which attained considerable practical significance during the conflict between Iran and Iraq. For the purpose of legal evaluation, minesweeping in the jurisdictional waters of a party to the conflict and similar activities on the high seas must be distinguished. On the high seas, the first aspect to be considered is the law of the sea. Conducting hostilities is a lawful use of the high seas, although this is not explicitly stated in the Law of the Sea Convention. Minesweeping, therefore, constitutes a kind of self-help against a lawful activity. On the other hand, the high seas should be free for shipping, and this right has a great weight. The conduct of hostilities also limits the freedom of navigation of other states. Minesweeping, therefore, involves balancing two freedoms, similar to the conflicting interests involved in the conduct of hostilities on the high seas. Minesweeping undertaken to protect a state's freedom of shipping does not

constitute an unacceptable limitation of the freedom of the parties to the conflict to conduct hostilities at sea.⁸⁸

2. From the point of view of the law of neutrality, minesweeping by neutral states constitutes an activity which benefits the adversary of the party which laid the mines. However, from the point of view of social significance, it is not the support for one of the parties which is the essential point, but the protection of the neutral state. Therefore, a (p. 629) minesweeping operation intended only to protect neutral shipping does not constitute a non-neutral service.

3. Unilateral minesweeping operations in the waters of a party of the conflict constitute a violation of the prohibition of the use of force. As a rule, they are illegal. However, there is no violation where a party to a conflict has laid mines in shipping lanes through which transit rights exist and which the minesweeping state is bound to keep open. This was confirmed by state practice during the conflict between Iran and Iraq.⁸⁹

4. Air Warfare

18.49

The airspace of a neutral state is inviolable (Article 40 HRAW 1923; Rules 170 and 171 HPCR Manual).

1. Section 18.49 formulates the application to airspace of the general rule of inviolability of neutral territory. This rule is of particular importance because, in the era of modern air warfare and missile technology, violations of airspace are easily committed.⁹⁰

2. The territorial jurisdiction of a neutral state extends to the limits of the atmosphere. Outer space above neutral territory is not subject to the neutral state's jurisdiction. Overflights by satellites and missiles moving in outer space therefore do not constitute a violation of neutrality.

3. The delimitation between airspace and outer space is still controversial. In both practice and theory, there are two main trends which, however, possess a number of variations. Functional theories focus on the kind of activity for which the delimitation is relevant. According to this view, satellites in orbit are typical space objects. Crossing a specific territory or stationing a satellite on a fixed point over the territory of a state does not constitute a violation of the territorial sovereignty of the respective states. Missiles only constitute typical space vehicles where they are at least partially brought into orbit around the earth where the centrifugal force and the attraction of the earth balance each other. Theories based on spatial concepts try to draw the line between airspace and outer space at a particular altitude, of roughly 100 kilometers.⁹¹

18.50

Parties to a conflict are forbidden to send military aircraft, missiles, or unmanned aerial vehicles into neutral airspace (Article 40 HRAW 1923; Rule 170 HPCR Manual). This is without prejudice to the right of transit passage through straits used for international navigation or archipelagic sea lanes passage and to the entry by military aircraft in distress (Rules 170, 172 HPCR Manual; see above, Section 18.26).

1. As a consequence of the inviolability of neutral airspace, the parties to the conflict are not allowed to penetrate by aircraft or other flight objects the airspace of neutral states. This includes a prohibition of overflight to targets or destinations situated beyond the

neutral territory. For aircraft and missiles attacking targets over large distances this may involve significant detours.

(p. 630) **2.** Overflight by civilian aircraft does not constitute a violation of neutrality. The neutral state must, however, exercise all necessary controls in order to prevent civilian overflight from being used for military purposes. Under air traffic rules, this is rendered possible by the so-called 'war clause' of the Chicago Convention.⁹²

3. The prohibition of overflight extends to neutral territorial waters. Overflight is, however, permissible over neutral international straights and archipelagic sea lanes.

18.51

A neutral state is bound to prevent violations of its airspace. Aircraft which enter such space must be forced to leave or to put down. The crews of military aircraft of a party to the conflict who have been brought down must be interned (Article 42 HRAW 1923; Rules 168 and 172, lit. b, HPCR Manual).

1. The dangers for neutral airspace described in the commentary to Section 18.49 lead to the question: what must a neutral state do in order to prevent such violations of its airspace? It is difficult to determine the effort required for this purpose.⁹³ There is an obligation of observation and of using force if necessary. The neutral state must exercise surveillance to the extent that the means at its disposal allow, in order to ascertain violations of its air space.⁹⁴ This includes at least simple radar observation of its airspace. It must also use all means at its disposal to prevent or terminate such violations.⁹⁵ A neutral state must take economically feasible measures in order to create an aerial defence capacity. On the other hand, it may not be required that each state possess the latest anti-missile defense technology in order to protect its neutrality.

2. The defence must be feasible for the neutral state. In this respect, defence against missiles possessing nuclear warheads, which may after interception fall on neutral territory and cause damage therein, cannot be required.

3. Interception of aircraft by the air force of a neutral state is undoubtedly among the measures which the neutral state is required to take. Aircraft entering its airspace must be forced to turn back or land. The obligation to intern their crews derives from the general principle described above.

18.52

Medical aircraft may be allowed to overfly the territory of a neutral state and to land therein (Article 37 GC I; Article 40 GC II; Article 31 API; Article 17 HRAW 1923).

A neutral state may allow medical aircraft of a party to a conflict to overfly its territory or to land therein; this does not constitute non-neutral service, provided that there is no discrimination between the parties to the conflict or that the permission is part of an impartial humanitarian relief action. If such medical aircraft flies according to the terms of an agreement allowing overflight, it is immune from attack.

18.53

Overflight and stopover require permission. A neutral state may place conditions and restrictions on overflight (Article 37, para. 2, GC I; Article 40, para. 2, GC II; Article 31 AP I).

1. Section 18.53 regulates the procedure to be respected in overflights authorized in accordance with Section 18.52. Even medical aircraft are not permitted to penetrate into (p. 631) neutral airspace without authorization. On the contrary, they require specific authorization, the granting of which is in the discretion of the neutral state.
2. If a neutral state grants such permission it may be subject to conditions, especially as to routes which must be followed and necessary stopovers. At a stopover an aircraft may be inspected to verify that it is medical transport (Article 31, para. 3, AP I). If the neutral state grants authorization to and imposes conditions on medical flights, the duty of impartiality applies. Both sides must be treated equally. In this case also identical treatment is not required. Often, geographic factors will result in one party using such transit flights, and the other not. The fact that the possibility of transit favours one party more than the other does not constitute a violation of the requirement of impartiality.
3. The neutral state is not bound to tolerate flights which are not authorized or which violate conditions lawfully imposed. Such flights are not immune against attacks: the neutral state may attack a medical aircraft flying illegally if there is no other means to prevent it from continuing the flight, or subject it to scrutiny. Given the risk of abuse of medical flights, the neutral state must take appropriate steps to ensure that the aircraft are not used to commit hostile acts against one of the belligerents.

18.54

The right of neutral aircraft to overfly the territory of the parties to the conflict is regulated by the general rules of international law on the protection of national airspace and the rules of international air traffic.

1. Under general international law applicable in times of peace, there is no general right for foreign aircraft, whether private or state-owned, to overfly the territory of another state or to land therein. For private non-scheduled air services, the Chicago Convention provides certain rights of overflight and landing. However, these rights do not apply in armed conflicts. According to the 'war clause' of the Chicago Convention,⁹⁶ the provisions of the Convention do not affect the freedom of action of the contracting parties in a war, be they belligerent or neutral. Traffic rights for scheduled air services are, as a rule, derived from bilateral agreements. Whether and to what extent these rights are affected by the fact that one of the contracting parties is a party to a conflict with a third state is a question to be regulated by the relevant agreement. Generally speaking, the legal situation is that a state which is party to a conflict is relatively free to grant or not to grant rights of overflight to aircraft flying neutral flags, subject, in particular, to the provisions of bilateral air transport agreements.
2. Special rules apply to airspace above specific types of jurisdictional waters. As stated above, the right of innocent passage over territorial sea does not comprise overflight. As far as overflight is concerned, territorial sea is treated in the same way as the land areas around it. An exception to this rule applies to international straits and archipelagic waters. In this case, the right of transit or passage (Articles 38 and 53 of the United Nations Convention on the Law of the Sea) includes a right of overflight (see commentary to Section 18.08).⁹⁷ It is submitted that these rules are now customary law.

18.55

The relevant rules of naval warfare apply to the control, capture, and confiscation of neutral aircraft above sea areas and to the treatment of their passengers and crew (p. 632) (Article 35 HRAW 1923). An aircraft which

does not carry clearly visible neutral national emblems may be treated as enemy aircraft.

The increase in air traffic raised the question of the control of neutral air commerce. The analogy to neutral shipping offers itself. When the Hague Rules of Air Warfare were elaborated, the rules concerning the control of neutral shipping were comprehensively taken over by these Rules. There is, however, relatively little state practice in this matter. As it can only be applied by analogy, not every detail of the rules concerning the control of neutral shipping applies. The special character of air traffic must be taken into account. As far as air traffic over the high seas is concerned, account must be taken of the fact that aircraft constitute a considerable threat to warships of the parties to the conflict. Thus, those ships will be inclined to react to a perceived threat where the identity of an aircraft is not beyond doubt. The shooting down of an Iranian civilian airbus by a US warship during the conflict between Iran and Iraq shows the kind of tragic errors which may result. The principle must be maintained that both belligerent and neutral warships, as in the case just mentioned, must endeavour to ascertain the nationality and category of an aircraft before it is attacked. This is only possible where neutral aircraft and civilian aircraft of the parties to the conflict do everything feasible to facilitate their identification. An aircraft which is not identifiable and does not carry any exterior emblem of nationality must be considered as an enemy military aircraft and may therefore be attacked.

5. Military Uses of Outer Space

18.56

Where military activities conducted in outer space relate to an armed conflict, the general rules of the law of neutrality must be observed.

1. There are various military uses of outer space, including uses in armed conflict. Military uses of outer space are not per se unlawful. Only the Moon and other celestial bodies are demilitarized.⁹⁸ In armed conflict, military uses of outer space must respect the general rules of the law of armed conflict, including the law of neutrality. Yet the specific conditions and possibilities of the use of outer space do not allow an unlimited transposition of the law of neutrality applicable to land warfare or to warfare at sea to the military uses of outer space in situations of armed conflict. While it has even been argued that ‘the law of neutrality is of continued validity with regard to belligerent uses of neutral territory and of infrastructure located therein, [but] it is not possible to extend its scope of applicability to outer space, because its rules are predominantly linked to the territorial sovereignty of neutral States’,⁹⁹ rules and principles of the law of neutrality do prevail in outer space.¹⁰⁰ These rules and principles of the law of neutrality are governed by the two fundamental principles: the duty of abstention and impartiality and the rule that the relations between the parties to an armed conflict and neutral states continue to be governed by international law as it applies in times of peace.

(p. 633) 2. As to the inviolability of neutral territory: attacks launched from outer space must respect it.¹⁰¹ Parties to a conflict may not use neutral air space for overflight, nor may neutral states allow them to do so.¹⁰² There seems to be general agreement that this duty ends where the airspace over neutral territory ends—at whatever altitude one places the dividing line between air space and outer space. Passing over neutral territory above that altitude that is in outer space, does not constitute a violation of neutrality.

3. As to the legal situation of objects in outer space: The status of ‘neutral’ space objects is somewhat doubtful. First, the ‘nationality’ of a space object must be determined. The clearest solution to this problem is that it is the State of registry.¹⁰³ Furthermore, a neutral space object does not necessarily enjoy the inviolability of neutral territory. This rule flows from the sovereignty of the neutral State over its territory. There is no sovereignty over

parts of outer space or over space objects.¹⁰⁴ The protection of neutral space objects flows from the rule of general space law that states may not interfere with lawful uses of space by other states. If neutral space objects are used in a way supporting the war effort of a party to the conflict, this justifies interference as a countermeasure. They may be attacked under the same conditions as military objectives belonging to the other party to an armed conflict.

4. Neutral territory may not be used as a basis of space activities supporting the military effort of a party to the conflict. Thus, tracking or control stations for satellites belonging to a party to the conflict are not permitted on neutral territory.

5. A particularly important problem is the use of telecommunications and satellites in armed conflict. In this respect, Art. 8 of Hague Convention V, although contained in a Treaty on land warfare, can serve as a guideline:

A neutral Power is not called upon to forbid or restrict the use on behalf of belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

Article 9 HC V requires the impartial application of any restrictions. The conclusion as to space warfare is this: states not parties to a conflict are not obliged to bar belligerents from the use of their communication satellites, but they may not grant access to one party while barring access for the other. Similar questions arise with regard to access to satellite imagery, which can be of high military value. Giving such imagery to one party and denying it to the other certainly is a violation of the duties of abstention and impartiality. If communication or observation satellites belonging to neutral States are used, or allowed by the neutral State to be used in a way which violates the duty of abstention and impartiality, this amounts to an unneutral service and the satellites may be destroyed as a countermeasure under the conditions just discussed.

Footnotes:

¹ J. Upcher, *Neutrality in Contemporary International Law* (OUP, 2020), 7; M. Bothe, 'Neutrality, Concept and General Rules', *MPEPIL*; E. Kussbach, 'La neutralité permanente et les Nations Unies; nouvelles perspectives après les changements fondamentaux en Europe de l'Est' (1991) 35 *Annales de droit international médical* 82 *et seq.*; I. Seidl-Hohenveldern, 'Der Begriff der Neutralität in den bewaffneten Konflikten der Gegenwart', in *Zum Recht und Freiheit. Festschrift für Friedrich August Freiherr von der Heydte* (Duncker & Humblot, 1977), Vol. 1, 593-613; J. Köpfer, *Die Neutralität im Wandel der Erscheinungsformen militärischer Auseinandersetzung* (München: Bernhard & Graefe, 1975), 50-64. An important political analysis is provided by H. R. Reginbogin, 'Neutrality. Past Lessons & Visions: Providing Peace, Security, and Justice in the Twenty-First Century', in P. Lottaz and H. R. Reginbogin (eds), *Notions of Neutralities* (Lanham *et al.*, Lexington Books, 2013), 185-212.

² W. Heintschel von Heinegg, *Seekriegsrecht und Neutralität im Seekrieg* (Berlin: Duncker & Humblot 1995), 501 *et seq.*

³ J.A. Roach, 'Neutrality in Naval Warfare', para. 16, in *MPEPIL*.

⁴ Bothe, above (n. 1), para. 5.

⁵ G.P. Politakis, *Modern Aspects of the Law of Naval Warfare and Maritime Neutrality* (Geneva: IUHEI/Kegan Paul International, 1998), 458 *et seq.*

⁶ N. Ronzitti, 'Italy's Non-Belligerency During the Iraqi War', in Ragazzi (ed.), *International Responsibility Today* (Nijhoff, 2005), 201.

- ⁷ W. Heintschel von Heinegg, 'Wider die Mär vom Tode des Neutralitätsrechts', in H. Fischer, U. Froissart, W. Heintschel von Heinegg, and C. Raap (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berliner Wissenschafts-Verlag, 2004), 221–41, at 231.
- ⁸ See commentary to Section 18.07.
- ⁹ D. Schindler, 'Transformations in the Law of Neutrality since 1945', in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian Law of Armed Conflict—Challenges Ahead: Essays in Honour of Frits Kalshoven* (Nijhoff, 1991), 373.
- ¹⁰ See commentary to Section 18.06.
- ¹¹ Bothe, above (n. 1), paras 7 *et seq.*; E. Castrén, *The Present Law of War and Neutrality* (Helsinki: Annales Academiae Scientiarum Fennicae, 1954), 421 *et seq.*
- ¹² Heintschel von Heinegg (n. 7) at 222, 238.
- ¹³ D. Schindler and J. Toman (eds), *The Law of Armed Conflict*, 4th edn (Nijhoff, 2004), 1065 *et seq.*
- ¹⁴ Published in L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (Cambridge University Press, 1999). An update is under discussion.
- ¹⁵ Final Report of the Committee on Maritime Neutrality, in International Law Association, *Report of the Sixty-eighth Conference* (Taipeh Conference, 1998), 496–521. As these rules had already been accepted in substance by the previous ILA Conference held in Helsinki, they were adopted under the name of 'Helsinki Principles on the Law of Maritime Neutrality'.
- ¹⁶ K. Ipsen, in Ipsen, *Völkerrecht*, 5th edn (München: Beck, 2004), 1112; M. Bothe, in W. Graf Vitzthum and A. Proelß (eds), *Völkerrecht*, 8th edn (Berlin: de Gruyter, 2019), 855 *et seq.*; Upcher, above (n. 1), 25 *et seq.*
- ¹⁷ Schindler, in Delissen/Tanja (eds), above (n. 9), 367 *et seq.*
- ¹⁸ *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, 66 (paras 88 *et seq.*).
- ¹⁹ *Hogan v An Taoiseach et al.*, High Court of Ireland, Judgment of 28 April 2003, [2003] 468, 2 I.R., at 504 *et seq.*; Bundesverwaltungsgericht (German Federal Administrative Court), Judgment of 21 June 2005, 59 *Neue Juristische Wochenschrift* (2006), 77, at 96, affirmatively quoting the preceding edition of this *Handbook*.
- ²⁰ Art. 17, *Yearbook of the International Law Commission 2011*, Vol. II, Part Two.
- ²¹ Schindler, above (n. 9), 373.
- ²² See M. Torrelli, 'La neutralité' (1991) 35 *Annales de droit international médical* 25–59, at 38 *et seq.* In its resolution concerning Iraq's attack on Kuwait (S/RES/678, 29.11.1990), the Security Council limited the authorization to use force to 'States cooperating with the government of Kuwait', thus excluding Israel. In its resolution 669, 24.09.1990, the Council expressly opened the possibility provided for in Article 50 UNC to enter into consultations regarding specific problems which a State may face due to sanctions imposed by the Security Council.
- ²³ See above, commentary to Section 18.01.
- ²⁴ In this sense apparently R. Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defense' (2003) 97 *AJIL* 576–85, at 582; for a critical view

see M. Bothe, 'Der Irak-Krieg und das völkerrechtliche Gewaltverbot' (2003) 41 AVR 255 at 262 *et seq.*

²⁵ Schindler, in Delissen/Tanja (eds), above (n. 9), at 372.

²⁶ Bothe, above (n. 1), para. 16.

²⁷ M. Rotter, *Die dauernde Neutralität* (Duncker & Humblot: Berlin 1981), 57 *et seq.*, 62 *et seq.*; F. Cede, 'Staatsvertrag und Neutralität aus heutiger Sicht', in M. Rauchensteiner and R. Kriechbaume (eds), *Die Gunst des Augenblicks: neuere Forschungen zu Staatsvertrag und Neutralität*, 2nd edn (Wien: Böhlau, 2006).

²⁸ See, e.g., for the current Swedish foreign policy the 2020 *Statement of Foreign Policy in the Riksdag*, presented on 12 February 2020 by Minister for Foreign Affairs Ann Linde, <https://www.government.se/speeches/2020/02/2020-statement-of-foreign-policy/>: 'Sweden will not remain passive if another EU Member State or a Nordic country suffers a disaster or an attack. We expect these countries to act in the same way if Sweden is affected. We must therefore be able to both give and receive support, civilian as well as military.' See also Minister for Defence Peter Hultqvist's keynote speech at Chatham House Security and Defence Conference, 12 March 2020, <https://www.government.se/speeches/2020/03/minister-for-defence-peter-hultqvists-keynote-speech-at-chatham-house-security-and-defence-conference/>: 'The EU and NATO are both instrumental for meeting today's complex security challenges in Europe and beyond. As a member of the EU and close partner to NATO, Sweden has a strong interest in an effective, result-oriented strategic partnership between these organisations.'

²⁹ M. Bothe, 'Neutrality at Sea', in I. Dekker and H. Post (eds), *The Gulf War of 1980-1988* (Nijhoff, 1992), 205 *et seq.*

³⁰ A highly differentiated answer to this question is given by Upcher, above (n. 1), at 80 *et seq.*

³¹ Above Chapter 13.

³² Castrén, above (n. 11), 34 *et seq.*; C. Greenwood, 'Neutrality at Sea: Comments', in Dekker/Post (eds), above (n. 29), 212 *et seq.*; Schindler, in Delissen/Tanja (eds), above (n. 9), 375 *et seq.*; for a discussion see Upcher, above (n. 1), at 13 *et seq.*, 39 *et seq.*

³³ See, e.g., Bothe, above (n. 29), on the one hand, and Greenwood, above (n. 32), on the other.

³⁴ See commentary to Section 18.01.

³⁵ For details see G. Nolte, 'Intervention by invitation', *MPEPIL* (n. 1).

³⁶ The Afghan government requesting Soviet help in 1979.

³⁷ The South Vietnamese government co-operating with the US since the mid-1950s was not universally recognized as the government of a separate state of South Vietnam, nor was the state as such. That government had to face an internal rebellion by the 'Vietcong', which was actively supported by North Vietnam. Thus, the armed conflict had both an internal and an international aspect. For an analysis of the status of the conflict, see Q. Wright, 'Legal Aspects of the Vietnam Conflict' (1966) 60 *AJIL* 750-69.

³⁸ For references see Bothe, above (n. 16), at 870 *et seq.*

³⁹ On further details see Upcher, above (n. 1), 35 *et seq.*

⁴⁰ For certain doubts in this regards see Upcher, above (n. 1), 63 *et seq.*

- ⁴¹ Concerning the problem of the parallel application of different levels of legal regulation, see Schindler, in Delissen/Tanja (eds), above (n. 9), 374 *et seq.*
- ⁴² M. Ruffert, 'Reprisals', para. 10, *MPEPIL*.
- ⁴³ Ibid., 332; Schindler, in Delissen/Tanja (eds), above (n. 9), 381 *et seq.*
- ⁴⁴ For example, during the Iran-Iraq War, the unneutral services rendered to Iraq by the US, Saudi Arabia, and Kuwait did not entitle Iran to adopt measures against those states involving the use of military force.
- ⁴⁵ See above, Section 2.01. Therefore, Schindler's theory of optional neutrality (in Delissen/Tanja (eds), above (n. 9), 373 *et seq.*) is problematic. Any attempt to mix in this way the law relating to the prevention of war and that relating to its conduct (and the law of neutrality is part of the latter) would negatively affect the functioning of the principle of reciprocity which is also the basis of the law of neutrality.
- ⁴⁶ Above (n. 18), para. 88.
- ⁴⁷ M. Bothe, 'The Protection of the Environment in Times of Armed Conflict' (1991) 34 *GYIL* 54-62, 59 *et seq.*
- ⁴⁸ P. Hostettler and O. Danai, 'Neutrality in Land Warfare', *MPEPIL* n. 1.
- ⁴⁹ L. Wildhaber, 'Muss die dauernde Neutralität bewaffnet sein?', in W. Haller, A. Kölz, G. Müller, and D. Thürer (eds), *Im Dienst an der Gemeinschaft. Festschrift für Dietrich Schindler* (Basel: Helbing&Lichtenhahn, 1989), 423, esp. 434 *et seq.*
- ⁵⁰ C. Greenwood, 'Self-Defence and the Conduct of International Armed Conflict', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Nijhoff, 1989), 273 at 275 *et seq.*; R. Lagoni, 'Gewaltverbot, Seekriegsrecht und Schifffahrtswirtschaftsfreiheit im Golfkrieg', in *Festschrift für Wolfgang Zeidler* (Berlin: de Gruyter 1987), 1833, at 1847 *et seq.*
- ⁵¹ Judgment of the German Federal Constitutional Court, 13.7.2018, BVerGE (Decisions of the Federal Constitutional Court, vol.) 149, 160, at sec. 134 *et seq.*
- ⁵² S. Oeter, *Neutralität und Waffenhandel* (Berlin: Springer, 1992), esp. at 216 *et seq.*; Upcher, above (n. 1), 135; for a discussion see Politakis, above (n. 5), 506 *et seq.*
- ⁵³ M. Bothe, 'Weapons of Mass Destruction, Non-Proliferation', *MPEPIL*
- ⁵⁴ Arms Trade Treaty, 02.04.2013, A/RES/234B, for Germany BGBl. 2013 II, 1426.
- ⁵⁵ Act implementing Article 26, para. 2, of the Basic Law (*Gesetz über die Kontrolle von Kriegswaffen*), 20 April 1961, as promulgated on 22 November 1990 (BGBl. I 2506), as amended by the Act of 13.04.2017 (BGBl. I, 2506); Foreign Economic Transactions Act (*Außenwirtschaftsgesetz*), 18 December 1986 (BGBl. I 2671).
- ⁵⁶ On the definition of contraband, see below Section 18.42.
- ⁵⁷ Hostettler/Danai, above (n. 48).
- ⁵⁸ This was a major issue during the US-British intervention in Iraq 2003. See the decisions of the Irish High Court of 28 April 2003, *Horgan v An Taoiseach* [2003] 468, 2I.R. and of the German Federal Administrative Court, quoted above n. 19; see above, commentary to Section 18.03.
- ⁵⁹ M.N. Schmitt (ed.), *Talinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd edn (Cambridge University Press 2017), 556 *et seq.*

- ⁶⁰ C. Krauss, 'War in the Gulf: Iran; Iran Said to Play Both Sides in the Gulf', New York Times, 31.1.1991, Sec. A. p. 13, available at <https://www.nytimes.com/1991/01/31/world/war-in-the-gulf-iran-iraq>
- ⁶¹ Castrén, above (n. 11), 468.
- ⁶² See *San Remo Manual*, above (n. 14), paras 14–36; Helsinki Principles, above (n. 15), para. 1.4.; see Heintschel von Heinegg, above (n. 2), 509 *et seq.*
- ⁶³ *San Remo Manual*, paras 31–3.
- ⁶⁴ *San Remo Manual*, paras 14, 34–5; Helsinki Principles, para. 1.1.
- ⁶⁵ R. Wolfrum, 'Military Activities on the High Seas: What are the Impacts of the U.N. Convention on the Law of the Sea?', in M.N. Schmitt and L.C. Green (eds), 'The Law of Armed Conflict Into the Next Millennium', in 71 *International Law Studies* (Naval War College) (1998), 501–13, at 502 *et seq.*; A. Proelß, 'Peaceful Purposes', para. 12 *et seq.*, *MPEPIL*.
- ⁶⁶ *San Remo Manual*, para. 34.
- ⁶⁷ *Ibid.*, para. 36.
- ⁶⁸ See Commentary to Section 18.09.
- ⁶⁹ Heintschel von Heinegg, above (n. 2), 512 *et seq.*
- ⁷⁰ Helsinki Principles, above (n. 15), para. 2.2.
- ⁷¹ *San Remo Manual*, para. 21.
- ⁷² *Ibid.*, para. 30.
- ⁷³ *San Remo Manual*, above (n. 14), para. 146; Helsinki Principles, above (n. 15), para. 5.2.1; N. Ronzitti, 'Armed Conflict at Sea and the Need for its Revision', in N. Ronzitti (ed.), *The Law of Naval Warfare* (Nijhoff, 1988), 1–58, 7 *et seq.*; A. Gioia and N. Ronzitti, 'The Law of Neutrality: Third States' Commercial Rights and Duties', in Dekker/Post (eds), above (n. 29), 221, 231 *et seq.*; M. Donner, *Die neutral Handelsschiffahrt im begrenzten militärischen Konflikt* (Kehl: Engel-Verlag, 1994), 261 *et seq.*; P. Drew, *The Law of Maritime Blockade* (OUP, 2017), 19 *et seq.*
- ⁷⁴ *San Remo Manual*, paras 151 and 152.
- ⁷⁵ C. Schaller, 'Contraband', *MPEPIL*.
- ⁷⁶ Heintschel von Heinegg, above (n. 2), 573.
- ⁷⁷ Above (n. 14).
- ⁷⁸ I. Venzke, 'Convoy', *MPEPIL*.
- ⁷⁹ *San Remo Manual*, above (n. 14), para. 120 (b); Helsinki Principles, paras 5.2.8, 6.1; Ronzitti, in Ronzitti (ed.), *Armed Conflict at Sea*, above (n. 73), 9; Bothe, in Delissen/Tanja (eds), above (n. 9), 387, 394.
- ⁸⁰ Roach, above (n. 3), para. 22.
- ⁸¹ *San Remo Manual*, n. 14, para. 148; Ronzitti, in Ronzitti (ed.), *Armed Conflict at Sea*, above (n. 73), 7 *et seq.*; Drew (n. 73), 25 *et seq.*
- ⁸² Roach, above (n. 3), para. 17.
- ⁸³ *San Remo Manual*, Commentary to para. 146.
- ⁸⁴ Helsinki Principles, above (n. 15), para. 5.2.5; Bothe, in Dekker/Post (eds), above (n. 29), 211.

- ⁸⁵ Donner, above (n. 73), 285 *et seq.*
- ⁸⁶ *ICJ Reports 1949*, 4, 28.
- ⁸⁷ Ronzitti, in Ronzitti (ed.), above (n. 73), 9; Bos, in Dekker/Post (eds), above (n. 29), 219 *et seq.*
- ⁸⁸ The *San Remo Manual* (para. 92) only recognizes a right of minesweeping where the mines have been laid in violation of international law. This is too restrictive. Para. 6.2. of the Helsinki Principles is somewhat more open.
- ⁸⁹ Ronzitti, in Ronzitti (ed.), *Armed Conflict at Sea*, above (n. 73), 5.
- ⁹⁰ P. Hostettler, 'Reflections on the law of neutrality in current air and missile warfare' (2014) 44 *Israel Yearbook on Human Rights* 145-66.
- ⁹¹ V. Vereshchetin, 'Outer Space', paras 8-17, *MPEPIL*; Hostettler/Danai, above (n. 48), para. 18, *MPEPIL*.
- ⁹² Convention on International Civil Aviation, Chicago, 7.12.1944, Art. 89.
- ⁹³ Hostettler/Danai, above (n. 48); A.S. Millet, 'La neutralité aérienne' (1991) 35 *Annales de droit international médical* 63, 69; Torrelli, above (n. 22), 44.
- ⁹⁴ *HPCR Manual*, para. 170 (b).
- ⁹⁵ *Ibid.*, para. 170 (c).
- ⁹⁶ Above (n. 92).
- ⁹⁷ See above.
- ⁹⁸ Art. IV para. 2, 2nd sentence of the Treaty on Principles Governing the Activities of States in the Exploration of and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), UNGA Resolution 2222(XXI), 19.12.1966. See Bothe, above (n. 16), at 843 *et seq.*
- ⁹⁹ W. Heintschel von Heinegg, 'Neutrality and Outer Space' (2017) 93 *International Law Studies* 526-47, at 546.
- ¹⁰⁰ See K. Mačák, 'Silent War: Applicability of the *Jus in Bello* to Military Space Operations' (2018) 94 *International Law Studies* 1-38.
- ¹⁰¹ See above, Sections 18.08 *et seq.*
- ¹⁰² See above, Sections 18.49 and 18.50.
- ¹⁰³ Art. VII and VIII Outer Space Treaty, Art. II Convention on Registration of Objects Launched into Outer Space, UNGA Resolution 3235 (XXIX), 12.11.1974.
- ¹⁰⁴ Heintschel von Heinegg (n. 99), 534 *et seq.*

(p. 634) 19 The Law of Non-International Armed Conflict

I. General

19.01

Many armed conflicts today take place largely within the boundaries of a state and involve confrontations between the authorities of a state and armed groups or among armed groups that do not operate under state authority at all. Such armed conflicts are referred to as non-international and although, by definition, they do not occur between sovereign states, there is a body of international law which applies to them nonetheless.

1. *The notion of non-international armed conflict.* While internal wars have frequently taken place throughout history, after the end of the Second World War such conflicts have exceeded international armed conflicts, not only in numbers and duration, but often also by the level of atrocities. After the end of the Cold War, ever more wars were fought within states, both with and without outside interventions. These ‘new wars’ resembled former forms of partisan warfare, but they have clearly reached new dimensions. If it was ever realistic to expect during armed conflict that warring parties generally treat each other equally, voluntarily accept rules of fair fighting, and make effective efforts to minimize suffering, the opposite is often shown in internal wars. Armed opposition groups may be aiming at denying state control, changing political leadership, or securing resources (oil, diamonds, gold, tropical wood, etc.). While it is typical for non-international armed conflicts that the size, equipment, training, and tactics of the warring parties are very different, this asymmetric nature is a constant challenge for the application of humanitarian law (*see* below, Section 19.19).

2. *Recognition of belligerency and its disuse.* At some occasions before the beginning of the twentieth century, states have recognized the existence of civil wars in other states to avow a determination to remain neutral; in other cases insurgents have been recognized by their own governments as belligerents, to secure application of the laws of war.¹ This practice dates back to times when the prohibition of war as a means of protecting national interests had not yet emerged and there prevailed a general perception that in the relationship between belligerent powers the law of peace is fully replaced by the law of war. That perception is no longer correct (*see* above, Section 3.49 and Chapter 14). The application of the modern law of armed conflict is not dependent on recognition of belligerency by the state against which an insurgency is directed. Recognition of belligerency by a third state, however, whether expressly declared or implied by its activities, would trigger obligations under the law of neutrality (*see* above, commentary para. 6 to Section 18.06).

(p. 635) **3. *Borderline situations in non-international armed conflicts.***

a) *Third-state intervention* will not necessarily change the non-international character of an armed conflict, if it is performed on invitation by the government of the territorial state. This principle applies also to multinational armed forces intervening on the side of a host state, and whether or not the armed forces of that state are involved in military operations against the insurgents.

b) *Ancillary cross-border operations* by or against armed groups will still qualify as non-international armed conflicts, provided that no armed forces of another state are involved.

4. Internationalized armed conflicts. Certain armed conflicts may be considered as internationalized, even if not all parties to the conflict are sovereign states. In such cases the law of international armed conflicts applies.

a) Outside control of and support for insurgents. Interventions by states in support of armed opposition groups in another state will internationalize the armed conflict if the intervening state is itself conducting military operations or controlling operations performed by the armed opposition group. Both these conditions do not necessarily come together. Where the intervening state is fighting to support an insurgency without exercising control of the armed opposition groups, two different types of conflict are taking place at the same time. This applies to the war in Libya 2011, when opposition fighters against the Ghaddafi government were supported by NATO Allies and Partners in an air and sea campaign pursuant to SC Resolution 1973 (2011), paras. 4–5, which was terminated on 31 October in accordance with SC Resolution 2016 (2011), para. 5. Two different types of armed conflict have also been assumed by the ICJ in the armed conflict in Nicaragua during the early 1980s.²

The level of control by intervening states may be controversial. In 1999, the ICTY Appeals Chamber in *Tadić*, after extensive discussion of the ICJ's more restrictive judgment in *Nicaragua*,³ accepted the evidence of 'overall control [of insurgents in Bosnia and Herzegovina (the Bosnian Serb Army) by the Federal Republic of Yugoslavia] going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations' as sufficient for qualifying the ongoing armed conflict as international; the Appeals Chamber held that 'international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law'.⁴ Although the general point of departure was the same for both courts, that is to ascertain the conditions on which under international law an individual may be held to act as an organ of another state, both decisions were made in different context. The ICJ had decided with the view to determine the international responsibility of the respondent state, whereas the ICTY had to establish the necessary (p. 636) precondition for the grave breaches regime of the Geneva Conventions to apply.⁵ The purpose for the ICTY Appeals Chamber to qualify the armed conflict in Bosnia-Herzegovina was not to decide on a matter of state responsibility, but to determine whether the appellant was guilty of grave breaches.⁶ The ICTY, when critically discussing the 'effective-control test' used by the ICJ, did not acknowledge that difference; but the ICJ has later observed that while the 'overall-control test' may be applicable and suitable to a determination of the nature of a conflict, it was not suitable for making determinations on state responsibility, as 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.⁷

b) National liberation wars. Article 1, para. 4, AP I provides that international armed conflicts include situations 'in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations'. A formal international recognition of the legitimacy of the movement involved in a national liberation war is not a condition for application of Article 1, para. 4.⁸ Under Article 96, para. 3, AP I the authority representing a people engaged in a war of national liberation may undertake to apply the Geneva Conventions and AP I in relation to that conflict by means of a unilateral declaration addressed to the depositary.⁹ It should be taken into consideration, (p. 637) however, that humanitarian protection may not be made subject to reciprocity;¹⁰ yet, the expectation of reciprocity may be a driving force to motivate for better compliance.¹¹ Articles 1, para. 4, and 96, para. 3, AP I are relevant only for the application of international humanitarian law,

without, however, exempting insurgents from criminal prosecution under the law of the state.¹²

c) Armed conflicts between states and transnational armed groups. To the extent that a 'war on terror' can be qualified as an armed conflict (*see above*, Section 3.08), this conflict may be internationalized when military operations are conducted against a transnational group acting on behalf of a foreign state, such as the Taliban in Afghanistan 2001. From the time, however, the state is no longer controlled by the group, ongoing hostilities between the group and regular armed forces operating with the consent of the territorial state are part of a non-international armed conflict.¹³ A position by the US administration in 2004, characterizing the conflict with al-Qaeda as an armed conflict with a non-party to the Geneva Conventions, in which even common Article 3 did not apply,¹⁴ was characterized as 'erroneous' and rejected by the US Supreme Court in 2006.¹⁵ The internationalization of an armed conflict has also been assumed when a state is engaged in military operations against a transnational group on the territory of a foreign state without the agreement of the latter, such as during the Israeli-Hizbollah War in Lebanon 2006.¹⁶ Similar arguments were used for military operations of the Israel Defense Forces against other Palestinian groups both within Israel and in areas no longer claimed by Jordan. The conflict between Israel and Palestinian groups which is lasting now for decades, was originally characterized by Israel as an international armed conflict. In a response to a petition against targeted killings the government of Israel claimed that the classification of the conflict is a complicated question, with characteristics that point in different directions. The Supreme Court of Israel has stated that according to all of the various classifications the laws of armed conflict apply; these laws allow striking at persons who are party to (p. 638) the armed conflict and take an active part in it, whether it is an international or non-international armed conflict, and even if it belongs to a new category of armed conflict, that is conflicts between states and terrorist organizations.¹⁷ This judgment convincingly underlines that a differentiation between international and non-international armed conflicts is not really relevant for the conduct of hostilities (*see below*, Section 19.03). Yet, important distinctions, most especially for the status of fighters, remain (*see below*, Sections 19.13–19.15). Discussions whether 'transnational armed conflicts', that is conflicts between states and non-state groups outside the territory of the state would *de lege ferenda* require a new legal regime to regulate the application of combat power and the treatment of non-combatants¹⁸ should not overlook that armed conflicts may be either international or non-international and that in the latter case the same legal regime applies to conflicts between governmental armed forces and forces of armed groups as to conflicts between such groups. Efforts to develop a more specific regulatory framework for 'transnational armed conflicts' must respect all existing legal obligations.¹⁹ The introduction of wars against terrorist organizations as a new legal category for a new type of armed conflict is not convincing. The non-international or international character of an armed conflict depends on the question whether or not a responsible territorial government has given its consent to military operations performed by the intervening state. Thus, it is still true that armed conflicts can be determined as international only in a case in which states (or at least national liberation movements fighting against colonial domination and alien occupation and against racist régimes) are involved as parties to the conflict.

5. The applicability of international law in non-international armed conflicts. The general issue of whether international legal principles and provisions apply in non-international armed conflicts cannot lightly be set aside. As the late Antonio Cassese correctly stated decades ago: 'In practice, insurgents are not willing to live up to international standards they have not accepted. What is even more important, States engaged in an internal armed conflict do not readily concede that civil strife calls for the application of international regulations.'²⁰ It may be more widely accepted today that international law is binding states even in their internal affairs, a consideration that applies not only to human rights

obligations of states towards their own citizens, but also to norms of international humanitarian law applicable in non-international armed conflicts. The more controversial question as to how non-state actors—insurgents or armed opposition groups—may be bound by rules of international law which have been adopted not by themselves, but by (p. 639) states including the state these groups are fighting against, has for a long time been perceived as overly complicating the fundamental principle that international treaties are not concluded on behalf of governments, but on behalf of states lawfully representing all their citizens. But is it fully convincing to assume that an acceptance of obligations by the government of the state is binding also armed groups fighting on its territory?²¹ In that case it could be argued that universal acceptance and recognition of international principles and rules by the international community is binding not only states but also armed opposition groups.²² This would include customary international law which is based on practice and *opinio juris* of states. The legislative jurisdiction of a state transforming international law into domestic law, thus creating obligations for compliance and enforcement, is particularly relevant for rules on humanitarian protection,²³ but it needs to be combined with voluntary elements, thus to ensure that principles and rules imposed by a cogent legal system are accepted by all actors and implemented in a responsible manner. While non-state actors are often unable or unwilling to accept pertinent obligations, mechanisms such as Geneva Call²⁴ may support compliance with existing obligations.

a) The law of non-international armed conflict. The law of armed conflict, as it has developed in the last part of the nineteenth and the first part of the twentieth century, deals predominantly with wars between states. Its basic principles and rules are, however, likewise relevant for non-international armed conflicts: in all armed conflicts elementary considerations of humanity must be respected under all circumstances, in order to protect victims, to reduce human sufferings, and to minimize damages to objects vital for survival. Therefore, the parties to the conflict do not have an unlimited choice of the means and methods of conducting hostilities, nor of selecting the targets to be attacked, and they must protect the victims from the effects and consequences of war. This concept is reflected in the principles and rules of international humanitarian law, to be respected by all and, while taking military necessity into account, limiting the use of force for humanitarian reasons. Parties to the conflict respecting these principles and rules are considered as respecting the international order, while those seriously violating them will commit internationally wrongful acts and perpetrators are liable to punishment.

b) Human rights. The applicability of the law of human rights is not limited to times of peace, unless and to the degree a state has used possibilities of derogation;²⁵ yet, it is a difficult task to ensure respect for human rights in armed conflicts. The state whose armed forces are engaged in hostilities is not always able to exercise jurisdiction with respect to (p. 640) enemy fighters and victims, so that conventional human rights obligations might not apply (*see above*, Section 14.05). With respect to people held in detention, however, the exercise of jurisdiction is not seriously disputable. Armed opposition groups, in turn, are often unaware of their human rights obligations, even if those obligations have binding effects also on non-state actors (*see above*, Section 14.06). Yet, adherence to human rights obligations is mandatory under existing national law and essential for reconciliation in the long term. The complex relationship between humanitarian law and human rights law (*see above*, Chapter 14) is of particular practical relevance in non-international armed conflicts.²⁶

6. Different thresholds for the application of treaty law. Treaty law has established different thresholds for its application in non-international armed conflicts.

a) Article 3 common to the Geneva Conventions, without giving any specific definition, simply refers to ‘the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’ (for the negotiating history *see* below, Section 19.05). This definition does not require that armed groups are fighting against the government of the territory in which operations are conducted, rather the conflict may be fought between armed groups or between an armed group and the state outside the territory of the latter. As the threshold for application of common Article 3 is not further specified, it has been argued that according to its current understanding that threshold might be lower today than what was expected during the negotiations in the Diplomatic Conference 1949, when many proposals had referred to situations displaying the characteristics of civil war.²⁷ An interpretation as to the text and its contents and purpose has to acknowledge that the Article was deliberately confined to a few minimum rules which should receive the widest scope of application. This limitation in substance enabled states to avoid a more specific definition of the scope of application which otherwise would have been controversial. The notion of ‘armed conflict not of an international character’ thus in itself reflects the dynamics of war and its changing character. The *ICRC Manual*, too, does not attempt to define that term too precisely.²⁸

b) A much higher threshold of application was deliberately introduced in AP II. According to its Article 1, para 1, the Protocol shall apply ‘to all armed conflicts [not covered by AP I] which take place in the territory of a High Contracting Party between its armed forces 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 this Protocol’. By establishing such a high threshold, in particular with the requirement of territorial control held by insurgents, the exclusion of military operations against insurgents outside the state’s own territory, and the exclusion of conflicts which do not involve governmental armed forces, the range of applicability of AP II is extremely reduced in modern armed conflicts.²⁹

(p. 641) **c)** Article 8(2e) ICC Statute, which enumerates a number of serious violations of the laws and customs of non-international armed conflict, is limited by virtue of the second sentence of sub-para. f to

armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

This limitation to ‘protracted armed conflict’ is not mentioned in sub-paras c and d with respect to serious violations of Article 3 common to the Geneva Conventions, hence different thresholds could be construed for the application of sub-paras e and f. Such difference was initially intended: China, Russia, and other states wanted to limit the field of application of sub-para. f at a time when sub-para. e had been settled. A proposal was made for sub-para. f to refer to conflicts as defined in Article 1, para. 1, AP II,³⁰ but the final text falls short of such extreme limitation. The ICRC and others had pointed out that a threshold as for AP II would exclude many existing armed conflicts involving dissident armed groups fighting against each other and also armed groups fighting against the established government without having a proper chain of command or exercising control of part of the territory.³¹ This led to the adoption of sub-para. f as it stands today, while the text of sub-para. e was not reconsidered. Drafters of the ICC Statute may have been unable to agree on the full amount of customary law existing for non-international armed conflicts. But they were also unable to settle the matter in clear treaty language. The use of the word ‘protracted’ is redundant in sub-para. f; it was deliberately taken from the 1995 *Tadić* decision, where the term ‘protracted armed violence’ was first used, although not in an effort of describing a higher threshold than that of common Article 3 common to the Geneva

Conventions, but just to explain the notion of armed conflict as opposed to internal disturbances (for the latter *see* below, Section 19.05).³² Sierra Leone had initially proposed a reference to 'protracted armed violence' in this context, but this was changed by the conference into 'protracted armed conflict' in an effort which was essentially the same in *Tadić*, to describe a situation which has clearly reached armed conflict level.³³ For a textual interpretation it is difficult to find a common sense argument for this distinction, as the crimes listed in sub-paras c and e respectively are fully comparable and any distinction would counter a fundamental humanitarian principle which was stressed by the ICTY in the following terms: 'What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.'³⁴ With the (p. 642) strange distinction in the texts of sub-paras c and e an example of careless drafting was given, as with the use of the term 'protracted' an element is stressed which is already inherent in the term 'armed conflict' itself, that is an armed violence which is sufficiently intense. The word 'protracted' thus refers more to the intensity of the armed violence than to its duration; it does not require 'sustained' military operations, or even operations that are conducted in a continuous manner.³⁵ If this understanding can be accepted, the level of application of Article 8, para. 2, lit. c and e, ICC Statute is substantially the same as in Article 3 common to the Geneva Conventions (*see* below, Section 19.11). It should also be considered that the contents of Article 8, para. 2, lit. c and e, ICC Statute is not based on an analytically convincing structure and does not fully reflect the current state of customary law.³⁶

7. Policy considerations and operational needs. Military operators, legal experts, and policymakers have argued over the years that humanitarian protection should be the same for all types of armed conflicts. While 'the law on different types of conflicts has pursued different courses to the prejudice of a common core of humanitarian principles',³⁷ considerations of sound policy and military effectiveness are strongly speaking in favour of applying similar rules to the conduct of hostilities in all armed conflicts (*see* below, Section 19.16). Yet, there remain certain legal distinctions between international and non-international armed conflicts, most especially in respect of the status of fighters (*see* below, Sections 19.13–19.15).

19.02

To better understand the law of non-international armed conflict, it is important to consider how two separate bodies of law for armed conflict—international and non-international—originally arose. Throughout the course of twentieth-century international lawmaking, many states took the position that a number of the rules applicable in international armed conflict—particularly those associated with the status of combatants—would limit their rights of action if applied in non-international armed conflicts. The concern that the application of the law applicable in international armed conflict to internal situations could obstruct the state's ability to pursue the conflict was not fundamentally based on concern about restrictions related to the conduct of hostilities. It was based, instead, on uneasiness about the legal implications for the status of parties to the conflict, and, in particular, on states' concerns about restrictions on their ability to prosecute and punish individuals under domestic law for their belligerent acts which constituted crimes under that law. These considerations gave rise to the legal conclusion that the application of provisions on humanitarian protection should not affect the legal status of the parties to the conflict.

1. *Historical context.* The principal instruments in the law of armed conflict address, and distinguish between, armed conflicts of international and non-international character. Their provisions governing non-international armed conflicts are less extensively developed than those governing international armed conflicts. While non-international armed conflicts, and rules regarding their conduct, received little focus in these instruments, certain fundamental principles applicable to non-international conflict find expression in Article 3 common to the Geneva Conventions. It sets out a basic set of protections that (p. 643) apply in all non-international armed conflicts, and are confirmed and supplemented by rules of customary law.

2. *Reluctance of states to apply rules of international law in internal armed conflict.* All states have legal frameworks which privilege their own police and armed forces as against insurgents who oppose them. In many cases it was held that a number of the rules applicable in international armed conflict—particularly those associated with the status of detained combatants—would limit a state's freedom of action if applied in non-international armed conflicts. Many governments did not want to accept any body of international law to apply domestically within their own sovereign territory. Importantly, the concern that the application of the laws of war in internal situations would or could obstruct the government's ability to prosecute the conflict was *not* fundamentally based on anxiety about restrictions related to methods and means of conflict. The concern was based, instead, on uneasiness about the laws' implications for the status of parties to the conflict, and, in particular, on states' concerns about restrictions on their ability to sanction individuals under domestic law for their belligerent acts. The 'fear'—this is the word the ICRC used in describing the concern—that application of international law to civil conflicts might somehow confer protected belligerent status to rebel forces gave rise to Article 3, para. 4, common to the Geneva Conventions, which provides that '[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.³⁸ The committee developing common Article 3 referred to the 'enormous practical difficulties' that were seen to be associated with applying the international rules to civil conflicts.³⁹ It is still true today that states are reluctant to apply the laws of war in internal conflicts. They would not want to imply that their own armed forces are legitimate targets in a civil war. They rather maintain a legal framework which privileges their own police and armed forces against those who oppose them. There are not just concerns about according a legal status to insurgents but also other difficulties of applying the laws of war in a civil war: maintaining the key distinction between civilian and military is notoriously difficult in civil wars.

3. *The relevance of status.* The question of status in the law of armed conflict is one of central importance. The law of armed conflict recognizes combatants as having a right to participate directly in hostilities. There are two benefits of profound consequence which flow from this right. *First*, those who hold it are entitled to prisoner-of-war status and its attendant rights and protections. *Second*, and perhaps more importantly, they are held immune from criminal prosecution for their belligerent acts—acts that would otherwise constitute serious crimes under domestic law. Combatants who are thus privileged have what is referred to as 'combatant immunity' which is, in effect, a limited licence to take life and cause destruction.⁴⁰ Those who participate in hostilities without combatant status may be prosecuted under relevant criminal law for their belligerent actions. States (p. 644) facing domestic insurgencies or threats from armed groups who fail to meet the criteria for combatant status have an obvious interest in ensuring that their rights to prosecute and sentence opponents for acts which may constitute murder and destruction remain uncompromised by the concept of combatant immunity. Thus, a line was drawn in order to avoid chaos of unaccountable groups claiming a right to lawfully use force.

4. *The principle of distinction in non-international armed conflicts.* The fundamental legal distinction between fighters and civilians and between military objectives and civilian objects may be difficult to apply in non-international armed conflicts, as armed opposition groups are often not well organized and equipped and they are conducting their operations with civilian support. It is applicable nevertheless, as '[t]he basic rule of protection and distinction ... is the foundation on which the codification of the laws and customs of war rests'⁴¹ and 'the prohibition of attacks against the civilian population as such, and against individual civilians, remains valid, even if the adversary has committed breaches'⁴² (see below, Section 19.03, para. 1).

19.03

Certain general principles of conduct underpin all military operations, regardless of the nature of the conflict. These principles are:

- **the distinction between fighters and civilians, as well as between military objectives and civilian objects;**
- **the prohibition of superfluous injury or unnecessary suffering; and**
- **humane treatment without discrimination.**

1. *General observation.* The three principles referred to in this section are inherent to international humanitarian law in general. They have the same meaning in international and non-international armed conflicts. All military operations must comply with these principles.

2. *The principle of distinction.* This principle protects civilians from the effects of military operations (see above, Section 4.01) and it also requires that civilians taking direct part in hostilities lose protection against the effects of hostilities for the duration of each specific act amounting to direct participation, whereas persons assuming a permanent combatant function for a party to the conflict lose civilian protection for the duration of such conflict (see above, Section 8.16). The application of this principle in non-international armed conflicts is based on customary law,⁴³ irrespective of the disputed practice of targeted killings by some states.⁴⁴ For civilians in conflicts of a higher threshold it is confirmed in Article 13 AP II. The term 'fighters' does not appear in treaty law and is used to avoid any misunderstanding as to the status of the persons concerned. It comprises combatant members of regular armed forces (see above, Chapter 5) and members of armed groups fighting against the government or against each other. The term 'military objectives' is 'limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, (p. 645) capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.⁴⁵

3. *The prohibition of superfluous injury or unnecessary suffering.* This principle applies to the use of weapons, projectiles and material, and to methods of warfare of a nature to cause superfluous injury or unnecessary suffering,⁴⁶ irrespective whether this effect was 'calculated' or not; the expression 'superfluous injury or unnecessary suffering', covers simultaneously the sense of moral and physical suffering (see above, Sections 401, 402).⁴⁷

4. *The principle of humane treatment.* The principle of humane treatment without adverse distinction is a legal obligation which calls for actively reducing needless suffering and accepting humanitarian imperatives as obstacles to a supposed right of doing whatever is needed to win a war.⁴⁸ It is expressly stated in Article 3, para. 1, common to the Geneva Conventions with respect to persons *hors de combat*, but humanity requires to refrain from

cruelties and perfidious acts also against fighters. Various distinct aspects of humane treatment are also addressed in human rights conventions.⁴⁹

19.04

There is an important trend in the law towards expanding the scope of application of the rules related to the conduct of hostilities originally contained only in the law of international armed conflict to situations of non-international armed conflict, while, at the same time, respecting the distinction which continues to exist in these two types of conflicts on matters of status of the fighters.

1. *Historical origin.* This trend was visible already in the work of Hugo Grotius (1583–1645), some of whose main ideas in *De Jure Belli ac Pacis* were first developed in defence of private and mercenary wars.⁵⁰ In the eighteenth century, Emmerich de Vattel held that a sovereign has to observe the ordinary laws of war towards rebellious subjects who openly take up arms against him.⁵¹ A century later, the first modern codification of the laws of war was developed by Francis Lieber during the American Civil War, at a time when there was no actual involvement of US forces in international armed conflicts.⁵² The Lieber Code expressly refers to situations '[w]hen humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire'. It facilitates such adoption by expressly stating that 'it does in no way whatever imply a partial or complete acknowledgement of [the rebels'] government, if they have set up one, or of them, as an independent and sovereign power'. To avoid any misunderstanding in this matter, Lieber even added the sentence: 'Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgement of the revolted people as an independent power.'⁵³

(p. 646) 2. *Influences from other branches of law.* The trend to overcome the traditional distinction between rules of conduct for international and non-international armed conflicts was supported by the development of standards of protection in other fields of law. Human rights instruments apply not only in peacetime, but in general also during armed conflict. Protections of civilians, even of those who are indicted for having committed crimes, are part of constitutional guarantees in many states today.

3. *Present meaning.* The clear trend in customary humanitarian law towards expanding the scope of application of the rules governing the conduct of hostilities to non-international armed conflicts has become manifest in state practice and *opinio juris*.⁵⁴ This trend carries implications for how and which weapons are used in warfare, for the protection of victims of armed conflict, and for the criminalization of violations of these rules. While more progressive trends in literature towards full convergence of the law of international and non-international armed conflicts⁵⁵ are not always supported by practice, it is also fair to state that restrictive attempts to limit international legal obligations in non-international armed conflicts to 'rudimentary' or 'minimum' protection rules that still characterize the attitude of states at diplomatic conferences do not fully reflect the interest of parties in military operations and were in fact overtaken by developments of customary international law (see below, Section 19.12).

19.05

International humanitarian law generally does not apply to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

1. Relevant treaty provisions. Non-international armed conflicts are distinct from international armed conflicts on the one hand (*see above*, Section 19.01, paras 1–3) and internal disturbances and tensions on the other. The principle that international humanitarian law generally does not apply to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature was first stated in Article 1, para. 2, AP II. While AP II has a range of application much smaller than common Article 3 (*see above*, Section 19.01, para. 6), the principle stated here is generally applied to all non-international armed conflicts. It was reaffirmed in Article 8, sub-paras 2(d) and 2(f), ICC Statute which expressly excludes violations committed in internal disturbances and tensions from the Court’s jurisdiction for war crimes. While sub-para. 2(d) is related to serious violations of common Article 3, a number of other serious violations of the laws and customs of non-international armed conflict are enumerated in sub-para. 2(e), and are limited to ‘armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’, by virtue of the second sentence of sub-para. 2(f). For the contents and meaning of these provision *see above*, Section 19.01, para. 6(c), and below, Section 19.11.

(p. 647) **2. General considerations.** The distinction between non-international armed conflicts and internal disturbances and tensions is not expressly addressed in common Article 3 to the Geneva Conventions, which applies to ‘the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. While no definition of ‘armed conflict’ was included in the Conventions (*see above*, Section 3.01), Pictet’s Commentary lists the following ‘different conditions, although in no way obligatory’, constituting convenient criteria in this context: (1) that the party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Geneva Conventions; (2) that the legal government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory; (3) that the *de jure* government has: (a) recognized the insurgents as belligerents; or (b) claimed for itself the rights of a belligerent; or (c) accorded the insurgents recognition as belligerents for the purposes only of the Geneva Conventions; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression; (4) (a) that the insurgents have an organization purporting to have the characteristics of a state; (b) that the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory; (c) that the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war; (d) that the insurgent civil authority agrees to be bound by the provisions of the Convention.⁵⁶ Arguing eloquently for the application of the humanitarian protection standards of Article 3 also in situations of internal ‘armed strife’, Jean Pictet then gave the following explanation which is still relevant today:

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection. Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the scope of application of the Article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as

essential in all civilized countries, and embodied in the municipal law of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and (p. 648) mutilate prisoners and take hostages? However useful, therefore, the various conditions stated above may be, they are not indispensable, since no Government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.⁵⁷

Indeed, minimum humanitarian standards are applicable in all situations, including internal violence, disturbances, tensions, and public emergency. These standards cannot be derogated from under any circumstances. Pictet at the same time endorsed existing national limitations relevant for law enforcement operations, as, indeed, Article 3 does not authorize states to treat a riot like an armed conflict or to use lethal force and detention without trial (*see*, in particular, Article 3, para. 1, no. 1, lit. a and d). Similar considerations are included in the *ICRC Commentary on the Additional Protocols*.⁵⁸

3. Remaining legal distinctions. It has been suggested that a ‘unified use of force rule’ that unifies the law of armed conflict for international and non-international conflicts and even for military operations other than war, such as robust peacekeeping and law enforcement operations, has emerged as a customary international legal norm, hence the degree of force permitted and the notion of military necessity should not be interpreted differently in international and non-international armed conflicts.⁵⁹ While this opinion seems convincing in certain respect, a critical reservation must be made with respect to the conduct of hostilities during armed conflict. It may still be held that in all armed conflicts international humanitarian law provides a more liberal regime for the use of force than human rights law. Pertinent rules, in particular those requiring the protection of civilians and persons *hors de combat*, avoidance and in any event minimization of incidental deaths, injuries, and destruction, are still less restrictive for military operations under the *lex specialis* rules of international humanitarian law than for law enforcement operations in peacetime. In the conduct of hostilities enemy combatants may be targeted and attacked with lethal force, regardless of whether they could be captured or arrested. On the other hand, in law enforcement operations police forces may be entitled to seek some advantages in exceptional situations by feigning civilian status or using tear gas or dum-dum bullets, practices that are prohibited in hostilities. Law enforcement operations in internal disturbances will generally follow specific rules which are not fully comparable to military operations in an armed conflict. The use of riot control agents such as tear gas (CS), prohibited as a method of warfare under Article I, para. 5, Chemical WeaponsConv,⁶⁰ is not prohibited for law enforcement including domestic riot control (p. 649) purposes, as expressly stated in Article II (9) Chemical WeaponsConv. For riot control CS is a means of last resort, to avoid the use of deadly fire. The employment in certain police operations of dum-dum bullets which have been generally outlawed for armed conflicts,⁶¹ may be permissible to lessen the risk to civilians, in particular within buildings where the use of fully jacketed projectiles might have a ‘billiard’ effect on concrete walls, thus jeopardizing the lives of hostages and police officers in action. Both prohibitions apply in international as in non-international armed conflicts today,⁶² but not in law enforcement operations.

4. The law applicable in internal disturbances. Even in the absence of specific treaty provisions of international humanitarian law, clear legal protections apply in internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. These are derived from human rights and national laws. States may decide, and have done so sometimes as a matter of policy, that even if a particular situation is not an armed conflict under international law, the relevant principles and rules of

international humanitarian law will be applied.⁶³ There may be situations where below the threshold of the conduct of hostilities law enforcement operations are executed by armed forces. In such cases a strict line must be drawn between these two different tasks both with respect to the goals and the methods and means to be used.⁶⁴

19.06

Even in cases not covered by existing treaty rules, the principles of humanity must guide all parties.

1. General. The origin of this rule dates back to the Martens Clause (*see* above Section 2.31) which has been reaffirmed in Article 1, para. 2, AP I, and, in a shorter form, also referred to in the Preamble (para. 4) of AP II. The legal effect of this rule lies in its limitations of possible denunciations of treaty obligations, as expressly recognized in Articles 63, para. 4, GC I; 62, para. 4, GC II; 142, para. 4, GC III; and 158, para. 4, GC IV, but even more importantly in its role as a guide for conduct in situations which are not fully addressed by existent treaty law.

2. ‘Cases not covered by existing treaty rules’. These cases include acts not expressly addressed in this Handbook and situations below the level of an armed conflict.

(p. 650) **3. ‘Principles of humanity’.** As a matter of logic, principles not covered by the law in force derive from unwritten rules inherent to existing law. Principles of humanity are inherent to international humanitarian law and human rights law. Both AP I and AP II refer to ‘the principles of humanity and the dictates of public conscience’ in the same context, thus reinforcing their obligatory character. While in contrast to Article 1, para. 2, AP I, no reference to ‘established custom’ was made in the Preamble to AP II, it was rightly stressed soon after the Protocols’ adoption, that ‘the existence of customary norms in internal armed conflicts should not be totally denied’.⁶⁵ Today, the existence of customary international law for non-international armed conflicts is fully acknowledged (*see* above, Section 19.04, para. 3, and below, Section 19.12).

4. Operational relevance. Principles of humanity, whether or not these are covered by conventional law or custom, are essential for reaching the aim of the law of all armed conflict: to maintain the rule of law by protecting victims of violence. Their full observance is of both tactical and strategic importance, as it will be decisive for conducting convincing operations, winning the hearts and minds of the people and establishing a stable peace (*see* below, Section 21.02).

II. Applicable Law

19.07

Specific conventional rules on humanitarian protection in non-international armed conflicts have first been developed with Article 3 common to the Geneva Conventions. They provide for fundamental protections of persons taking no part or no longer an active part in hostilities, a right of initiative of impartial humanitarian bodies, such as the International Committee of the Red Cross, and an encouragement to the parties to the conflict to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions.

1. General. The rules contained in Article 3 common to the Geneva Conventions provide fundamental standards of protection stemming from the right to life and principles of humanity in all armed conflicts. These rules have been recognized by the ICJ as an emanation of ‘elementary considerations of humanity’ constituting ‘a minimum yardstick’

applicable to all armed conflicts.⁶⁶ The fundamental importance of common Article 3 was reconfirmed many times.⁶⁷

2. *Obligations of non-state actors.* The law of non-international armed conflicts is binding upon all parties, both states and non-state actors (*see above*, Section 19.01, para. 5). Whereas the binding effect of international humanitarian law on non-state actors was never seriously disputed, the extent to which this would also apply to underlying human rights norms was shadowed by a widely believed myth according to which human rights could be claimed against the state, but not against individuals. That myth may have been supported by a limited textual understanding of human rights conventions, but it was (p. 651) never keeping with custom, neither with practice, and cannot be upheld.⁶⁸ Non-state actors have included human rights commitments in their policy statements and codes of conduct. The UN has secured such commitments on many occasions. Human rights breaches by individuals were never excused with failing obligations. It is logical to state that non-state actors may not only claim rights, but have also to comply with obligations under existing humanitarian law and human rights law.

3. *Legal status of the parties.* As expressly stated in Article 3, para. 4, these rules do not affect the legal status of the parties to the conflict.

4. *Right of initiative.* The right of initiative of impartial humanitarian bodies enables them to offer services to the parties to the conflict. The ICRC, which is expressly mentioned in this context, has a unique role to play in armed conflicts (*see below*, Section 14.24). It is supplemented today by activities of the UN (*see below*, Sections 14.25–14.31), international and regional organizations, states, and NGOs (*see below*, Sections 14.32–14.33).

5. *Special agreements.* Special agreements relating to all or part of the other provisions of the Geneva Conventions are encouraged to supplement the fundamental rules contained in Article 3. It will be difficult to conclude such agreements during an ongoing non-international armed conflict, although this was possible in some cases.⁶⁹ A general forum for humanitarian engagement of armed non-state actors is provided by Geneva Call.⁷⁰ It remains an important task to support implementation of applicable rules of humanitarian law and human rights law for the protection of victims of armed conflicts.

19.08

Certain subsequent treaties also provide for fundamental protections in non-international armed conflicts (Article 19 CultPropConv).

1. Following the example of Article 3 common to the Geneva Conventions, the 1954 CultPropConv provides in Article 19 that in a non-international armed conflict ‘the provisions of the present Convention which relate to respect for cultural property’ should apply. With this formula not much of the Convention’s core provisions were left outside. Any practical limitation which might derive from this formula was removed by Prot2CultPropConv (*see below*, Section 19.10).

(p. 652) **2.** It may be recalled that the 1935 Roerich Pact has no such limitation at all; its declared purpose is ‘that the treasures of culture be respected and protected in time of war and in peace’.

19.09

An attempt to develop and supplement Article 3 common to the Geneva Conventions led to controversial negotiations from 1970 to 1977 and had to be reduced to a number of provisions applicable to armed conflicts which take place in the territory of a contracting party between its armed forces 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 rules so achieved (AP II).

1. For the threshold of application of AP II, as defined in its Article 1, *see above*, Section 19.01, para. 6, lit. b. Due to this high threshold, AP II is technically inapplicable to the many armed conflicts in disintegrated states in which the government has become largely ineffective and warring parties are fighting against each other.⁷¹
2. The contents of AP II is limited to rudimentary provisions of humane treatment, humanitarian protection of the wounded, sick, and shipwrecked, and the civilian population and individual civilians against the dangers arising from military operations. All of its basic provisions are reflected in customary international law today. By virtue of customary law, practically all substantial provisions of AP II are also applicable in non-international armed conflicts of much lower threshold.⁷²
3. AP II, its clear deficiencies notwithstanding, has supported an educational process which has enhanced awareness of existing rules of humanitarian protection in non-international armed conflicts.

19.10

For some treaties the scope of applicability was subsequently expanded to include armed conflicts not of an international character (Blinding WeaponsProt; MinesProt as of 1996; Prot2CultPropConv; Article 1, paras 2-6, Inhumane WeaponsConv as of 2001). Other treaties were enacted with a broad scope right from their first entry into force (ClusterConv; LandMinesConv; ChemicalWeaponsConv; BiologicalWeaponsConv).

1. There have been a number of successful efforts to formally expand the scope of rules of conventional international law originally designed for international armed conflicts in order to ensure their application also in non-international armed conflicts. The Prot2CultPropConv, adopted on 26 May 1999, extended all provisions of the CultPropConv to non-international armed conflicts, thus further amplifying its scope of application (*see above*, Section 1208). In 2001, at the Second Review Conference on the 1980 InhumaneWeaponsConv,⁷³ its Article 1 was amended to cover non-international armed conflicts,⁷⁴ due to a successful US (p. 653) initiative⁷⁵ which followed similar earlier developments under the 1995 BlindingWeaponsProt and the 1996 MinesProt. The latter also prohibits 'the transfer of any landmines to any recipient other than a State or a State agency authorised to receive such transfers' (Article 8, para. 1, lit. b).
2. Under Article 1, para. 1 of the 1997 LandMinesConv, each state party undertakes 'never under any circumstances' to use, produce, acquire, or stockpile anti-personnel mines and destroy or ensure destruction of such weapons, irrespective of their use in international or non-international conflicts. States are likewise obliged not to 'transfer to anyone' or 'assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention'. The latter obligations also prohibit states from providing anti-personnel mines to any non-state actors, such as armed opposition groups.⁷⁶ Similar provisions are contained in Article I of the 1993 Chemical WeaponsConv, which provides that state parties 'never under any circumstances' develop, produce, otherwise acquire, stockpile, or transfer, 'directly or indirectly, chemical weapons to anyone'. That Convention further prohibits to use chemical weapons, to engage in any military preparations for such use, and 'to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention'. This prohibition likewise includes any assistance for or encouragement of non-state actors to acquire or use chemical weapons. Article I, para. 5, Chemical WeaponsConv prohibits the use of riot control agents as a

method of warfare, as one of the rare provisions that may illustrate different conduct in armed conflict and law enforcement operations (*see above*, Section 19.05, para. 3).

(p. 654) **19.11**

Article 8(2)(e) of the Rome Statute on the International Criminal Court confirms the existence of rules limiting methods and means of combat in non-international armed conflicts.

Article 8(2)(e) ICC Statute, as amended on 10 June 2010, 14 December 2017, and 6 December 2019, enumerates nineteen serious violations of rules concerning the conduct of hostilities in non-international armed conflicts as ‘war crimes’. This list supplements the violations of Article 3 common to the Geneva Conventions which are listed in Article 8(2)(c) ICC Statute. The fact that the application of sub-para. e is expressly limited to ‘armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’ (*see sub-para. f, second sentence*), does not establish a higher threshold than that of common Article 3 (*see above*, Section 19.01, para. 6(c)).

19.12

As confirmed by current customary international humanitarian law, many rules on means and methods of fighting and protection are likewise applicable in international as in non-international armed conflicts.

1. Current law. After adoption of AP II, and despite severe controversies during its negotiations (*see above* Section 19.09), practice has led to the creation of rules parallel to those in AP I, and applicable as customary law to non-international armed conflicts.⁷⁷ This applies to the rules on the conduct of hostilities,⁷⁸ and the respect for specifically protected persons and property.⁷⁹ Customary rules so confirmed may be derived from common sense, as stated by the ICTY in the following terms: ‘What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.’⁸⁰ Hence an attempt to summarize the law of non-international armed conflicts in an enumerative form remains a questionable undertaking, as any comprehensive list⁸¹ can be understood as excluding the applicability of further rules. Whether intended or not, this would create the wrong perception that in non-international armed conflicts only minimum rules would apply. It may be true that there are often little restraints on the armed engagements of government forces and rebels;⁸² but such attitude does not reflect existing law. It also ignores that states still have an interest to maintain the rule of law *vis-à-vis* rebels, even if today it seems to be more difficult to understand this than for example during the American Civil War, for which the Lieber Code had been adopted. Rebels in turn have an interest in winning support from civilians, which could hardly be achieved by denying their protection under international humanitarian law. While a comprehensive approach remains necessary to identify relevant rules, it should focus on a full description of rules applicable in all armed conflicts; a comprehensive evaluation of existing differences between international and internal conflicts; and a realistic assessment of special issues of compliance and enforcement.

2. Human rights influence. The UN project on ‘Fundamental Standards of Humanity’⁸³ was a significant contribution to evaluating human rights law and international humanitarian (p. 655) law in its application to situations of internal violence. The adoption in 2001 of a General Comment on Article 4 ICCPR with respect to the application of human rights norms in situations of national emergencies⁸⁴ and the ILC’s Articles on State Responsibility for Internationally Wrongful Acts⁸⁵ have further supported this project. Rulings of the ICTY and ICTR have helped to clarify the definition of crimes and contributed to the alignment of international humanitarian law norms applicable in international and non-international

armed conflicts.⁸⁶ Although final results of this project were not formally adopted, the study may facilitate an assessment of principles of humanitarian protection which apply to all human beings in all situations. It may also contribute to a better understanding of the accountability of armed groups and other non-state actors.

3. Security Council support. UN Security Council activities on the protection of civilians in armed conflicts have underlined the need for developing substantial rules including procedural structures and mechanisms for better protection. As civilians must be protected in all armed conflicts, not many differences can be made between international and internal conflicts in this context. Based on reports of the Secretary General,⁸⁷ the Security Council has taken first steps to alert political interest, encourage consensus among states, and develop a plan for further action.⁸⁸ Closer co-operation between the Office for the Coordination of Humanitarian Affairs (OCHA), the Department of Peacekeeping Operations (DPKO), and the Department of Political Affairs is envisaged, to effectively support these activities. The Security Council has adopted an aide-memoire for addressing issues of protection of civilians in armed conflict on a more systematic and consistent basis.⁸⁹

4. Support from civil society. Non-governmental organizations (NGOs) have an important role to play in conflict prevention, conflict resolution, and post-conflict reconstruction.⁹⁰ The influence of NGOs has been supported by the courage, devotion, and compassion of individuals and in turn the role of individuals for the implementation and development (p. 656) of international humanitarian law has clearly been increased by NGOs during their activities. This role has been indispensable already in the past and it is challenging states at present and in the foreseeable future.⁹¹

5. Prevailing limits. It must be borne in mind, however, that certain legal distinctions between international and non-international armed conflicts still remain (see below, Sections 19.13–19.15).

III. Legal Distinction between International and Non-International Armed Conflicts

19.13

A distinction between international and non-international armed conflict remains part of the law of armed conflict, most especially in respect of the status of fighters.

19.14

The right to participate in armed hostilities is generally limited to combatants of a state who meet the requisite elements. Such right may be exercised only by forces sufficiently organized within a system of international accountability to ensure to the maximum extent possible its responsible exercise.

19.15

In non-international armed conflicts, fighters cannot claim status as prisoners of war upon detention, neither are their actions exempt from criminal prosecution.

1. Treaty law. There is still a significant distinction between international and internal conflicts in current treaty law. The treaty provisions of international humanitarian law

applicable to conflicts between states do not apply to non-international armed conflicts, unless particularly specified.

2. Customary law. The progressive development of customary law has not led to a complete amalgamation between rules for international and non-international armed conflicts. Specific distinctions still remain. They apply to the threshold for satisfying proportionality,⁹² the status of fighters,⁹³ public property,⁹⁴ the time of release of persons deprived of their liberty,⁹⁵ and belligerent reprisals⁹⁶ (see below, paras 3–4).

3. Specific distinctions. Prevailing distinctions between the law of international and non-international armed conflict may be described as follows:

a) Proportionality standards. In a non-international armed conflict force government armed forces should use particular restraint in their operations. This is due to the asymmetric character of the conflict. It will take more to justify the killing of one fighter by another than in a traditional symmetric conflict, hence force should be used ‘in a more calibrated manner’.⁹⁷ At the same time, it would be ‘inhumane to treat the soldiers being (p. 657) attacked in a way that would make any tactics that are necessary to save lives disproportionate’.⁹⁸ This is not to say that the principle of proportionality (see Commentary to Section 7.06 above), which is based on a balance between military advantage and the suffering of victims, could be different in different types of conflict, but it illustrates that requirements for application are case-specific.

b) Status of combatants/fighters. In international armed conflicts combatants enjoy significant protection upon capture, as they are entitled to prisoner-of-war status and may neither be tried for their participation in hostilities nor for acts that do not violate international humanitarian law.⁹⁹ Armed opposition groups in a non-international armed conflict cannot claim prisoner-of-war protection for their fighting members,¹⁰⁰ but fundamental procedural principles and safeguards under human rights do apply.

c) Public property. The parties to an international armed conflict may seize military equipment belonging to an adverse party as war booty.¹⁰¹ In occupied territory, they may take public property that can be used for military operations, without the obligation to compensate the state to which it belongs.¹⁰² In a non-international armed conflict, the seizure of such equipment is not regulated under international law.¹⁰³

d) Release of persons deprived of their liberty. While under the law of international armed conflicts, prisoners of war must be released and repatriated without delay after the cessation of hostilities¹⁰⁴ and civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities,¹⁰⁵ there is no universal treaty provision on the release of persons deprived of their liberty in non-international armed conflicts. It may be concluded from numerous peace accords and from resolutions of the Security Council and regional organizations that such detainees must be released as soon as the reasons for the deprivation of their liberty cease to exist.¹⁰⁶ A clear regulation will depend on the question, whether an amnesty for participation in hostilities has been proclaimed (see below, Section 19.20).

e) Belligerent reprisals. Where not expressly prohibited, parties to an international armed conflict may in extreme cases resort to reprisals, subject to stringent conditions.¹⁰⁷ Parties to a non-international armed conflict do not have the right to resort to belligerent reprisals.¹⁰⁸

4. Controversial distinctions. Certain rules well accepted in international armed conflict may be disputed in internal conflicts.

a) The law of belligerent occupation. As the rules of occupation law have been developed in situations of foreign occupation as a result of a clear and lasting victory, important preconditions for their application are absent in a non-international armed conflict. Yet, essential standards for the protection of civilians and persons *hors de combat* are essentially the same in internal armed conflict.¹⁰⁹ Hence, it would not be correct to deny the applicability of rules of occupational law in non-international armed conflicts altogether.

b) Military objectives. Some have argued that in non-international armed conflicts the notion of 'military objectives' is in effect more limited than in international armed (p. 658) conflicts.¹¹⁰ This argument is based on US objections against certain aspects of the definition set forth in Article 52, para. 2, AP I. It ignores that the same definition was confirmed for all armed conflicts in Article 2, para. 6, MinesProt and Article 1, lit. f, Prot2CultPropConv, which limits military objectives to those objects which 'by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'. Different interpretations of this rule are discussed above (Section 4.02). The US has interpreted it as including objects that contribute to the enemy's 'war-fighting or war sustaining capability', but has referred to the issue solely in the context of international armed conflicts.¹¹¹ It should be accepted, however, that similar considerations may become relevant for the conduct of parties to a non-international armed conflict. Hence the more convincing view is that in all armed conflicts a similar interpretation of 'military objectives' should be applied.

IV. Compliance

19.16

Armed forces should comply with the rules applicable in international armed conflicts in the conduct of their operations in all armed conflicts; however, such conflicts are characterized (see above, Section 3.09).

1. The policy rule to comply with the rules of international humanitarian law in the conduct of any armed conflict, irrespective of whether the conflict is characterized as internal or international serves not only humanitarian interests but also operational requirements.¹¹² The rule avoids confusion on the side of troops and their commanders, as regular armed forces are normally trained for military operations in international armed conflicts and not for law enforcement purposes. Also, the character of an armed conflict is not always clear, sometimes it may even change during operations.

2. The policy to comply with the law of war during all armed conflicts, however such conflicts are characterized, was first stated for the US Forces¹¹³ and for the German Bundeswehr.¹¹⁴ It was vigorously endorsed by international consensus,¹¹⁵ and may be considered today as indicating a progressive development of the law. Its quite obvious meaning is not to encourage any disregard for the legal distinction between the two different forms of armed conflict, as they are explained above (Sections 19.13–19.15), but rather to fully apply the rules related to the conduct of hostilities also in a non-international (p. 659) armed conflict (see above, Section 19.04, para. 3). Thus, soldiers are professionally trained to comply with international humanitarian law fully and any misunderstanding as to the applicability of more than rudimentary (or 'minimum') rules in a non-international armed conflict shall be avoided.

19.17

Also unprivileged fighters must be treated humanely.

1. Fundamental principle. Humanitarian protection is essential for all victims of violence. This is underlined by fundamental human rights obligations, as deriving from the ICCPR, as from the ECHR, ACHR, the African Charter on Human and Peoples' Rights or the Arab Charter on Human Rights or the ASEAN Human Rights Declaration. These obligations apply also in military operations, unless they are lawfully derogated in cases of emergency (*see above*, Section 19.01, para. 5 b) or their application is excluded by *lex specialis* rules of humanitarian law (*see above*, Section 14.04). Both exceptions are seldom fulfilled in reality. Furthermore, even beyond treaty law, there are fundamental standards of protection which have been generally accepted and must be respected as guidelines for best practice in the treatment of prisoners (*see above*, Section 13.04).

2. Restrictions in a state of emergency. It is to be deplored that even minimum protection was denied in recent counter-terrorist operations. Fundamental human rights must be respected without exemption. Even in a state of emergency *habeas corpus* may not be completely suspended, although in extreme cases the right to liberty and security may be limited to the effect that in case of arrests or detentions the reasonable time to implement *habeas corpus* may be longer than twenty-four hours.¹¹⁶ Under existing law detainees do not lose the right of legal protection altogether.

3. Good governance and effective policy. In armed conflicts, as in peacetime, humanitarian protection of victims is not only a technical legal issue. It must be considered in broader terms of good governance and effective policy. Long-term perspectives may lead to the introduction of protections which are not strictly required under existing law. If states participating in a multinational operation have taken differing policy decisions in this respect, interoperability problems must be solved (*see below*, Section 21.03). This may include the application of humanitarian law standards by analogy. Unilateral statements to that effect may be made by the detaining power.

19.18

All fighters in non-international armed conflicts must comply with the rules applicable in such conflicts.

1. Obligation of states and non-state actors. The law of non-international armed conflicts is not only binding upon states but also upon non-state actors. This principle was first recognized with the adoption of Article 3 common to the Geneva Conventions, which established fundamental rules of humanitarian protection binding all parties to a (p. 660) non-international armed conflict, notwithstanding the fact that the application of these rules shall not affect the legal status of any of them.¹¹⁷

2. Policy considerations. Many have argued that compliance with the law contributes to effective and efficient conduct of operations, while violations by one side would be likely to encourage reciprocal misconduct by the other side; that harsh and inhumane behaviour will alienate potential allies, both on the domestic and international level; that compliance will facilitate ending the hostilities and promote resolution of the conflict, while misconduct in military operations would frustrate such endeavours; and 'winning the peace' in the long term presupposes national reconciliation which can only come about if the parties believe they can live and work together.¹¹⁸ Considering the duration of and atrocities committed in many non-international armed conflicts, such assumptions fall deplorably short of existing realities. Neither the parties to the conflict, nor the victims can rely on benevolent considerations. They must take convincing initiatives to make such principles work. Strategies must be developed to engage armed groups on humanitarian issues, to build pressure on relevant groups, and to support them in their capacity as administrative organizations.¹¹⁹ To do this effectively, states and civil society must take positive action to investigate the root causes for violations of the law, develop incentives for compliance, and

ensure respect for its fundamental principles. This also includes the prosecution of war crimes committed in non-international armed conflicts.¹²⁰

3. The obligation of states. All states have a legal obligation to respect and ensure respect for international humanitarian law (Common Article 1 GC I-IV; Article 1, para. 1, AP I). The applicability of this provision to non-international armed conflicts, initially denied in 1949,¹²¹ has been subject to a dynamic interpretation during the last decades and is now widely accepted.¹²² It marks the responsibility of a state for acts committed by its armed forces and other persons and groups acting in fact on its instructions, or under its direction or control,¹²³ but it also extends to acts of third states, not directly involved (p. 661) in an armed conflict, in their relations to state and non-state parties to the conflict. The modern understanding of existing obligations under Article 1 clearly goes beyond traditional perceptions of national sovereignty, which in the past had strictly excluded any interference in domestic matters of another state. Measures to be taken under this obligation by states together with international organizations and civil society are essential to convince parties of an armed conflict of the advantages of compliance with the law. This calls for an extended spectrum of activities to influence the relevant actors (*see below*, Chapter 21). In non-international armed conflicts, special agreements between the parties may help to further compliance with international humanitarian law (*see above*, Section 19.07). Unilateral declarations by armed opposition groups may include commitments to international humanitarian law. They may even be requested by the ICRC or other organizations, such as Geneva Call, addressing the party's interest to comply with the law (*see above*, Section 19.01, para. 5). Codes of conduct for armed groups may induce their members to fight according to the rules. An inclusion in ceasefire agreements of commitments to ensure respect for international humanitarian law may not only support observance of those rules that continue to apply after the cessation of hostilities, but remind parties of their obligations if hostilities are renewed. Last but not least, the parties to the conflict must consider offering incentives for compliance. For making such offers states will be in a better position than insurgents, even if recognition of belligerency is not considered as an option (*see below*, Section 19.20).

19.19

Reciprocal compliance with international humanitarian law should be encouraged, but in no case may humanitarian protection be made subject to compliance by the other side.

1. Due to the asymmetric nature of non-international armed conflicts it is difficult for states to influence the operations of armed opposition groups by setting examples in the interest of reciprocity. Yet, political contacts are essential even while fighting is continued and signals must be given to create and support understanding for the importance of compliance with legal standards of protection. This underlines the importance of civil-military co-operation even during military operations.
2. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.¹²⁴ Hence, compliance with international humanitarian law must not be enforced by denying protection to victims.
3. Parties to an armed conflict must encourage respect for international humanitarian law by the adversary through their own behaviour, thus creating a climate of compliance.

19.20

The detaining state must endeavour to grant amnesties for mere participation in hostilities.

1. Article 6, para. 5, AP II provides that '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated (p. 662) in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'. Such amnesties should also be possible after conflicts below the threshold set forth in Article 1, para. 1, AP II.¹²⁵ The Security Council and competent UN and regional bodies have encouraged and many states have granted such amnesty to members of armed opposition groups.¹²⁶ During the conflict and even after the end of hostilities it may be difficult if not impossible to balance competing interests in achieving or denying amnesties. Yet, without a clear perspective for their own individual treatment as detainees, fighters will hardly adapt their conduct to humanitarian principles and rules.¹²⁷

2. As amnesties are related to the mere participation in hostilities, they apply to certain offences under domestic law connected with such participation, but not to war crimes and crimes against humanity. An amnesty which would not observe this principle would hardly help to stabilize a post-conflict situation.

V. Termination of Hostilities

19.21

The termination of hostilities in non-international armed conflicts is often a complex process in which rules of international humanitarian law continue to exist and may influence post-conflict peacebuilding (see above, Section 3.57).

1. As in international armed conflicts, the termination of hostilities between armed opposition groups and the government or between various armed groups requires more than a mere cessation of hostilities. While factual fighting may be brought to an end with the intensity of violence falling below the threshold of protracted armed confrontation (see above, Section 19.01, para. 6) or even terminating armed activities temporarily or permanently, this does not automatically mark the end of the state of armed conflict. Parties may not find themselves in agreement on whether and under which terms the hostilities have been brought to an end. There may be continuing mistrust and there may be fighting and peaceful co-operation going on at the same time.

2. Unlike the beginning of an armed conflict which often challenges other states, the Security Council, the ICRC, or other international organizations to formally react on its existence, its termination in practice is often left to the parties themselves. Formal agreements to end a non-international armed conflict are rather rare¹²⁸ and if concluded, as recently in the case of the Democratic Republic of Congo, Sudan, South-Sudan, and Syria¹²⁹ a continuation of fighting is a frequent phenomenon. A research project dealing with the matter concluded that international law contains no rule as to how long the (p. 663) cessation of hostilities needs to last for an armed conflict to be considered legally at the end.¹³⁰

3. While it may be difficult to identify a clear point in time when an armed conflict has ended, for practical purposes such definition may not be desirable, as important principles of international humanitarian law continue to apply even after the end of hostilities and it is essential for parties to the (former) conflict, to communicate with each other, establish working relationships between each other, and improve the living conditions of the victimized population.

Footnotes:

¹ A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP, 2010), 14–23.

² ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Judgment of 27 June 1986, para. 219: ‘The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.’ See also A. Paulus and M. Vashakmadze, ‘Asymmetrical war and the notion of armed conflict—a tentative conceptualization’ (2009) 91 *IRRC* 95–125.

³ ICJ, *ibid.* para. 115.

⁴ ICTY, *The Prosecutor v Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Merits (15 July 1999), paras 99–145, at 145.

⁵ Meanwhile, war crimes committed in non-international armed conflicts are penalized under Art. 8(2)(c) and (e) ICC Statute which is, however, not applicable under the ICTY Statute.

⁶ See ILC, Report on the work of its fifty-third session, Chapter IV ‘Responsibility of states for internationally wrongful acts’, UN Doc. A/56/10 (2001), 106–7.

⁷ ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, paras 402–6. For a differing view, see A. Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *EJIL* 649–68.

⁸ The *UK Manual*, para 3.4.2, requires ‘as a minimum recognition by the appropriate regional inter-governmental organization’. This would go too far. As correctly explained in Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocol of 1 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), para. 105, this idea was advanced during the negotiations on Art. 1(4) AP I, but was not adopted.

⁹ The *UK Manual*, para. 3.4.2(c) and para. 15.2.2, states that the Protocol only applies if the authority representing the peoples engaged in the armed conflict makes a special declaration in accordance with Article 96, para. 3, AP I. While declarations in accordance with Article 96, para. 3, are in the interest of humanitarian protection, it appears from the text of Art. 1, para. 4, AP I that its applicability results from the very fact of fighting for national liberation, irrespective of declarations made and of the communication of such declarations to the state party. The *ICRC Commentary on the Additional Protocols* confirms that the authority representing a people engaged in a struggle *may* make a declaration (para. 116), the effect of which would be that the Conventions and AP I would immediately come into force between the parties (para. 3767). The text of the AP I, however, does not make such declaration a condition for evaluating the conflict as international, neither does it pronounce itself on procedures under which the depositary should handle a declaration made by a national liberation movement. It may be considered that any requirement of formal acceptance by the state party to the conflict would lead to politicized uncertainties, as no government will readily offer status to insurgents, whereas special acts of acknowledgement would be inevitable with the acceptance of declarations communicated by the depositary. As spelled out in Article 96, para. 3, lit. a, the effect of a declaration made by an authority representing a people fighting a national liberation war is that the Conventions and AP I are brought into force ‘for the said authority’, while their applicability for the state parties even to this conflict is a result of their ratification of AP I rather than any kind of acceptance of the declaration made. This discussion is now of limited relevance,

as practice has shown that in the numerous armed conflicts which are currently fought Art. 1, para. 4, AP I does not apply.

¹⁰ See above, Section 3.06 and below, Section 19.19, and Section 21.02, para. 1; cf. G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979 IV) 165 *RdC* 353-445, at 434-5.

¹¹ See below, Sections 21.04 and 21.06.

¹² For this aspect, see below, Section 19.20.

¹³ The ICRC had stated in an aide-memoire submitted on 18 November 2002 to Permanent Missions in Geneva that following the convening of the Loya Jirga in Kabul in June 2002 and the subsequent establishment of an Afghan transitional government on 19 June 2002—which not only received unanimous recognition by the entire community of states but could also claim broad-based recognition within Afghanistan through the Loya Jirga process—the ICRC no longer views the ongoing military operations in Afghanistan directed against remnants of Taliban or al-Qaeda forces as an international armed conflict.

¹⁴ Associate Press, *Prisoner Abuse Bush Order*, 22 June 2004, § 2: 'I accept the legal conclusion of the Department on Justice and determine that none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world because, among other reasons, al-Qaida is not a High Contracting Party to Geneva. ... I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al-Qaida of Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character".'

¹⁵ US Supreme Court, *Hamdan v Rumsfeld et al.*, 29 June 2006, 67-72, stating that Art. 3 is applicable here and emphasizing that 'the Executive is bound to comply with the rule of law that prevails in this jurisdiction'.

¹⁶ M. Sassòli, *Transnational Armed Groups and International Humanitarian Law* (Harvard: HPCR, Occasional Paper Series, 2006), 5, considering that the military operations of Hizbollah were not attributable to Lebanon, as the Lebanese government has not authorized and was unable to stop them, although Hizbollah was represented in the Lebanese Cabinet; Report of the Commission of Enquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2 (23 November 2006), paras 8-9 and 57; for detailed consideration, see A. Zimmermann, 'The Second Lebanon War: *Jus ad bellum*, *Jus in bello* and the Issue of Proportionality', in (2007) *Max Planck Yearbook of United Nations Law* 99-141, at 110-15.

¹⁷ Supreme Court of Israel, 1. *The Public Committee Against Torture in Israel*, 2. *Palestinian Society for the Protection of Human rights and the Environment v The Government of Israel et al.*, Judgment of 13 December 2006, HCJ 769/02, para. 11.

¹⁸ G. S. Corn and E. T. Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations' (2009) 42(1) *Israel Law Review* 46-80, at 57-80. See also M. N. Schmitt, 'Classification in Future Conflict', in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (OUP, 2012), 455-77.

¹⁹ ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', Opinion Paper, March 2008, <<http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>>; ICTY *The Prosecutor v Haradinaj, Balaj, and Brahimaj*, IT-04-84-T, Trial Chamber Judgment, 3 April 2008, paras 49, 60; see also S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, 2012), 234. For an excellent evaluation

of the process of internationalization see K. Mačák, *Internationalized Armed Conflicts* (OUP, 2018).

²⁰ A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict' (1981) 30 *ICLQ* 416-39, at 425.

²¹ M. Bothe, 'Conflits armés internes et droit international humanitaire' (1978) 82 *RDGIP* 82 *et seq.*, at 92-3.

²² Constitutional Court of Colombia in Case No. C-225/95, Constitutional Review of AP II, decision of 18 May 1995, partly reproduced in M. Sassòli, A. Bouvier, and A. Quintin (eds), *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd edn (ICRC, 2011), Vol. III, 2240-55, paras 7, 14.

²³ S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, 2012), 236-42; Sivakumaran in A. Clapham, P. Gaeta, M. Sassòli (eds), *The Geneva Conventions. A Commentary* (OUP, 2015), 417-28; ICRC *Commentary on the First Geneva Convention* (CUP, 2016), 179-82; Y. Dinstein, *Non-international Armed Conflicts in International Law* (CUP, 2014), 63-73; D. Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *JCSL* 101-31, DOI: 10.1093/jcsl/kru010; K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP, 2017), 177-208.

²⁴ Geneva Call engages with armed non-State actors (ANSAs) to encourage them to comply with international humanitarian norms, <<http://www.genevacall.org/>>.

²⁵ Article 4 ICCPR, Article 15 ECHR, Article 27 ACHR, Article 4 Arab Charter on Human Rights. There is no derogation clause in the African Charter on Human and Peoples' Rights.

²⁶ See H.-P. Gasser, 'International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion?' (2002) 45 *GYIL* 149-65.

²⁷ Cullen, above (n. 1), 158.

²⁸ *ICRC Manual*, Part B, Chapter 23, para. 503.4 ('... as a matter of common sense, before it can be said that there is an armed conflict, there has to be a certain level of violence').

²⁹ See below, Section 19.09.

³⁰ Bureau Proposal, UN Doc. A/CONF/.183/C.1/L.59.

³¹ ICRC memorandum conveyed by New Zealand, UN Doc. A/CONF/.183/INF/11 (13 July 1998).

³² ICTY, *The Prosecutor v Tadić*, Appeals Chamber, Jurisdiction (2 October 1995), para. 70: '... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. See also ICTY, *The Prosecutor v Delalić et al. (Celebici)*, Case No. IT-96-21-A, Appeals Chamber (20 February 2001), para. 184.

³³ M. Boot, *Genocide, Crimes Against Humanity, War Crimes. Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, 12 School of Human Rights Research Series (Intersentia, 2002), 573-5; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court. Sources and Commentary*, with contributions by L. Doswald-Beck and R. Kolb (CUP, 2003), 441; A. Zimmermann, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999), Art. 8, no. 333.

³⁴ *Tadić*, Appeals Chamber, Jurisdiction, para. 119. For further discussion of this principle see below, Section 19.12.

- ³⁵ *Tadić*, Trial Chamber, Merits, para. 568; *The Prosecutor v Haradinaj, Balaj, and Brahimaj*, IT-04-84-T, Trial Chamber Judgment, 3 April 2008, paras 37–49; Cullen, above (n. 1), 127–30.
- ³⁶ C. Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *IsrYHR* 103–77, at 130–42, 175.
- ³⁷ R. R. Baxter, 'Some Existing Problems of Humanitarian Law' (1975) XIV *RDMilG* 297–303, at 301.
- ³⁸ J. S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary, Vol. IV* (ICRC, 1958), 44: 'This clause is essential. Without it neither Article 3, nor any other Article in its place, would ever have been adopted. It meets the fear—always the same one—that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the de jure Government's lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority and power, upon the adverse Party.'
- ³⁹ Report drawn up by the Joint Committee and presented to the Plenary Assembly, *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume II, Section B, at 129.
- ⁴⁰ This licence is limited in the sense that the denial of life and destruction caused must be consistent with international humanitarian law.
- ⁴¹ *ICRC Commentary on Art. 48 AP I*, para. 1863.
- ⁴² *ICRC Commentary on Art. 13(2) AP II*, para. 4784.
- ⁴³ Rules 6 and 7 *CIHL*; *ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities* (ICRC, 2009), 33–6.
- ⁴⁴ See, e.g., Israel Supreme Court, 1. *The Public Committee Against Torture in Israel*, 2. *Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel et al.*, Judgment of 13 December 2006, HCJ 769/02.
- ⁴⁵ Art. 52, para. 2, AP I; Art. 2, para. 6 of the amended MinesProt; Art. 1 Prot2CultPropConv; Rule 8 *CIHL*.
- ⁴⁶ Art. 35, para. 2, AP I.
- ⁴⁷ *ICRC Commentary on Art. 35, para. 2, AP I*, para. 1426.
- ⁴⁸ Y. Sandoz, 'International Humanitarian Law in the Twenty-First Century' (2006) 6–2003 *YIHL* 3–40, at 7–8.
- ⁴⁹ Art. 2, para. 1, ICCPR, Art. 14 ECHR, Art. 1, para. 1, 5 ACHR; L. Moir, *The Law of Internal Armed Conflict* (CUP, 2002), 197–8.
- ⁵⁰ K. Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (OUP, 2005), 129.
- ⁵¹ E. de Vattel, *Le Droit des Gens ou Principes du Droit Naturel* (first published Neuchâtel, 1758), J. B. Scott (ed.), *The Law of Nations* (Washington, DC: Carnegie Institute, 1916), 238.
- ⁵² M. H. Hoffman, 'The customary law of non-international armed conflict. Evidence from the United States Civil War' (1990) 277 *IRRC* 322–44, at 326; S. Vöneky, 'Der Lieber Code und die Wurzeln des modernen Kriegsvölkerrechts' (2002) 62 *ZaöRV* 423–60.
- ⁵³ Art. 152 of the Lieber Code.
- ⁵⁴ Th. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239–78, at 260–3. The existing trend towards equal application on rules of means and methods of fighting in both types of armed conflict is, although still reluctantly, widely conceded today, see K. Watkin and A. J. Norris (eds), *Non-International Armed Conflict in the Twenty-first Century*, Vol. 88 *International Law Studies* (Newport, RI: Naval War College, 2012), in particular the

contributions by W. H. Boothby (197–210), W. Heintschel v. Heinegg (211–36), and R. B. Jackson (237–59).

⁵⁵ See, e.g., J. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalised Armed Conflict' (2003) 85 *IRRC* 313; E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP, 2010).

⁵⁶ Pictet, *Commentary* (iv), 35–6, with reference to the *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume II, Section B, at 121. The ICRC has stated in its Opinion Paper, above (n. 19), that based on practice and developments in international case law, '[n]on-international armed conflicts are *protracted armed confrontations* ... that must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organization*'. The new ICRC *Commentary on the First Geneva Convention* (CUP, 2016), 435, confirms that these two criteria are 'decisive for determining the threshold of application of common Article 3'. Ongoing discussions on the exact meaning of 'intensity' and 'organization' notwithstanding (see J. K. Kleffner, 'The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict' (2019) 95 *International Law Studies* 161–78), principles of humanity must prevail in all situations.

⁵⁷ Pictet, *ibid.* See also 'Declaration of Minimum Humanitarian Standards' (Turku Declaration) of 2 December 1990 (Annex to UN Doc. E/CN.4/1996/80); No. 282 *IRRC* (1991), 328; reprinted in (1995) 89 *AJIL* 215; A. Rosas and Th. Meron, 'Combatting lawlessness in grey zone conflicts through minimum humanitarian standards' (1995) 89 *AJIL* 215.

⁵⁸ ICRC *Commentary* on Art. 1 AP II, paras 4475–8.

⁵⁹ F. F. Martin, 'Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict' (2001) 64 *Saskatchewan Law Review* 347–96; see also the discussion by J. J. Paust, L. C. Green, and F. Martin in (2002) 65 *Saskatchewan Law Review* 405–10, 411–25, 427–50, and 451–68; W. Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *EJIL* 741–67.

⁶⁰ This provision has removed controversies on the question whether such prohibition already derived from the 1925 GasProt and customary law. Riot control agents are defined in Art. II, para. 7 of the Chemical WeaponsConv as chemicals 'which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure'. While many states considered the use of riot control agents for military purposes as unacceptable, the UK had stated in 1970 that CS and other such gases were outside the scope of the GasProt. The US, on ratification of the GasProt in 1975, reserved the right to use riot control agents and chemical herbicides and declared that, as a matter of policy, such use would be restricted, see *UK Manual*, para 1.27.2.

⁶¹ Dum-Dum Bullets HagueDecl 1899; see L. Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars' in M. N. Schmitt and L. C. Green (eds), *The Law of Armed Conflicts: Into the Next Millennium*, Vol. 71 *International Law Studies* (Newport, RI: Naval War College, 1998), 39–75, at 41 and n. 7.

⁶² See Rules 75 and 77 *CIHL*. The use of dum-dum bullets is listed in Art. 8(2)(b)(xix), ICC Statute as a war crime in international armed conflicts, and after the 2010 Amendment also in Art. 8(2)(e) (xv) for non-international armed conflicts. M. Schmitt, C. Garraway, and Y. Dinstein, 'The Manual on the Law of Non-International Armed Conflict. With Commentary' (2006) 36 *IsrYHR Special Supplement* 35–6, consider it doubtful whether the prohibition of dum-dum bullets can be regarded as applicable in non-international armed conflicts, but the examples given by them clearly relate to law enforcement against

terrorists and hostage-takers rather than military operations, that is to situations which could also arise in international armed conflicts and should not be treated differently.

⁶³ *UK Manual*, Section 15.2.1.

⁶⁴ D. Fleck, 'Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?' in A. Fischer-Lescano, H.-P. Gasser, T. Marauhn, and N. Ronzitti (eds), *Frieden in Freiheit. Peace in liberty. Paix en liberté. Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos, DIKE, 2008), 391–407.

⁶⁵ *ICRC Commentary on the Preamble of AP II*, para. 4435.

⁶⁶ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Judgment of 27 June 1986 (para. 218). Because of a reservation made by the US in accepting the jurisdiction, the ICJ could not apply multilateral treaties to the facts of this case, but had to rely on the customary nature of the relevant rules.

⁶⁷ ICJ, *ibid.*; ICTY, *The Prosecutor v Tadić*, Appeals Chamber, Jurisdiction (2 October 1995), paras. 89, 98; *The Prosecutor v Kunarac et al.*, Judgment of 22 February 2001, para. 68; *CIHL Vol. I*, xliv.

⁶⁸ A. Clapham, *Human Rights Obligations of Non-State Actors* (OUP, 2006), 58, 280; A. Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors', in Ph. Alston (ed.), *Non-State Actors and Human Rights* (OUP, 2005), 37–89 [69–72]; C. Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in H. Fischer, U. Froissart, W. Heintschel v. Heinegg, and C. Raap (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag, 2004), 573–91 [at 588–91].

⁶⁹ See, e.g., Agreement of 22 May 1992 concluded at the invitation of the ICRC between the Parties to the Bosnian conflict, M. Sassòli, A. Bouvier, and A. Quintin (eds), *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd edn (ICRC, 2011), 1112; Agreement between UNICEF and Sudan People's Liberation Movement-United (SPLM-United) on Ground Rules for Operation Lifeline Sudan, May 1996, <<http://www.c-r.org/accord-article/operation-lifeline-sudan>>. For further information on humanitarian negotiations with armed groups in Afghanistan, Angola, Bosnia and Herzegovina, Burma/Myanmar, Burundi, Colombia, Democratic Republic of Congo, Liberia, Sierra Leone, Sri Lanka, Sudan, Tajikistan, Turkmenistan, Uganda, and Uzbekistan, see <<http://ochaonline.un.org/humanitariannegotiations/Documents/Bibliography%20docs/AnnexII.htm>>. Similar practices were relevant for the conflicts in Yemen 1962, Nigeria 1967, El Salvador (FMNL) 1990; and The Philippines (NDFP) 1998.

⁷⁰ See above (n. 24).

⁷¹ D. Kritsiotis, 'International Humanitarian Law and the Disintegration of States' 30 *IsrYHR Special Supplement* (2001), 17–35, at 22.

⁷² ICTY, *The Prosecutor v Tadić*, Appeals Chamber, Jurisdiction (2 October 1995), para. 117.

⁷³ Report of the Second Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, CCW/CONF.II/MC.I/CRP.1/Rev.1, 20 December 2001, <<http://www.icrc.org/eng/resources/documents/misc/59kc84.htm>>.

⁷⁴ The Conference decided to amend Article 1 of the Convention to read as follows: '1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions. 2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts. 3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols. 4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State. 5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs. 6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly. 7. The provisions of Paragraphs 2-6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article.' The Conference also recognized the right of a state party to take legitimate measures to maintain or re-establish law and order in accordance with paragraph 4 of amended Art. 1 of the Convention. It encouraged all states parties to deposit as soon as possible their instrument of ratification, acceptance, approval, or accession of the amendment to Art. 1 with the UN Secretary General as Depositary of the Convention.

⁷⁵ D. Kaye and St. A. Solomon, 'The Second Review Conference of the 1980 Convention on Certain Conventional Weapons' (2002) 96 *AJIL* 922-36.

⁷⁶ S. Maslen, *Commentaries on Arms Control Treaties, Vol. I, The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (OUP, 2004), 75.

⁷⁷ J.-M. Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87 No. 857 *IRRC* 175-212, at 189.

⁷⁸ Rules 1-2, 5-6, 7-24, 46-8, 50, and 52-105 *CIHL*.

⁷⁹ Rules 25-45, 55-6, 109-13, 115-29, and 131-8 *CIHL*.

⁸⁰ See above (n. 32), para. 119.

⁸¹ See, e.g., Schmitt/Garraway/Dinstein, above (n. 62).

⁸² A. Cassese, *International Law*, 2nd edn (OUP, 2005), 430.

⁸³ Reports of the Secretary General on Fundamental Standards of Humanity: UN Doc. E/CN.4/1998/87 (5 January 1998); E/CN.4/1999/92 (18 December 1998); E/CN.4/2000/94 (27 December 1999); E/CN.4/2001/91 (12 January 2001); E/CN.4/2002/103 (20 December 2001); see also Report of the Expert Meeting on Fundamental Standards of Humanity

(Stockholm, 22–4 February 2000); E/CN.4/2000/145 (4 April 2000); Special Issue: Laying the Foundation for a Convention on Crimes Against Humanity, Vol. 16/4 *JICJ* (2018).

84 General Comment No. 29 on Article 4 of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev. 1/Add.11).

85 UN Doc. A/56/10; J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (OUP, 2010).

86 ICTY, *Prosecutor v Kordić and Cerkez* (26 February 2001); *Prosecutor v Kristić* (2 August 2001); *Prosecutor v Delalić et al. (Celebici)* (20 February 2001); *Prosecutor v Kunarac et al.* (22 February 2001); *Prosecutor v Furundžija* (10 December 1998); *Prosecutor v Tadić*, Appeal on Jurisdiction (2 October 1995). See also ICTR, *Prosecutor v Kambanda* (19 October 2000).

87 Reports of the Secretary General to the Security Council on the protection of civilians in armed conflict (UN Doc. S/1999/957 of 8 September 1999 and S/2001/331 of 30 March 2001); Report of the Secretary General on prevention of armed conflict (UN Doc. A/55/985–S/2001/574 of 7 June 2001).

88 SC/RES/1265 (1999) and SC/RES/1296(2000), see also Minutes of the 4312th meeting of the Security Council on 23 April 2001 (UN Doc. S/PV.4312 and Resumption 1) and of the 4334th meeting of the Security Council on 21 June 2001 (UN Doc. S/PV.4334 and Resumption 1); Letter dated 21 June 2001 from the President of the Security Council addressed to the Secretary-General (UN Doc. S/2001/614). 4424th meeting of the Security Council on 21 November 2001 (UN Doc. S/PV.4424).

89 Statement by the President of the Security Council with Annex: Aide Memoire for the consideration of issues pertaining to the protection of civilians in armed conflict, UN Doc. S/PRST/201/25 (22 November 2010).

90 C. Stahn, 'NGOs and International Peacekeeping—Issues, Prospects and Lessons Learned' (2001) 61 *ZaöRV* 379–401.

91 D. Fleck, 'Humanitarian Protection Against Non-State Actors', in J. A. Frowein, K. Scharioth, I. Winkelmann, and R. Wolfrum (eds), *Verhandeln für den Frieden/Negotiating for Peace. Liber Amicorum Tono Eitel* (Heidelberg: Springer, 2003), 69–94; D. Fleck, 'The Role of Individuals in International Humanitarian Law and Challenges for States in Its Development', in M. N. Schmitt & L. C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (1998) 71 *International Law Studies* 119–39; C. Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements', in H. Fischer, U. Froissart, W. Heintschel v. Heinegg, and C. Raap (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag, 2004), 573–91.

92 Rule 14 *CIHL*.

93 Rules 3–4, 106–8 *CIHL*.

94 Rules 49 and 51 *CIHL*.

95 Rule 128 *CIHL*.

96 Rules 145–8 *CIHL*.

97 M. Newton and L. May, *Proportionality in International Law* (OUP, 2014), 290.

98 *Ibid*, 291.

99 *CIHL*, Vol. I, 384.

- 100** W. A. Solf, 'The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice' (1983) 33 *American University International Law Review* 53.
- 101** Rule 49 *CIHL*.
- 102** Rule 51 *CIHL*.
- 103** *CIHL*, Vol. I, 174.
- 104** Art. 118 GC III.
- 105** Art. 132, 133 GC IV.
- 106** Rule 128 *CIHL*.
- 107** Rules 145-7 *CIHL*; *see above*, Sections 7.42-7.45.
- 108** Rule 148 *CIHL*.
- 109** Rules 87-105, 112-38 *CIHL*.
- 110** Schmitt/Garraway/Dinstein, *above* (n. 62).
- 111** *US Naval Manual*, 402-3: 'Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war fighting capability may also be attacked.' This opinion is controversial in itself, *see San Remo Manual*, para. 40.12: 'The Round Table considered whether or not it should include the expression "military action" or some alternative expression such as "war effort" or "war sustaining effort" and eventually decided that these alternative expressions were too broad.'
- 112** *See above*, Section 3.09, para. 6.
- 113** DoD Directive 5100.77 of 10 July 1979, restated in DoD Directive 2311.01E of 9 May 2006, DoD Law of War Program, Section 4.1. *See also* US Army, Judge Advocate General's Legal Center and School, *Operational Law Handbook* (2019), Chapter 2 III; Department of Defense *Law of War Manual* (2015), Chapter 17.2.
- 114** *German Manual* 1992, Section 211.
- 115** International Institute of Humanitarian Law, 'Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts' (1990) 278 *IRRC* 404-8.
- 116** England and Wales Court of Appeal, *Abbasi et al. v Secretary of State for the Foreign and Commonwealth Office* [2002] EWCA Civ. 1598, para. 29. *See also* IACtHR, *Habeas Corpus in Emergency Situations*, Advisory Opinions OC-8/87 of 30 January 1987, Series A No. 8 (1987), para. 42, and OC-9/87 of 6 October 1987, Series A No. 9 (1987), para. 1: '“writs of habeas corpus” [...] are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited [...] and that they serve, moreover, to preserve legality in a democratic society'. The arguments of the IACtHR, developed in implementation of Arts 7 and 27 ACHR, are fully applicable to Art. 4 ICCPR.
- 117** For an instructive description of the progressive development of binding obligations of non-state actors with respect to humanitarian assistance, *see* M. E. O'Connell, 'Humanitarian Assistance in Non-International Armed Conflict, The Fourth Wave of Rights, Duties and Remedies' (2002) 31 *IsrYHR* 183-217.
- 118** Schmitt/Garraway/Dinstein, *above* (n. 62).
- 119** O. Bangerter, 'Reasons why armed groups choose to respect IHL or not' (2011) 93 No. 882 *IRRC* 1-32; M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1 *International Humanitarian Legal Studies* 5-51; C. Bruderlein, 'The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars' (Geneva: Centre for Humanitarian

Dialogue, 2000), <https://www.google.de/search?q=Claude+Bruderlein%2C+%E2%80%98The+Role+of+Non-State+Actors+in+Building+Human+Security%3A.+The+Case+of+Armed+Groups+in+Intra-State+Wars%E2%80%99&rlz=1C1AVSX_EnDE406DE410&aq=f&oq=Claude+Bruderlein%2C+%E2%80%98The+Role+of+Non-State+Actors+in+Building+Human+Security%3A.+The+Case+of+Armed+Groups+in+Intra-State+Wars%E2%80%99&aqs=chrome.0.57j60.3113j0&sourceid=chrome&ie=UTF-8>, 10; S. Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *ICLQ* 369-94.

120 Kress, above (n. 36).

121 Pictet, above (n. 38); *Commentary* I (1952), Article 1, 28; *Commentary* II (1960), Article 1, 26; *Commentary* III (1960), Article 1, 18; *Commentary* IV (1958), Article 1, 16.

122 See F. Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 *YIHL* 3-61, at 54; B. Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1*, (Berlin: Duncker & Humblot, 2001); B. Kessler, 'The Duty to "Ensure Respect" Under Common Art. 1 of the Geneva Conventions: Its Implication in International and Non-International Armed Conflicts' (2001) 44 *GYIL* 498-516.

123 Rule 139 *CIHL*.

124 Rule 140 *CIHL*. B. Simma, 'Reciprocity', *MPEPIL*, paras 6 and 8, seems to deny this, questioning the absolute character of human rights and humanitarian obligations. Yet, a difference should be made between 'normative' treaties and 'contract' treaties essentially codifying a *quid pro quo* between two categories of state parties; it should be considered that general participation clauses are no longer part of international humanitarian law; and the potential impact of behaviour should not be confused with the existence of a legal obligation.

125 See above, Section 19.01, para. 5, lit. c.

126 Rule 159 *CIHL*; Vol. I *CIHL*, 611-14; Vol. II/2 *CIHL*, 4017-44.

127 D. Fleck, 'International Humanitarian Law After September 11: Challenges and the Need to Respond' (2003) 6 *YIHL* 41-71, at 65-7.

128 C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP, 2008); C. Bell, *Peace Agreements and Human Rights* (OUP, 2000).

129 See Geneva Academy of International Humanitarian Law and Human Rights, *The Rule of Law in Armed Conflicts (RULAC)*, <http://www.rulac.org>.

130 ILA Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law', ILA (ed.), *Report of the Seventy-Fourth Conference*, The Hague, 2010, (London: ILA, 2010), 676-721, at 712.

(p. 353) Chapter 14 Internal (Non-International) Armed Conflict

1. Introduction

By definition, the law of armed conflict only applies to armed conflicts. This raises the question; when is there an armed conflict?¹ This is a question of fact that precedes the law as '*l'existence précède l'essence*'.²

Originally, the law of armed conflict only applied to international armed conflicts, not because civil wars did not exist, but simply because states felt that such conflicts pertained to the sphere of their domestic affairs and they were not prepared to allow international regulation of this type of situation.³ As is well known, the first international humanitarian law (IHL) instruments date back to the 1864 Geneva Convention and the 1868 Saint-Petersburg Declaration, while the first codifications of IHL date back to the 1899 and 1907 Hague Conventions. Yet all those rules only applied to conventional international wars. The first text which expressly addressed (p. 354) non-international armed conflicts was Article 3 common to the four 1949 Geneva Conventions (GCs). The resistance of some states at that time to include this provision in the GCs was yet another demonstration of the reluctance of states to regulate internal armed conflicts at the international level.⁴

Things have changed today. Article 3 common to the four 1949 GCs—a single Article, out of about 400 provisions contained in the GCs—has been joined by an increasing number of provisions that regulate internal armed conflicts. Thus, 18 substantive provisions of the second Additional Protocol of 1977 (AP II) to the 1949 GCs have been devoted entirely to non-international armed conflicts. The criminalization as war crimes of serious violations of Common Article 3 and other rules applicable to non-international armed conflicts, however, has come as a later development in customary international law, as recognized by the seminal 1995 decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*,⁵ and in part codified by Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), adopted in 1994 by the Security Council.⁶

The quantitative development of norms applicable to internal armed conflicts was confirmed in the recent ICRC Study on Customary International Humanitarian Law (2005), that shows that among the 161 rules contained in the study, at least 137 (and perhaps even 144 rules) are applicable to both non-international and international armed conflicts.⁷

This Chapter will briefly examine the variety and complexity of IHL rules applicable to non-international armed conflicts (NIACs), and then turn to the criteria for identifying the existence of a non-international armed conflict.⁸

2 The Variety and Complexity of IHL Rules on NIACs

The IHL rules applicable to NIACs are essentially the following:

- Article 3 common to the 1949 GC;
- Article 19 of the 1954 Hague Convention for the Protection of Cultural Property (1954 Hague Convention); (p. 355)
- the 1977 AP II to the 1949 GC;
- Article 2, paragraph 2 (c-f), of the Statute of the International Criminal Court adopted in Rome on 17 July 1998;

- Article 22 of the Hague Protocol of 26 March 1999;
- the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (hereafter: 'the 1980 Convention'), as amended on 21 December 2001 with the result that its five Protocols are now applicable to NIACs for the states parties which have accepted the amendment made in 2001;
- the majority of customary IHL rules defined and published by the ICRC Study.⁹

Among the above, AP II is the only conventional instrument fully dedicated to NIACs.¹⁰

Not all the rules mentioned above, however, apply to all kinds of NIACs. While Common Article 3 and Article 19 of the 1954 Hague Convention apply to any non-international armed conflict, AP II only applies to a specific category of NIAC, namely one which takes place in the territory of a state between its armed forces and dissident armed forces or other organized armed groups exercising control over a part of its territory. Article 8 paragraph 2(f) of the ICC Statute adds more complexity, since it states that it applies to protracted NIACs which take place in the territory of one state between governmental authorities and organized armed groups or between such groups.

Today, it seems no longer very useful to consider the detail of these provisions and the situations they govern: adopted in 1949, 1954, 1977, and 1998, these rules have changed, and the Statute of the ICC, given its recent adoption, seems largely to express the current state of customary international law. (The ICRC Study on Customary IHL has not dealt with the issue of the definition of non-international armed conflict, and it is not therefore a point of reference in this respect.)

However, it is important to observe that all the rules mentioned above share a common element: since the adoption in 1977 of AP II, they state that they do not govern situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature (AP II, Article 1 paragraph 2; the 1999 Protocol to the 1954 Hague Convention, Article 22 paragraph 2; the 1980 Convention amended in 2001, Article 2; and the ICC Statute, Article 8 paragraph 2(d)). It is therefore vital to distinguish between armed conflict and internal disturbances and tensions, as we shall see below.(p. 356)

3 The Criteria for Definition of Internal Armed Conflicts

In the *Tadić* case, the ICTY Trial Chamber maintained:

The two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, are used 'solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.¹¹

To distinguish an armed conflict from banditry, terrorism, and short rebellions, the nature of hostilities and the quality of the actors will serve as defining criteria.

A. The nature of hostilities

The *Tadić* judgment just cited requires that hostilities reach a certain level of intensity, ie a certain level of gravity and duration.

(i) The gravity of hostilities

NIACs involve open hostilities between the warring parties. Some examples show what the case law considers as open hostilities. Thus, concerning the question of whether the clashes between the UÇK (*Ushtria Çlirimtare e Kosovës* or Kosovo Liberation Army) and the Serb forces in Kosovo in the 1990s amounted to an armed conflict, the ICTY noted that,

- from February to July 1998, the UÇK had attacked villages and even cities;
- the UÇK had closed roads, established checkpoints;
- in June 1998, the UNHCR counted 15,000 refugees in Montenegro who had fled Kosovo.¹²

In another case, the ICTY found that

- the number of attacks by the KLA increased from nine in 1995 to 1486 in 1998;
- these attacks were directed against civilians and Serbian police or security;
- buildings had been bombed;
- the conflict fulfilled the criterion of intensity so that one could speak of armed conflict.¹³

Concerning the violence that took place in the Central African Republic (CAR), the ICC Pre-Trial Chamber noted that the former Chief of Staff of the CAR Armed (p. 357) Forces (FACA), Fr Bozize, 'led mainly dissident FACA forces towards Bangui',¹⁴ in October 2002, in order to overthrow President Patassé; JP Bemba sent between 1000 and 1500 soldiers of the Movement for the Liberation of Congo (MLC) to assist Patassé in repelling the FACA;¹⁵ and according to witness accounts:

- the MLC forces engaged 'in combat' and established 'their strategic bases';
- 'the conflict was of a certain intensity'.¹⁶

Therefore, the ICC Pre-Trial Chamber found there was an armed conflict in the CAR.

In short, hostilities must reach a magnitude that requires confrontation almost similar to those between regular armies.¹⁷

(ii) The duration of hostilities

Article 8 paragraph 2(f), of the ICC Statute refers to 'protracted armed conflict'. In 1995, the ICTY had already limited non-international armed conflict by reference to 'protracted armed violence':

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.¹⁸

How does one define a protracted armed conflict? The ICTY has held that crimes committed in Bosnia-Herzegovina, in April 1993, were part of a 'protracted conflict', because, in this territory, 'in the time following October 1992 there was serious fighting for an extended period of time'.¹⁹ The Pre-Trial Chamber of the ICC held that clashes during a period of five months (late October 2002 to mid-March 2003) were 'to be regarded as "protracted" in any event';²⁰ *a fortiori* the hostilities that stretched from July 2002 until end 2003 in Ituri,²¹ or the Darfur conflict in 2003-04²² are obviously protracted hostilities.

However, the protracted nature of the armed conflict does not seem to be a condition for the applicability of Common Article 3. Thus, the Inter-American (p. 358) Commission of

Human Rights ruled that a clash of 30 hours between the Argentine army and rebel soldiers was governed by Common Article 3 due to:

the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question.²³

It added:

More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, *i.e.*, a military operation against a quintessential military objective—a military base. The officer in charge of the Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as commander-in-chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers. [...] Despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Art. 3, as well as other rules relevant to the conduct of internal hostilities.²⁴

This finding suggests that the criterion of protracted conflict affects only the application of AP II and Article 8 paragraph 2(e)–(f), of the ICC Statute, not the application of Common Article 3 of GC.

B. The nature of the actors

As in international armed conflicts, the nature of the actors in an armed conflict is a fundamental criterion for the application of IHL. Once an international armed conflict opposes states or international organizations, the public nature of the actors does not raise many difficulties since states and international organizations are, by definition, statutory bodies that can assume the acts of their forces and be legally accountable for them. IHL being premised on oppositions between armed actors under public international law, this criterion should be reflected in IHL applicable to non-international armed conflicts to the extent that IHL must also determine which entities are responsible for the actions of their forces and can therefore be accountable for them on the international plane. The texts are not this specific, but a logical interpretation leads us to this conclusion. At the Diplomatic Conference of 1949, states had already stressed that the conflicts referred to in the future Common Article 3 only concerned warring parties recognized as such by the legal government and having the characteristics of a state or a governmental authority,²⁵ but these criteria were then abandoned because of the difficulties of their application.²⁶(p. 359)

In the case of an insurgency against a government, the latter is clearly an actor under public international law. In contrast, the insurgent authorities fulfil this criterion only to the extent they meet the definition of an ‘organized armed group’, an expression found in Article 1(1) of AP II, in Article 8(2)(f) of the Rome Statute of the ICC, and in the cases quoted above.

If the concept of ‘state’ is fairly simple to define in international law,²⁷ that of ‘organized armed group’ requires some elaboration. It is clear from the jurisprudence and practice that an organized armed group is characterized by the fact that, first, it exerts a form of public power (i), secondly, it is responsible and identifiable (ii).

(i) A form of public power

Article 1(1) of AP II refers to ‘organized armed groups [...] under responsible command’. According to the commentary to this provision, the group in question must be organized,

not as a regular army, but in a way to ensure a military strategy and impose discipline on the group's forces:

It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority.²⁸

Thus, the ICTY, in cases relating to Kosovo, showed that the crimes imputed to the accused were committed in an armed conflict and that the UÇK met the criteria of an organized group; to this end, the Trial Chamber noted that:

- the UÇK had established an embryo of administrative organization of the territory of Kosovo;
- Kosovo was divided into seven areas of command;
- the UÇK forces were surrounded and subjected to a hierarchic military command;
- the supply of arms was organized.

The Chamber also says:

With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms. [...] progressively from late May to late August 1998 the territory of Kosovo was divided by the KLA into seven zones [...] the KLA soldiers were provided with military training.²⁹

The Chamber further notes that the leadership of the UÇK:

- was making public statements, coordinating military actions, regulated the duties of commanders; (p. 360)
- had established a military police, provided military uniforms to its forces, was negotiating with the EU diplomatic missions in Belgrade, was considered a key player in political negotiations to resolve the Kosovo problem.³⁰

The ICC has made a similar analysis, determining the clashes which occurred in Ituri (Eastern Congo) in 2002-03 between 'organized local armed groups' (UPC/FPLC, FNI, FRPI PUSIC) to be an 'armed conflict' because these groups:

- (i) had a certain degree of organization, insofar as such groups acted under a responsible command and had an operative internal disciplinary system; and
- (ii) had the capacity to plan and carry out sustained and concerted military operations, insofar as they held control of parts of the territory of the Ituri District.³¹

An organized armed group must not necessarily have a legal personality since no text requires or suggests this. In a different context, the European Union (EU) Council's Common Position 2001/931/CFSP provides for measures to fight terrorism committed by 'groups and entities' (Article 1);³² interestingly, the EU General Court ruled that the expression could refer to 'any other types of social organisations which although they do not have legal personality nonetheless exist in a more or less structured form'.³³ This finding could be applied to organized groups involved in a non-international armed conflict.

(ii) An accountable and identifiable power

The concept of 'responsible authority' is linked to that of responsible command that appears in IHL with regard to resistance movements (Hague Regulations, Article 1; GC III, Article 4A(2)(a)). The underlying idea is that the 'person responsible' for acts of his/her forces will ensure 'the discipline which must prevail in volunteer corps'.³⁴ However, it is reasonable to think that the concept of command responsibility goes further and implies the idea of a responsible authority at the international level. In 1874 at the time of the Brussels Declaration, which became the model for the second Hague Convention of 1899, in 1907 the time of the Hague Conventions, and in 1949 when the Geneva Conventions were adopted, the authority was the state. Today, an organized armed group may also appear as a subject of international law and bear responsibility for the actions of its armed forces, provided it is 'organized' (see above) and identifiable (see below).(p. 361)

Thus, the ICTR suggests, incidentally, that violations of Common Article 3 of the GCs and AP II committed during the conflict in Rwanda in April-July 1994, could be imputed to the parties to the conflict by reason of the governmental character of one of the parties, the organized nature of the other and its submission to a responsible command:

The ability of the governmental armed forces to comply with the provisions of such instruments is axiomatic. In the instant case, the two armies were well organised and participated in the military operations under responsible military command. Therefore, based on Art. 6 (1) of the ICTR Statute, it could be concluded that the appropriate members of the FAR and RPF shall be responsible individually for violations of Common Article 3 and Protocol II if factually proven.³⁵

The ICC links organization of the armed group and responsible command because, as the Pre-Trial Chamber of the Court said with regard to Article 1(1) of AP II:

responsible command impl[ies] some degree of organization of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol.³⁶

The criterion of responsible command, however, has meaning only insofar as it is known and accessible, like a state. It must therefore be identifiable. In 2004, the ICRC best demonstrated the link that must exist between the existence of an identifiable party and the application of IHL:

Armed conflict of any type requires a certain intensity of violence and, among other things, the existence of opposing parties. Party to an armed conflict is usually understood to mean armed force or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law. The very logic underlying IHL requires *identifiable* parties in the above sense because this body of law—while not parties' legal status—establishes equality of rights and obligations among them under IHL [...] In the case at hand, it is difficult to see how a loosely connected, clandestine network of cells... could qualify as a "party" to the conflict.³⁷

Three years later, the ICRC repeats the same idea:

The parties to the conflict have to be *identifiable*, i.e. they must have a minimum of organization and structure, and a chain of command.³⁸

One can understand the logic of limiting the application of IHL to hostilities where the parties to the conflict are responsible and identifiable: this allows (p. 362) authorities to determine who can and should be held responsible for violations of IHL. To ensure accountability of the parties to the conflict, they must be known or at least be identifiable, like a state authority. Thus, the Al Qaeda group has no address in the phone book! On the other hand, the People's Mojahedin Organization of Iran is acting under the authority of the National Council of Resistance for Iran, whose members are known; therefore, its armed actions against a regime which, since 1980, continues to attack parts of the population, amount to episodes of an armed conflict fully regulated by IHL. *In casu*, the characterization of 'armed conflict' seems even more justified as today the ICTY jurisprudence equates the mistreatment of a civilian population to 'armed attacks'.³⁹

4 Concluding Remarks

It is clear that a NIAC falls within the scope of IHL only if the criteria of intensity (open hostilities) and nature of the belligerents (responsible and identifiable actors) are satisfied. The underlying idea is that the application of IHL requires a degree of external accountability of the protagonists so that they can appear as actual 'parties to the conflict': states are willing to accept the applicability of IHL to armed hostilities on condition that the actors demonstrate their ability to 'play the game' like 'big boys'. If this condition is not met, the situation is not outside the law, but it falls more under the domestic law of the state, without prejudice to the application of international rules other than those found in IHL—namely human rights law and international criminal law.

In substance, any situation of NIAC meeting the aforementioned conditions of intensity of hostilities and accountability of the parties is governed by Common Article 3, Article 19 of the 1954 Hague Convention, its 1999 Protocol, the 1980 Convention as amended in 2001, and Article 8 (2)(c) of the Rome Statute of the ICC. If, moreover, the conflict is protracted, it also falls under Article 8(2)(e)-(f) of the Rome Statute of the ICC and AP II interpreted in the light of this provision of the Statute.

Footnotes:

¹ See *amplius* E. David, *Principes de droit des conflits armés* (5th edn, Bruxelles: Bruylant, 2012) § 1.45ff.

² J.-P. Sartre, *L'existentialisme est un humanisme* (Paris: Nagel, 1946), 29.

³ Cf Burma's position in 1949, in *Actes de la conférence diplomatique de Genève de 1949*, Berne, Département politique fédéral, nd, T. II, B, 320–3.

⁴ Cf Burma's position in 1949 (n 3), 322–6.

⁵ ICTY Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, §§ 128–34.

⁶ S/RES/955, 8 November 1994.

⁷ See David (n 1) § 1.63.

⁸ For further reading see eg S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012); A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010); E. La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge: Cambridge University Press, 2008); L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002).

- ⁹ L. Doswald-Beck and J.-M. Henckaerts, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), 3 vols.
- ¹⁰ On the difficulties relating to the adoption of this Protocol, see David (n 1), § 1.64.
- ¹¹ ICTY, *Tadić*, Trial Judgment, 7 May 1997, § 562.
- ¹² ICTY, *Limaj*, Trial Judgment, 30 November 2005, §§ 135–73.
- ¹³ ICTY, *Haradinaj et al*, Trial Judgment, 3 April 2008, §§ 90–9.
- ¹⁴ ICC, Pre-Trial Chamber, *Bemba*, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo*, 15 June 2009, § 240.
- ¹⁵ *Bemba*, *Decision* (n 14), §§ 340–4.
- ¹⁶ *Bemba*, *Decision*, (n 14), § 244.
- ¹⁷ For other examples drawn from practice, see David, (n 1), § 1.84.
- ¹⁸ ICTY, Appeals Chamber, *Tadić*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, §§ 128–34, § 70; ICTY, *Tadić*, Trial Judgment, 7 May 1997, §§ 561ff; ICTY, *Aleksovski*, Trial Judgment, 25 June 1999, § 43; ICTY, *Jelisić*, Trial Judgment, 14 December 1999, § 29.
- ¹⁹ ICTY, *Kordić et Čerkez*, 17 December 2004, § 341.
- ²⁰ ICC, *Bemba*, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo*, 15 June 2009, §§ 235, 248–55.
- ²¹ ICC, *Katanga*, Pre-Trial Chamber, *Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga*, 5 November 2007, § 28.
- ²² ICC, *Al Bashir*, Pre-Trial Chamber, *Decision on the Prosecutor's Application for a Warrant of Arrest*, 4 March 2009, § 63.
- ²³ Case No 11.137, *Abella* case, 18 November 1997, § 155.
- ²⁴ Case No 11.137, *Abella* case, 18 November 1997, § 155.
- ²⁵ *Actes* (n 3), 119.
- ²⁶ See intervention of Switzerland, *Actes* (n 3), 330–1.
- ²⁷ Cf T.A.M., *Deutsche Continental Gas-Gesellschaft*, 1 August 1929, *Recueil*, IX, 336; Montevideo Convention of 26 December 1933 on the Rights and Duties of States, Art 1; Arb Comm of the EC, 29 November 1991, *RGDIP* (1992), 264.
- ²⁸ Commentary AP I and II, § 4463.
- ²⁹ ICTY, *Limaj et al*, Trial Judgment, 30 November 2005, §§ 90, 95, 119.
- ³⁰ *Limaj et al* (n 29), §§ 100, 103, 108, 112, 123, 125, 129; also, ICTY, *Haradinaj et al*, Trial Judgment, 29 November 2012, §§ 402–5, 410.
- ³¹ ICC, *Katanga et Ngudjolo Chui*, Pre-Trial Chamber, *Decision on the Confirmation of Charges*, 30 September 2008, § 239; in the same way, ICC, *Lubanga*, Pre-Trial Chamber, *Decision on the Confirmation of Charges*, 29 January 2007, § 234; ICC, *Bemba*, Pre-Trial Chamber, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo*, 15 June 2009, § 234.
- ³² OJEC L 344/93 of 28 December 2001.
- ³³ Case T-348/07, *Al-Aqsa*, 9 September 2010, § 58.

34 Commentary GC III, 59.

35 ICTR, *Kayishema and Ruzindana*, Trial Judgment, 21 May 1999, § 174.

36 ICC, *Lubanga*, Pre-Trial Chamber, *Decision on the Confirmation of Charges*, 29 January 2007, § 232.

37 Excerpts of the Report prepared by the ICRC for the 28th International Conference of the Red Cross, *IRRC*, 2004, 234 (emphasis added).

38 *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, 2008, 7 (emphasis added).

39 ICTY, *Kunarac*, Appeals Judgment, 12 June 2002, § 86; *Stakić*, Trial Judgment, 31 July 2003, § 623.

(p. 664) 20 The Law of International Peace Operations

I. General

20.01

International peace operations comprise all peacekeeping operations and peace enforcement operations conducted in support of diplomatic efforts to establish and maintain peace. The modern concept of peace operations goes beyond traditional peacekeeping, as it combines elements of peacekeeping with peacemaking and peacebuilding.

1. Introduction. The international community is engaged worldwide in operations in which armed forces and other governmental agencies, such as police are deployed to establish, maintain, and secure peace. A clear distinction could be made between operations led by the United Nations and missions led by regional or sub-regional organizations. Most of the operations today are deployed with complex mandates to support national authorities to rebuild a nation after often lengthy periods of conflict. Peace operations are mandated to assist in providing security and public order to host populations but also to support the introduction or restoration of basic essential services, such as governmental structure in which democratic representation take place, an independent, impartial justice delivery system, and to help begin to tackle the root causes of conflict, which is essential in achieving sustainable peace and development.¹

2. Peace operations, historical development. Peacekeeping is a technique pioneered and developed by the United Nations that defies simple definition. It is based on the principle that an impartial presence of multinational troops on the ground can ease tensions and allow negotiated solutions in a conflict situation. Peacekeepers have patrolled buffer zones between hostile parties, monitored ceasefires and helped defuse local conflicts, allowing the search for durable, political settlements to continue. Lightly armed troops or unarmed military observers from around the world were sent to observe ceasefire agreements. The 'entry strategy' and decisions leading to deployment was straightforward: war, ceasefire, invitation to monitor ceasefire compliance and deployment of military observers or units to do so, while efforts continued for a political settlement.

(p. 665) **3. United Nations peace operations, period 1948–1988.** In May 1948, the Security Council decided to establish a field operation to assist the United Nations Mediator and the Truce Commission in supervising the observance of the truce in Palestine. Two weeks later, an initial group of thirty-six unarmed military observers arrived in the Middle East as the first United Nations peacekeepers establishing UNTSO.² Soon after, the conflict between India and Pakistan over Kashmir led to the establishment of UNMOGIP³ with functions of monitoring ceasefires and reporting on the situation. UNEF I⁴ was the first armed mission and the first to be labelled peacekeeping. Until 1988, missions were usually established in a stable environment with limited means and a limited mandate, maintaining a neutral position and essentially with the sole function of monitoring the situation. Peacekeepers were not authorized to use force to fulfil their mandate; force was only to be used in self-defence. An important exception was the 1961 intervention in Congo. ONUC⁵ had been the largest operation until the 1990s. It was the first intervention under conditions of violent civil conflict and the first case of peacekeeping combined with peace enforcement, authorized by the UN Security Council. Because of the violence involved, and the ambiguity concerning the mandate of the operation, for a long time ONUC was also an example of how

not to conduct a peacekeeping operation. All subsequent missions were limited in number and scope, and no new operation was established between 1978 and 1988.

4. *United Nations peace operations (1989–2003).* With the end of the Cold War, the Security Council looked to UN peacekeeping as the instrument of choice for international conflict management. UN peacekeeping successfully transformed itself into a mechanism for not only observing ceasefire agreements, but also for implementing comprehensive peace agreements.⁶ In Namibia, El Salvador, and Mozambique, this newly retooled instrument of UN peacekeeping was quite successful. In these more complex and dangerous missions, peacekeepers were regularly authorized to use force in the context of their mandate. The humanitarian mission in Northern Iraq⁷ was the first mission authorized to use force, not as a measure of peace enforcement but to guarantee the protection of the population and the delivery of assistance. Traditional UN peacekeeping operations have shifted in the course of an evolving conflict from Chapter VI to Chapter VII, such as the case of Somalia.⁸

(p. 666) **5. *United Nations peace operations (2004–2006).*** In 2004–2006, nine UN peace operations have been launched or expanded: Burundi (ONUB), Côte d’Ivoire (UNOCI), the Democratic Republic of Congo (MONUC), Haiti (MINUSTAH), Iraq (UNMI), Lebanon (UNIFIL), Liberia (UNMIL), Sudan (UNMIS) and Timor Leste (UNMIT), while four have drawn-down or closed: Burundi (ONUB), Kosovo (UNMIK), Sierra Leone (UNAMSIL) and Timor Leste (UNMISSET).⁹ As 2019 drew to a close, almost 98,000 men and women were deployed in thirteen peace operations around the world, of which approximately 84,000 were troops, police, and military observers provided by 121 contributing countries.¹⁰ This adds up to a broad range of mandated tasks, each of which demands appropriate—and often significant—focus, expertise, and resources in the field and in headquarters. It also demands a much higher degree of mission integration at every level and phase. Such expanded activity takes place in environments that are often volatile and insecure and where, despite the establishment of a peace agreement, the presence of UN peacekeepers may be resisted by factions and armed groups that remain outside of a peace process. In these unstable contexts, UN field missions are required to operate at high levels of sensitivity and risk, complicating the implementation of complex tasks and engagement with those local populations most in need of support. Even where political and security conditions are favourable, the operational challenges for peace operations are daunting.¹¹

6. *United Nations peace operations (2007–2019).* From 2007 to 2019, in total seven new UN peace operations have been launched.¹² One was concluded in Sudan,¹³ one was launched and concluded in Chad and the Central African Republic,¹⁴ and one was launched and concluded after four months in Syria.¹⁵ In the Democratic Republic of Congo, MONUC transformed into the stability mission MONUSCO.¹⁶ Peacekeepers withdrew from Eritrea and Ethiopia in 2008 after UNMEE had monitored the tense border between the two countries for seven-and-a-half years after restrictions placed on it by Eritrea undermined its ability to carry out its mandate.¹⁷ Other missions were concluded in Georgia,¹⁸ Timor-Leste,¹⁹ Côte d’Ivoire,²⁰ Liberia,²¹ and Haiti.²² In 2015, the (p. 667) Support Office for AMISOM (UNSOA) was replaced by the Support Office in Somalia (UNSOS).²³

7. Starting January 2019, the restructuring of the peace and security pillar of the UN became into effect.²⁴ The Department of Political Affairs and the Peacebuilding Support Office formed the new Department of Political and Peacebuilding Affairs (DPPA),²⁵ while the Department of Peacekeeping Operations became the Department of Peace Operations. The overarching goals of the reform are to: prioritize prevention and sustaining peace; enhance the effectiveness and coherence of peacekeeping operations and special political missions; address fragmentation to move towards a single, integrated peace and security pillar; and align it more closely with the development and human rights pillars to create greater coherence and cross-pillar co-ordination. The two departments share a single regional political-operational structure, responsible for the management of all political and

operational peace and security activities, under the leadership of Assistant Secretaries-General with regional responsibilities, who will report to the Under-Secretaries-General for Political and Peacebuilding Affairs and for Peace Operations.²⁶

8. The UN *Department of Peace Operations* (DPO) serves as an integrated 'centre of excellence' for United Nations Peace operations, responsible for preventing, responding to, and managing conflict and sustaining peace in the context of mandates in countries where peace operations under its purview are deployed. This includes facilitating and implementing political agreements, providing integrated strategic, political, operational, and management advice, direction, and support to peace operations; developing political, security, and integrated strategies, leading integrated analysis, and planning of peace operations and backstopping those operations.²⁷

9. *Regional- and sub-regional-based organizations.*²⁸ Since the mid-1990s, there has been a trend towards a variety of regional- and sub-regional-based peacekeeping missions.²⁹ This trend holds the promise of developing regional capacity to address shortfalls in the numbers of peacekeepers, and it should augment and not detract from the ability of the United Nations to respond when blue helmets are requested. This poses a challenge for the Security Council and regional organizations to work closely with each other and mutually support each other's efforts to keep the peace and ensure that regional operations are accountable to universally accepted human rights standards. Regional and other partners that have collaborated politically or co-deployed with United Nations peacekeeping (p. 668) operations include the African Union (AU);³⁰ the Economic Community of West African States (ECOWAS);³¹ the European Union (EU),³² and the North Atlantic Treaty Organization (NATO).³³ The Security Council expressed its determination to take appropriate steps to the further development of co-operation between the United Nations, and regional and sub-regional organizations in maintaining international peace and security.³⁴ This resolution reflects the growth of interaction between the United Nations and partner organizations. This includes annual high-level meetings of the UN Secretary General with regional and other intergovernmental organizations, along with recent meetings of the Security Council with regional organizations. The opportunities lie in the establishment of a more effective partnership operating in close co-operation with the Security Council, based on a clear division of labour that reflects the comparative advantage of each organization.

10. *Peace enforcement.* Peace enforcement operations in principle lack consent of states involved and are based on a strong Chapter VII mandate addressing serious human rights violations and threats against international peace and security of a certain state. Enforcement operations are usually conducted by a multinational force and as a rule commanded by a lead-nation. Examples include Korea (1950) carried out by a group of states on the invitation of the state concerned, Kuwait (1990),³⁵ and Libya,³⁶ authorized by the Security Council. A distinction could be made between full-scale enforcement operations (a factual armed conflict situation between the coalition of the willing and a (p. 669) state) and relatively small-scale actions to enforce peace during a UN-led peacekeeping operation. Such enforcement actions are sometimes necessary to protect the mission or to protect civilians under imminent threat of physical violence. In the Democratic Republic of Congo, robust UN military operations based on Chapter VII, including cordon and search operations and pre-emptive action against militias, illustrate the intertwining of peacekeeping and peace-enforcing.

11. *Deployment, Immunity, and Status-of-Mission Agreements.* It flows from the consensual character of peace operations that host states have a final say as to what countries, units, and equipment enter their territory. During negotiations on the status-of-mission agreement between the international or regional organization and the host state, sensitive issues need to be disclosed, discussed, and cleared.³⁷ For international organizations and Sending States, immunity is an essential prerequisite for a successful deployment and performance

during a (often complicated) mission. Immunity usually comprises—among others—the exemption from criminal- and civil jurisdiction of the Host State. Immunity is rooted in treaty law and customary international law, while it presumes effective remedies will be in place to respond to violations of international law or Host State law by international organizations, Sending States, or individuals. Military members of a contingent who commit a crime usually are repatriated to their own country and undergo judicial process there; in some cases military courts martial take place in the host country. Such an exception to host-country criminal jurisdiction applies not to military observers, police officers, or civilian staff of a peace operation. The Secretary General has the right and the obligation to waive even the functional immunity of United Nations personnel if such immunity impedes the course of justice. Therefore, respect for the law of the host country is an essential obligation of all peacekeepers. The relevant status-of-mission or -forces agreement (SOMA or SOFA) includes the obligations of United Nations personnel to respect the law of the country where they are deployed:

- individually accountable through appropriate disciplinary action. For instance, there is a recommendation for expedited disciplinary procedures for sexual exploitation and abuse cases involving civilians;
- financially accountable for the harm they have done to victims. For instance, it proposes that existing rules be amended to compel civilians to make child support payments; and
- criminally accountable if the acts of sexual exploitation and abuse committed by them constitute crimes under applicable law.

II. Applicable Law

20.02

In peace operations today, a complex legal regime comprising peacetime rules of international law, international humanitarian law, and national law must be adhered to and properly implemented.

1. Peace operations will derive their legitimacy from the authority of the Security Council. In establishing a peace operation, the Security Council follows the Charter of the United (p. 670) Nations, exercising its primary responsibility for maintaining international peace and security. The fundamental legitimacy of a peace operation ensures that it commands the respect and support of all member states in implementing its mandate. International legitimacy and recognition is all-important for the day-to-day work of peacekeepers. Member states contribute personnel, equipment, and other resources to a peace operation because of its legitimacy. Furthermore, legitimacy confers a privileged legal status on a peace operation and its personnel that is essential in implementing its mandate.
2. The rules of engagement³⁸ for the operation, which form the legal authority for the use of force, specify how and when peacekeepers are authorized to use force, including deadly force. Other international legal instruments and norms guide the activities of peacekeepers and define the relationship between the operation and the host country. Altogether the apparatus of authority and law composes the legal framework for peace operations. All peacekeepers must have a sound understanding of the legal framework of their operation so that they know their own obligations and responsibilities in the implementation of their mandate. Legal norms must be considered in the conduct of their official duties as well as their personal life. In fulfilling their duties, peacekeepers also need to be aware of other legal agreements, including the peace agreement or ceasefire agreement if such exists,

other national laws, and international treaties and conventions that can guide their activities in support of the peace process.

20.03

Where peace operations are mandated by the Security Council in accordance with Chapter VI or VII of the UN Charter, or by a regional arrangement under Chapter VIII, participating states will operate on the basis of relevant international resolutions. These resolutions may flow from ceasefire agreements, peace agreements, and assessments and reports such as those from the UN Secretary General.

The United Nations Secretary General reports frequently to the Security Council. These reports usually contain an assessment of the current security situation, including the security institutions and the international military assistance, and address political developments, including governance at national regional and local levels.

20.04

In peace operations, the significance of human rights obligations may be seen under three different aspects:

- **Ideally, there would be an express mandate by the Security Council and/or a regional organization requesting not only all parties to the conflict, but also the peacekeeping force to protect human rights.**
- **Even where such commitment has not been expressly stated, peace operations are to respect the law of the receiving state including its obligations under international law of which human rights are an important part.**
- **Finally, the human rights obligations of the sending state apply extraterritorially for acts committed within their jurisdiction (see above, Chapter 14).**

1. Human rights in peace operations. As large-scale human rights violations are both a root cause as well as an outcome of many modern conflicts, addressing human rights issues has become an integral part of UN-led or UN-mandated peace operations. Depending on the mandate of a peace operation, human rights work may include:

- reporting human rights violations and working to prevent future abuse;
- (p. 671) — investigating and verifying past human rights violations;
- promoting and protecting civil, cultural, economic, political, and social rights;
- conducting capacity-building initiatives with local governmental agencies and non-governmental organizations (NGOs), including national and local human rights institutions;
- assisting relevant judicial and truth and reconciliation processes to foster a culture of accountability and address impunity;
- collaborating with UN and international development and emergency relief organizations on human rights issues;
- designing and conducting human rights training programmes for UN peacekeeping personnel and local and national institutions, such as the military and police forces;

- providing advice and guidance on human rights to all peacekeeping components;
- working to address the human rights aspects of problems associated with most modern conflicts, including massive movements of refugees and internally displaced persons (IDPs), the increasing conscription of child soldiers, and the sexual exploitation and trafficking of women and children; and
- identifying and integrating a human rights perspective into programmes to disarm, demobilize, and reintegrate combatants.³⁹

2. Human rights component. Peace operations have addressed human rights issues by including a human rights component⁴⁰ in operations. A memorandum of understanding (MoU)⁴¹ may govern how human rights components function within peacekeeping operations. The MoU provides, among other things, for dual reporting lines to both the Special Representative to the Secretary General and the Office of the High Commissioner for Human Rights and joint responsibilities for the recruitment of human rights officers for peacekeeping operations. Although the human rights component has the lead role on human rights issues in a peacekeeping operation, human rights work is everyone's responsibility. All peacekeeping personnel should be aware of human rights issues and, through their work and conduct, be ready to promote human rights values with their colleagues and counterparts in the host society. Human rights information and analysis should systematically inform the mission's strategic thinking and policymaking at all levels. The early involvement of human rights experts in the planning of human rights activities of peacekeeping operations can contribute to the effectiveness and full integration of such activities within the mission, as well as to their sustainability after the withdrawal of the mission. Specifically, the inclusion of human rights experts in an integrated mission task force (IMTF), which is established at UN Headquarters for the planning of future missions, is essential. Similarly, the early deployment of human rights officers in the first phase of mission deployment is important.

(p. 672) **3. International standards and codes of conduct.** International humanitarian organizations and other actors, when providing assistance, should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard.⁴² In so doing, these organizations and actors should respect relevant international standards and codes of conduct. The need for military forces conducting humanitarian or military operations outside their own countries to respect human rights standards is strengthened by the possibility that increasingly they may be subject to national and regional human rights scrutiny in respect of their conduct. Increasingly, courts in a number of countries are showing a willingness to exercise jurisdiction over actions which occurred outside their territory but which have a connection with it. Human rights provisions should be reflected in the rules of engagement and codes of conduct of military forces engaged in providing forms of humanitarian assistance.

4. International versus state responsibility in case of alleged human rights violations by peacekeepers. Two cases involving NATO peacekeepers in Kosovo were declared inadmissible by the European Court of Human Rights. The first case involved two Kosovar brothers who found a number of undetonated cluster bombs.⁴³ While playing, one bomb detonated and killed one and seriously injuring wounding the other. The applicants (the surviving brother and his father) alleged that the death and injuries were caused by the failure of French KFOR troops to mark and/or defuse the undetonated cluster bombs which KFOR had known to be present on the side in question. They referred on the right to life under Article 2 ECHR. In the second case,⁴⁴ the applicant complained under Article 5 (right to liberty and security) and Article 13 (right to an effective remedy) about his detention by KFOR. He further complained under Article 6 (right to fair trial) and under Article 1 (obligation to respect human rights) that France, Germany, and Norway had failed to guarantee the Convention rights of individuals living in Kosovo. The Court considered

whether it was competent to review the acts of the states in question carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter. The Court argued that Chapter VII allowed the Security Council to adopt coercive measures in relation to an identified conflict considered to threaten peace, in case UN SC Res. 1244, establishing UNMIK and KFOR. The Court further found that since operations established under Chapter VII of the Charter were fundamental to the mission of the UN and since they relied for their effectiveness on support from member states, the Convention could not be interpreted in a manner which would subject the acts and omissions of contracting partners to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in the field including the effective conduct of its operation.

5. *State responsibility for peacekeepers.* In 2007, a civil claim⁴⁵ was filed at the Hague District Court against the state of the Netherlands and the United Nations. The complainants were family members (partially organized in a foundation) of the 8,000–10,000 (p. 673) persons killed during the Dutch military presence in the enclave of Srebrenica. Plaintiffs held the defendants jointly responsible for the fall of the enclave Srebrenica and the consequences thereof. In these proceedings, plaintiffs and the foundation sought a judicial declaration that the state of the Netherlands and the UN, due to a failure to perform their undertakings and obligations, acted unlawfully with respect to plaintiffs and the murdered members of their family. Plaintiffs further claimed an advance of EUR 25,000 per person for the loss and injury suffered and yet to be suffered, as well as damages yet to be determined by the Court. The claims of plaintiffs and the foundation rest upon the alleged actions, or omissions, of the state of the Netherlands and the UN, within the framework of the implementation of, *inter alia*, UN SC Resolutions 819, 824, and 836, to protect the enclave of Srebrenica (declared by the UN as a 'Safe Area') and the civilians who found themselves there, against attacks by the Bosnian Serbs.

The Hague District Court⁴⁶ in deciding the matter of whether or not the UN enjoys immunity in this case first considers how the immunity, enshrined in Article 105, subsection 1 of the UN Charter and developed in Article II, para. 2 of the Convention on the Privileges and Immunities of the United Nations is interpreted and applied to prevailing law in international practice. The Court concludes that in international-law practice, absolute immunity of the UN is the standard and is respected, and that the interpretation of Article 105 of the UN Charter offers no basis for restriction of the immunity of the UN. The Hague Court of Appeals⁴⁷ dismissed the argument of the District Court that the UN enjoys an absolute immunity. The Court ruled that there has to be a balancing of interests between the immunity of jurisdiction of the UN on the one hand and the protection of the fundamental rights of the plaintiffs to have access to an effective judicial review on the other. The Court of Appeals decided that—even in this exceptional case—the immunity of jurisdiction of the United Nations prevails as plaintiffs have alternative means to bring their claims to justice and therefore upholding the UN's immunity would be proportionate. Because the perpetrators as well as the Dutch state can be sued, the general interest of the UN not to be forced to appear in national courts would prevail. Plaintiffs have appealed to the Court of Cassation in the Netherlands pleading to reject UN-immunity or refer the case to the Court of Justice of the European Union.

a) In two related cases, the Civil Chambers of the Court of Appeal of The Hague held the state of the Netherlands responsible for the death of three Muslim men after the fall of Srebrenica.⁴⁸ In July 1995, a Dutch battalion under the command of the UN had the task of protecting the Muslim enclave Srebrenica in Bosnia-Herzegovina. The enclave was surrounded by the Bosnian Serbian Army under the command of General Mladic. On 11 July 1995, the Bosnian Serbian Army occupied Srebrenica. The Dutch battalion (Dutchbat) withdrew all troops to a nearby compound. A stream of thousands of refugees from Srebrenica soon began. 5,000 of these refugees were admitted into the Dutch compound,

among whom 239 were able-bodied men (i.e. 16–60 years of age). Among the refugees who had sought refuge to the compound were the families of the interpreter (father, mother, and younger brother) and the electrician (wife and children) (p. 674) for Dutchbat. The brother of the interpreter and the electrician were sent by Dutchbat from the compound at the end of 13 July 1995. The father of the interpreter went with them. Subsequently, they were murdered by the Bosnian Serbs. In a proceeding before the Court of Appeal, their next of kin (hereinafter complainants) sought compensation from the state. The District Court of The Hague had rejected their claims in the first instance.

b) The Court of Appeal first had to make a decision about the defence of the state that the Dutchbat military acted under the auspices of the UN and that the state, therefore, was not responsible for the actions of Dutchbat. As to what criterion applies for state versus UN responsibility, the Court noted that the question that should be answered is who exercised ‘effective control’, not who exercised ‘command and control’, as considered by the District Court.⁴⁹ Both in international public law literature⁵⁰ and in works of the International Law Commission, in situations in which a state contributes troops to the UN for the execution of a peace operation, the question of who should be held accountable for specific actions of these troops depends on who exercises ‘effective control’ over those actions. This opinion has also been expressed in the draft articles on responsibilities of international organizations of the International Law Commission, Article 6 of which reads: ‘The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.’ Although ‘effective control’ in this provision only refers to the accountability of the acquiring international organization, it is accepted that the same criterion applies to the question of whether acts by individual troops shall be considered as acts of the state that contributed the troops. The question of whether the state exercised ‘effective control’ over actions of Dutchbat should be answered bearing in mind the specific circumstances at hand. Not only is it relevant to consider if the underlying actions were the result of specific instruction by the UN or the state, but also if no specific instruction exists, whether the UN or state were in a position to prevent such actions.⁵¹ The Court considers it generally accepted that more than one party exercises ‘effective control’, so it cannot be excluded that applying the criterion results in the accountability of more than one party. This leads the Court only to investigate whether the state exercises effective control over the alleged actions and sets aside the question of whether the UN also exercised effective control. The Court considered it relevant to point to the highly differing circumstances of the alleged actions by Dutchbat from a normal situation where a state contributes troops to UN Operations (p. 675) as was the case in *Behrami v France*⁵² and *Saramati v France, Germany, and Norway*.⁵³

The Court further argued that after 11 July 1995 the mission to protect Srebrenica had failed. Srebrenica fell that day and there was no discussion that Dutchbat, or United Nations Protection Force (UNPROFOR) in any other composition, would continue the mission. On the evening of 11 July 1995, a meeting between the UN Force Commander, the Dutch Chief of Defence Staff, and the Deputy Commander of the Dutch Army took place and resulted in the conclusion that use of force would be useless. The aim was to evacuate the refugees and Dutchbat. The Court considered the outcome of the meeting was a consensual decision to evacuate between the UN Force Commander on behalf of the UN and the two Dutch generals on behalf of the Dutch government, the implication also being that after completion of the evacuation Dutchbat would be redeploying.⁵⁴ As of 11 July 1995, an interim period started and one important task of Dutchbat was to support the evacuation of refugees. During this period, the Dutch government had separate authority from the UN as it related to the preparations for the overall redeployment of Dutchbat from Bosnia-Herzegovina. The highest Dutch senior-ranking officer acted in a dual-hatted capacity on

behalf of the UN, being chief-of-staff of HQ UNPROFOR in Sarajevo and on behalf of the Dutch government. In that capacity he instructed the Dutchbat commander on the evacuation, confirmed by the latter in a message to Mladic: '... I did receive a message from the authorities of the Netherlands through HQ UNPROFOR in Sarajevo concerning the evacuation of Dutchbat. I have been ordered ...'.⁵⁵

The Court concluded there is no doubt that the Dutch government was closely involved in the evacuation and the preparations thereof and was in a position to prevent the alleged actions, provided it was timely informed. The facts left no other conclusion than if the government had ordered not to have M. leave the compound or to take him along with the unit when redeploying, this order would have been executed. The Court emphasized that the alleged actions violated UN orders issued by the acting commander of HQ UNPROFOR to protect refugees and that the authority to take disciplinary measures against such violations resided with the state. The alleged actions for which the complainants blame Dutchbat are directly linked to decisions and orders of the Dutch government. The complaint that Dutchbat ordered M. to leave the compound and did not prevent the separations of M. and his wife and children is linked to the way in which the evacuation and orders of the Dutch Minister of Defence were executed. The same is true for the complaint that Dutchbat did not immediately report the separations of men and women and other human rights violations the battalion witnessed.⁵⁶ The Court ultimately concluded the state exercised 'effective control' over the alleged actions by Dutchbat and, therefore, could be held accountable.⁵⁷ The Court was of the opinion that Dutchbat should not have sent the electrician and the interpreter's brother from the compound and they had to have anticipated that the interpreter's father would follow his son. Dutchbat had witnessed in the meantime more than one incident in which Bosnian Serbs had beaten up or killed male refugees outside the compound. Therefore, at the end of the (p. 676) afternoon of 13 July 1995, Dutchbat knew that the men would run a great risk when they would leave the compound. The Court considered explicitly that its judgment in this case was exclusively related to the specific situation of these individuals. No judgment was given about the situation of the other refugees. The position of the other refugees, which differs in certain aspects from the case at hand, is not at issue in this procedure.

20.05

When peace operations include elements of peace enforcement, international humanitarian law must be applied.

1. Peace operations traditionally encompass a wide range of activities where military units are used for purposes other than the large-scale combat operations. They have monitored ceasefire agreements and manned observation posts in buffer zones. But the idea of a peacekeeper seen as an international policeman has changed due to the often more volatile and complex character of operations. The changing character necessitated appropriate action: a powerful and broad mandate and a flexible and responsive approach towards parties or elements that obstructed peace. The approach has led to questions related to the use of force and have triggered a discussion on the applicability of international humanitarian law.
2. In an attempt to address the issue and for the purpose of setting out fundamental principles and rules of international humanitarian law that apply to forces conducting operations under UN command and control, the UN Secretary General has issued a Bulletin.⁵⁸ Section 1 of the Bulletin states that the fundamental principles and rules of international humanitarian law set out in the Bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.⁵⁹ Shortly after its promulgations, the Bulletin triggered questions in the

military and legal community on the threshold for the 'situation of armed conflict'. A practical solution for the applicability of the Bulletin may be found by declaring the fundamental principles specified in the Bulletin to be applicable at all times. To adhere to such fundamental principles as humane treatment of the wounded, women, children, and detainees should be a matter of standard policy, regardless of the situation at hand.

3. Rules of engagement typically may refer to international humanitarian law provisions. The argument being that the rules referred to are perceived customary international law, and regardless the factual situation, should be adhered to in any case.

III. Mandates

20.06

Mandates for peace operations should be issued by the Security Council in the exercise of its primary responsibility for the maintenance of international peace and security. In the absence of a Security Council mandate, operations must be based on (p. 677) another international legal basis, for example host-state consent. The drafters of mandates should consider that the relevant provisions are to be implemented at different levels and for different purposes.

1. All peace operations operate under a mandate which provides both a legal basis under public international law for the deployment of military forces by the participating states on the territory of the state(s) where the operation is conducted and sets out the basic objectives and purposes of the operation in question.⁶⁰ These in turn serve as the parameters and framework for the implementing instruments, such as the agreements by which the participating states commit elements of their armed forces to the operation and the rules of engagement (ROE) under which the operation is conducted.⁶¹ It goes without saying that such instruments of implementation derive their authority from the mandate itself and as such must reflect the terms, objectives, and purposes of the mandate.

2. Unlike traditional peacekeeping operations, modern peacekeeping operations support post-conflict efforts to preserve and consolidate peace by helping to rebuild the basic foundations of a secure, functioning state. To this end, missions will undertake a broad range of Security Council-mandated tasks to support the implementation of an agreed peace process. Such multidimensional operations have become the dominant form of peacekeeping operations in recent years. In contrast to traditional peacekeeping operations, multidimensional operations have been deployed in the dangerous aftermath of an intrastate conflict, normally at the request of the parties, to assist in the implementation of a comprehensive peace agreement.

3. Numerous actors provide humanitarian assistance and support long-term peacebuilding efforts with local institutions. Post-conflict activities undertaken in collaboration with or alongside a UN peacekeeping operation may include:

- humanitarian relief;
- economic governance and anti-corruption;
- investment in infrastructure reconstruction;
- human capacity-building;
- long-term rule of law support;
- institution-building and technical assistance; and

— poverty alleviation.

4. In situations where no central state authority has ever existed, the UN may be required to play a dual administrative and capacity-building role for an extended period. Consequently, in addition to the functions fulfilled by multidimensional peacekeeping operations, a UN interim or transitional administration may be required to assume temporary authority over the executive and legislative structures in a given territory or country.⁶²

(p. 678) **20.07**

The term ‘mandate’ should be used to refer exclusively to the authorization and tasks under public international law.

1. Depending on the nature of the peace agreement and its own assessment of the measures required to support the peace process, the term mandate refers exclusively to tasks under public international law such as:

- monitor a ceasefire or cessation of hostilities to allow space for political negotiations and a peaceful settlement of disputes;
- protect civilians;
- provide operational support to law enforcement agencies;
- assist in the restructuring and reform of the armed forces;
- facilitate the implementation of the peace agreement through the provision of good offices, mediation support, and other confidence-building measures;
- assist with the disarmament, demobilization, and reintegration (DDR) of former combatants;
- support the delivery of humanitarian assistance;
- supervise and assist with the organization of elections;
- strengthen the rule of law, including assistance with judicial reform and training of civilian police;
- promote respect for human rights and investigate alleged violations;
- assist with post-conflict recovery and rehabilitation;
- assist with mine action; and
- promote national dialogue and reconciliation.

2. National authorities when providing personnel (military or police) to peacekeeping operations may have restrictions on how and where their units will deploy and what tasks will not be supported by them. These so-called *caveats* may be based upon national policy, national legislation, or factual (operational or logistic) limitations of the units.

20.08

Mandates have to be rather broad to cover evolving scenarios. There is a clear need for realistic objectives and a reasonable degree of specificity in order to provide a precise legal framework for the mission.

1. An increasing number of UN operations are multifunctional in nature. Mandates range from immediate stabilization and protection of civilians to supporting humanitarian assistance; organizing elections; assisting the development of new political structures; engaging in security sector reform; disarming, demobilizing, and reintegrating former combatants; and laying the foundations of a lasting peace.⁶³ The UN frequently works with other global institutions, regional organizations, donor countries, NGOs, and host governments, in trying to achieve these ends. The Secretary General, however, still refers to a 'gaping hole' in the UN system's institutional machinery when it comes to meeting the challenge of helping countries with the transition from war to lasting peace effectively.⁶⁴ While performance is improving, the success rate in long-term stabilization is still (p. 679) too low, and many countries relapse into conflict after an initial period of stabilization. This conclusion can in part be ascribed to a lack of strategic, co-ordinated, and sustained international efforts. An Integrated Mission is an instrument with which the UN seeks to help countries in the transition from war to lasting peace, or to address a similarly complex situation that requires a system-wide UN response, through subsuming actors and approaches within an overall political-strategic crisis management framework.⁶⁵ At least three dilemmas are raised in relation to integration: the humanitarian dilemma reflects a tension between the partiality involved in supporting a political transition process and the impartiality needed to protect humanitarian space. The human rights dilemma relates to the tension that arises when the UN feels compelled to promote peace by working with those who may have unsatisfactory human rights records, while still retaining the role of an 'outside critic' of the same process. The local ownership dilemma relates to the need to root peace processes in the host country's society and political structures without reinforcing the very structures that led to conflict in the first place.⁶⁶

2. Realistic long-term objectives and an exit strategy must be based on an all-encompassing vision. As part of a broader UN peacebuilding strategy, the Secretary General has endorsed guidelines for a comprehensive and inclusive UN system approach to the planning of integrated peace support operations or integrated missions.⁶⁷ An Integrated Mission is one in which there is a shared vision among all UN actors as to the strategic objective of the UN presence at country level. This strategic objective is the result of a deliberate effort by all elements of the UN system to achieve a shared understanding of the mandates and functions of the various elements of the UN presence at country level and to use this understanding to maximize UN effectiveness, efficiency, and impact in all aspects of its work. An Integrated Mission is one in which structure is derived from an in-depth understanding of the specific country setting; of the evolving security, political, humanitarian, human rights, and development imperatives in that particular country; and of the particular mix of assets and capacities available and/or required to achieve the desired impact through mutually supportive action. In other words, form (mission structure) should follow function and be tailored to the specific characteristics of each country setting.

20.09

Decision-makers should consider the adoption of a mandate allowing the international military force to intervene in cases of illegal use of force against civilians in the area of operations. When doing so, they should take the means and capabilities of the international military force into account.

1. *Protection of civilians.* Many peace operations involve an element of the protection of internally or externally displaced persons. It is important that military personnel are aware of the human rights of the persons they are assigned to protect. The origins of the concept of a 'responsibility to protect' are to be found in the debate in the 1990s about humanitarian intervention. At that time, the Security Council showed itself willing, in some circumstances at least, to characterize egregious human rights abuses as a threat to international peace and security, thus opening up the possibility of enforcement action

under Chapter VII of the UN Charter. The problem was a gap between theory and practice, often with tragic consequences, as the genocidal acts in both Rwanda and Srebrenica (p. 680) showed. In addition, humanitarian intervention was, and remains, a politically charged and divisive concept—a fact which did not contribute to its positive reception or use. The Report of the Secretary General's High-Level Panel on Threats Challenges and Change set out its proposals for 'a more secure world'.⁶⁸ In it, the Panel endorsed what it called 'the emerging norm of a responsibility to protect civilians from large-scale violence'. The UN Secretary General, likewise urged all to 'embrace the responsibility to protect, and, when necessary, ... act on it'.⁶⁹ This was further endorsed in the outcomes of the September UN Summit, convened by the Secretary General to review progress with implementation of the UN Millennium Goals. It is recognized that this responsibility rests first and foremost with each individual state; however, where the state is unable or unwilling, the international community shares a collective responsibility to act—through, for example, humanitarian operations, monitoring missions, diplomatic pressure, and, ultimately as a last resort, with force.

2. At the end of 2019, there were an estimated 70.8 million forcibly displaced worldwide. 41.3 million are internally displaced persons (IDPs) and 25.9 million refugees, including the three with the largest populations—Syria, Afghanistan, and South-Sudan.⁷⁰ The High Commissioner for Refugees is mandated by the United Nations to lead and co-ordinate international action for the worldwide protection of refugees and the resolution of refugee problems.⁷¹

3. Often, military units will be the first people who come into contact with people fleeing persecution. Especially in view of the growth of international criminal jurisdiction for human rights abuses, it is important that military personnel either document such evidence themselves (if they have the requisite skills and resources) or create the conditions where human rights workers can receive such testimony. Military personnel will increasingly be regarded as having a duty to contribute to the effective prosecution of human rights abuses.

4. *Protection of civilians, limitations.* Most mission mandates routinely include three caveats which limit the protection of civilians to those under imminent threat, in line with the mission's capacity and capability, and according to its geographical deployment. While the first allows for subjective (and partisan) interpretations about what exactly constitutes an imminent threat, the other two are clearly a function of parameters determined prior to deployment. All three are conceptually vague enough to be used as escape clauses which serve to explain *post facto* why effective protection could not be provided in a given situation.⁷²

5. There is significant variation in the use of the term 'protection'. The Office for the Coordination of Humanitarian Affairs uses it as an umbrella concept to advocate for a number of otherwise unrelated interventions (child protection, refugee security, (p. 681) humanitarian access, etc.), whereas DPO responds to it as an additional mandated task, usually without the additional resources it would warrant. This only increases the need for continuous and ambiguous prioritization between competing and under-resourced mission objectives. As a result, some protection interventions are pursued intermittently and therefore lose their effectiveness. There is an inherent difficulty in correlating, in quantifiable terms, a given protection situation with an appropriate military response (how many troops are needed to protect a spontaneous refugee settlement?). Furthermore, there are no benchmarks in civilian protection such as the crude mortality rate in a camp situation which tracks improvements (or a worsening) in the welfare of a given population over time. This methodological void raises some hard questions about, for instance, the

level of violence that should be considered as normal or what would constitute a real improvement in the protection situation.

6. The geographical limitation brings to light a classical dilemma of humanitarian triage: is it morally just to focus only on those pockets of threatened civilians which are within the sphere of influence of a given military unit's area of responsibility when it is known that gross abuses take place just beyond it? 'Better some protection than none at all' may not be an appropriate answer here because an uneven protection environment produces multiple push and pull factors, including population movements which in turn create their own protection dynamics.

7. This situation may be illustrated by another civil case brought against the Dutch State, a Dutch Court of Appeals⁷³ ruled that the government was partially liable in the deaths of more than 300 Muslim men killed by Bosnian Serb forces in the 1995 Srebrenica massacre. The ruling formally struck down the District Court's 2014 judgments⁷⁴ that said the State was liable in the deaths of the Bosnian Muslim men and boys who were turned over by Dutch peacekeepers to Bosnian Serb forces in July 1995 and subsequently killed. The Court of Appeals upheld the earlier findings while cutting the amount of damages receivable by the relatives of the dead by assessing the victims' chances of survival had they remained in the care of the Dutch troops.⁷⁵

The Dutch Supreme Court⁷⁶ ruled that the State is liable to a more limited degree than determined by the Court of Appeal. In so far as this case concerns the acts of Dutchbat until 23:00 on 11 July 1995, those acts were performed under the command and control of the UN, without the State exercising effective control in that regard. Those acts cannot be attributed to the State for that reason. The State cannot be held liable for the fact that Dutchbat was unable to prevent Srebrenica from being captured by the Bosnian Serbs.⁷⁷ In the period starting from 23:00 on 11 July 1995, after Srebrenica had been conquered and after it was decided to evacuate the Bosnian Muslims who had fled to the mini safe area, the State did have effective control of Dutchbat's conduct. That conduct can be attributed to the State for that reason. The evacuation—which, in hindsight, (p. 682) turned into deportation of the male refugees by the Bosnian Serbs—commenced in the afternoon of Wednesday, 12 July 1995, with Dutchbat's co-operation. From the evening of 12 July 1995 Dutchbat became aware that the male refugees, after being separated from the other refugees by the Bosnian Serbs, ran a real risk of violation of their rights to physical integrity and life by the Bosnian Serbs. The continued co-operation in the evacuation of refugees on Thursday, 13 July 1995, was not wrongful, however.⁷⁸

Although Dutchbat knew of the aforementioned realistic danger to the male refugees, Dutchbat discontinuing its co-operation could not have changed this, as the Bosnian Serbs would continue the evacuation. By continuing to co-operate in the evacuation, in any event Dutchbat could prevent women, children, and the elderly from being trampled. This is why it was not wrongful for Dutchbat to continue its co-operation in the evacuation.⁷⁹ However, the latter is different in respect of the evacuation at the end of the afternoon of 13 July 1995 of the refugees who were inside the compound. Dutchbat failed to offer the male refugees in the compound the choice of staying behind there, even though that was possible. As a result, Dutchbat withheld from these male refugees the chance of escaping from the Bosnian Serbs. That was wrongful. The chance that the male refugees, had they been offered this choice, would have escaped the Bosnian Serbs was small, but not negligible. That chance is estimated at 10 per cent. This is why the liability of the State is limited to 10 per cent of the damage suffered by the surviving relatives of these male refugees.⁸⁰

IV. Rules of Engagement (ROE) and Use of Force Beyond Self-Defence

20.10

Rules of engagement (ROE) are directives to operational commanders, which delineate the parameters within which force may be used by designated international peace operations personnel. They should be founded on Security Council resolutions and must be issued and implemented in accordance with the provisions of international law. ROE should be established for each peace operation. They should be clear and simple.

1. ROE, in general, are no new phenomenon. Rules for the use of force or directives for opening fire have existed for ages to avoid early escalation of a conflict and to guarantee unity of doctrine when it comes to the most visible and potentially destructive part of warfare. Increasingly, the use of force during peace operations will be a sensitive matter for a variety of reasons. The changing character of peace operations—patrolling streets in built-up areas and in crowded slums instead of patrolling in deserted buffer zones between nation states—inevitably will lead to an increased risk of civilian casualties once peacekeepers use force as a last resort. Civilian casualties as a result of peacekeepers' actions may rapidly jeopardize the operation and may lead to demonstrations and revenge or have other far-reaching political consequences. It is, therefore, of extreme importance that ROE are developed thoroughly and carefully, within an operational, legal, and political framework.⁸¹

(p. 683) 2. The Security Council resolution for a new peacekeeping operation is a compromise of the deliberations of the fifteen members of the Council. The mandate therefore leaves much room for interpretation by mission planners when developing an initial concept of operations. Second, a concept of operations will leave the necessary operational space for planners at force headquarters level, adjusting plans to situations as they occur. Despite the necessary room for interpretation, clarity is needed when it comes to the authority to use force. Not only will this clarity protect individuals against excessive use of force, it also protects peacekeepers from prosecution when force is used within the parameters of the ROE.

3. ROE traditionally are developed for military personnel. Police forces are using ROE or similar directives for the use of force. Specific ROE are often developed for maritime operations and interception and engagement of aircraft. As private (military) contractors are increasingly participating during peace operations, similar rules on the use of force may exist for such personnel. In peace operations, small groups of soldiers rather than large formations of military units are deployed to execute tasks. Often, junior leaders will have to make decisions on the use of force. No commander or superior when monitoring the situation from headquarters or a command post with live-camera images can substitute for the common sense of the leader on the scene. Only they are able to make a final analysis and assessment and decide how best to defuse or control the situation on the ground. Hence, rules should be clear and simple, understandable for junior leaders and soldiers.

20.11

While remaining predominantly defensive in nature, the ROE allow for the potential need for offensive action if necessary, in order to ensure the

implementation of the tasks assigned. The ROE also provide a definition of the circumstances under which the use of force may be justified.

Nothing in ROE excludes a commander's right and obligation to take all necessary and appropriate action for self-defence. All personnel may exercise the inherent right of self-defence. Measures to protect personnel, premises, and property of the mission and to guarantee freedom of movement of peace operations personnel should be clearly addressed in ROE. The ROE should allow peacekeepers to use up to deadly force, to defend oneself and other peacekeeping or international personnel against a hostile act or a hostile intent. Moreover, it accepts the use of force, under circumstances, deadly force, to protect peacekeeping installations and areas or goods designated by the force commander, against a hostile act. Rules would normally also allow up to and including deadly force against any person and/or group that limits or intends to limit freedom of movement.

20.12

The ROE define the degree and the manner in which force may be applied and are designed to ensure that the application of force is controlled and legal. They inform commanders of the constraints imposed and the degrees of freedom they have, in the course of carrying out their mission.

1. Force can be defined as the use of, or threat to use, physical means to achieve an objective. In peacekeeping, minimum force⁸² aims to use force only as a mean of last resort. As the host country has accepted peacekeepers on its territory, use of force with a view (p. 684) to collateral damage should be minimized. If peacekeepers as a result of their actions cause the death of innocent spectators, alienation of the civilian population comes closer. Therefore, less lethal means should be employed if possible.

2. Commanders should, where appropriate, consider the use of alternatives to the use of physical force such as deception, psychological methods, negotiation, and other non-lethal means, which may include the deployment or manoeuvre of larger forces in order to demonstrate resolve. This could be unarmed force: physical force, short of the use of 'armed force'. Stop, search, and apprehension is a form of unarmed and physical force, and although weapons may be present at the scene or at hand, armed force⁸³ as such may not be used in the situation. If unarmed force is inappropriate, two distinct levels of armed force could be applied: deadly force or non-deadly force. Non-deadly force is the level of force which is neither intended nor likely to cause death regardless of whether death actually results.⁸⁴ It entails the use of batons, and the use of firearms firing warning shots or shots aimed at lower body parts. Non-deadly force would be appropriate if the opponent is not carrying firearms and poses a non-deadly threat to peacekeepers or to those under their protection. The ultimate degree of force of peacekeepers would be deadly force, the level of force, which is intended, or is likely to cause death regardless of whether death actually results.⁸⁵ This generally will be applied if no other means or methods are available to react to a hostile act or hostile intent of armed opponents.

20.13

The ROE are to be translated in a clear and concise way into the language(s) of each participating nationality. Throughout the conduct of military operations, where armed force is to be used, peace operations personnel must comply with the international legal principles of proportionality, the minimum use of force and the requirement to minimize the potential for collateral damage.

Once the ROE are finalized and signed by the appropriate authorities, a translation should be available at short notice to enable commanders and troops to get familiar with the rules and to continue pre-deployment training or update training in the mission area. As mission-specific rules are largely based on a generic set of rules, basic definitions and principles for the use of force do not change much. Translations should be clear and concise. It is relevant to have the final language checked by commanders and junior troop leaders, as mistakes in the pocket card (soldier's card) made by translators may have unintended consequences when it comes to applying the rules.

20.14

Whenever the operational situation permits, every reasonable effort must be made to resolve any hostile confrontation by means other than the use of force (e.g. through negotiations). Any force used must be limited in its intensity and duration to what is necessary to achieve the objective. In some circumstances, operational urgency may dictate the immediate use of deadly force. The use of force must be commensurate with the level of the threat and all necessary measures are to be taken to avoid collateral damage.

Proportionality in peace operations is directly linked to winning hearts and minds in peace operations. Civilian deaths among the local population will immediately reflect on the attitude and behaviour of the local population against peacekeepers. This is especially the case in operations where units and soldiers will continue to work in the same area of operations. They will be confronted on a daily basis with (p. 685) the negative effects of their actions. Warnings of the civilian population may be an effective measure to limit collateral damage and need to be balanced with operational security and the element of surprise. It appears that in peacekeeping operations priority should be given at all times to the protection of civilians and the avoidance of collateral damage, even if this may lead to delays in daily operations.

20.15

During peace operations, use of force beyond self-defence may only be used in the circumstances as specified in the ROE.

Pre-emptive self-defence against an anticipated attack must be supported by compelling evidence (in the prevailing context) that hostile units or persons are committed to an immediate attack.

20.16

In the context of lessons learned studies, a database on the use of force should be developed and made available for future planning.

Although to date no comprehensive database on the use of force is available, such a tool would assist troops to prepare for new deployments. Although no situation will be identical, some common lessons from the use of force may be learned. Particular countries that so far have not been active in peace operations would benefit tremendously from an overview of best practices when applying force in peace operations.

V. Authority Command and Control

20.17

A more distinct regulation of command and control in UN peace operations could add to their effectiveness and help to make responsibilities more transparent. Sending states and the UN should co-operate in its implementation.

1. The system of Authority Command and Control (AC2) in UN peacekeeping operations derives from the UN Charter, which designates the Secretary-General as the chief administrative officer of the Organization and requires him to perform the functions entrusted to him by the Security Council and the General Assembly. The Security Council establishes peacekeeping missions, provides their mandates, specifies the high-level political objectives of each mission, and entrusts the Secretary-General with the responsibility for implementing mission mandates.⁸⁶ To ensure the effective and accountable implementation of the decisions of both the Security Council and the General Assembly, the Secretary-General confers responsibility and delegates authority for mission management to the Head of Mission (HOM).⁸⁷ These authorities are governed by the AC2 framework at three distinct but overlapping levels: strategic, operational and tactical. Most of the strategic level authority and responsibilities are vested in the senior leadership in UNHQ and mission headquarters (mission HQ), namely the HOM and other members of the Mission Leadership Team (MLT). The operational level encompasses both mission HQ and the sub-national level, where most missions have Field Offices and/or military sector/(p. 686) regional HQ(s). The Heads of the Military and Police Components exercise 'UN operational command and control' over the Military and Police Components respectively.
2. The decentralized nature of the AC2 framework in United Nations peacekeeping missions cascades authority downward and ensures that senior United Nations personnel at different levels within the mission have responsibility for decision-making on strategic, operational, and tactical issues within their areas of responsibility, under the strategic guidance of the HOM and MLT. This means that certain strategic responsibilities also rest with senior United Nations personnel deployed in Field Offices and/or military sector HQ(s) who oversee significant numbers of personnel and resources, in accordance with their respective terms of reference. Managing authorities, roles, and responsibilities at these different levels and across different mission components is essential to the effective functioning of AC2 in United Nations peacekeeping missions.⁸⁸

20.18

The UN should recognise its human rights and international humanitarian law obligations and co-operate with sending states to ensure their accountability for wrongful acts.

1. Recent court decisions related to immunities and responsibilities of international organizations and Sending States may influence the way international organizations and States (both receiving and sending) consider their contribution and preparation for future deployments. In a highly critical report of the UN Special Rapporteur on Extreme poverty and human rights,⁸⁹ reference is made to the UN legal approach to the cholera crisis⁹⁰ in Haiti, including the denial of legal responsibility for the outbreak, the rejection of all claims for compensation, a refusal to establish the procedure required to resolve such private law matters and suggestions that the Organization's absolute immunity from suit would be jeopardized by adopting a different approach.⁹¹ The report states that the existing United Nations approach of simply abdicating responsibility is morally unconscionable, legally indefensible, and politically self-defeating and that it is also entirely unnecessary. In practice, it jeopardizes the immunity of the United Nations by encouraging arguments calling for it to be reconsidered by national courts. It upholds a double standard according

to which the United Nations insist that Member States respect human rights, while rejecting any such responsibility for itself.⁹²

2. The critical report resulted in a new approach by the United Nations,⁹³ a General Assembly resolution welcoming the new approach,⁹⁴ and a subsequent Secretary-General's (p. 687) report⁹⁵ detailing the UN two-track approach and the Haiti Cholera Response Multi-Partner Trust Fund. A General Assembly resolution, which also recognizes the United Nations' moral responsibility to the victims of the cholera epidemic in Haiti and their families, reaffirmed its support for the Organization's new approach to cholera in Haiti and invited Member States, donors, financial institutions, the private sector, and others to extend financial support for the initiative.⁹⁶

VI. Child Soldiers

20.19

International humanitarian law and the UN Convention on the Rights of the Child set fifteen as the minimum age for military recruitment and participation in armed conflict (Article 77, para. 2, AP I; Article 38 ChildConv; see above, Sections 5.06 and 8.05). The Optional Protocol to the UN Convention on the Rights of the Child on the involvement of children in armed conflict states that governments and armed groups are prohibited from using children under the age of eighteen years in armed conflict. It also bans compulsory recruitment of children under the age of eighteen years and it bans voluntary recruitment of children under the age of eighteen years by armed groups.

Children are uniquely vulnerable to military recruitment and manipulation into violence because they are ignorant and impressionable. They are forced or enticed to join armed groups. Regardless of how they are recruited, child soldiers are victims, whose participation in conflict bears serious implications for their physical and emotional well-being. They are commonly subject to abuse and most of them witness death, killing, and sexual violence. Many participate in killings, sometimes committing the very worst atrocities and most suffer serious long-term psychological consequences. Fighting groups have developed brutal and sophisticated techniques to separate and isolate children from their communities. Children are often terrorized into obedience, consistently made to fear for their lives and well-being. They quickly recognize that absolute obedience is the only means to ensure survival. Sometimes, they are compelled to participate in the killing of other children or family members, because it is understood by these groups that there is 'no way back home' for children after they have committed such crimes.

20.20

A child soldier is any person under eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore only refer to a child who is carrying or has carried arms.

The definition may have significant consequences once the disarmament phase starts. When child soldiers are financially compensated when handing in weapons or ammunition, formerly unarmed family members may suddenly possess weapons or parts of weapons, potentially blurring anticipated numbers and eligibility criteria. The eligibility criteria should be sufficiently broad and based upon the 'Cape Town Principles' (p. 688) for children associated with armed forces or groups.⁹⁷ Children should, therefore, not be required to

hand in weapons in order to participate in disarmament, demobilization, and reintegration programmes, and there should be no cash remuneration for weapons relinquished. Unfortunately, even where disarmament, demobilization, and reintegration planning has incorporated these widely accepted principles, as in the case of Liberia, their application has been uneven⁹⁸ and there was increased evidence that the payment of cash allowances to demobilized children adversely affected their acceptance and reintegration into the community.

20.21

The considerable challenges in healing and reintegrating children into their communities in the aftermath of conflict is sometimes further compounded by severe addiction and dependency of children to drugs.

Drugs may result in the reckless and brutal behaviour of children who are sometimes committing the very worst atrocities. Therefore, reintegration is often a complex process of community healing and atonement, and negotiation with families to accept their children back. All these dimensions of the experience of child combatants carry significant implications and challenges in terms of design and resources needed for psychosocial and other reintegration programming. The demobilization of children should be sought at all times, and separate and child-specific programmes should be organized for demobilized children.⁹⁹ Peacekeeping missions and United Nations agencies should seek to benefit from local expertise and NGO child-protection capacity in developing and implementing such comprehensive child-specific disarmament, demobilization, and reintegration programmes. Issues that require further attention and consideration include the duration of hosting and types of activities undertaken in care centres, appropriate ways to approach child drug abuse and options for assisting children without families.

20.22

Monitoring, documentation, and advocacy are fundamental to eliminating child recruitment and to informing programmes to this end. Special protection measures are needed to prevent recruitment of children in camps for refugees and internally displaced persons.

1. Peacekeepers, ideally, would identify recruitment processes and areas where recruitment takes place in an early stage. Subsequently, advocacy and other tactics targeting recruiters and their adult leaders will assist in eliminating the recruitment of children.

(p. 689) 2. Children associated with armed forces who have crossed into a country of asylum should be accorded a legal status, protection, and assistance that promotes their rehabilitation and reintegration. Refugee status should be accorded to children who flee armed conflict due to their well-founded fear of being subjected to forced military recruitment, sexual slavery, or other serious child rights violations. From 2002 to 2004, 168 disarmed Liberian child soldiers were granted *prima facie* refugee status in Sierra Leone and were placed in camps for Liberian refugees; children whose families were traced were voluntarily repatriated. This process incorporated child-protection elements such as proper identification of children immediately upon entry to the country of asylum; prompt separation from commanders; accommodation in a civilian environment conducive to rehabilitation (instead of together with adult foreign combatants in internment camps); sensitization of refugee communities to facilitate community-based integration; access to education, counselling, and other psychosocial programmes; and community-based interim care, tracing, family reunification, and voluntary repatriation in safety and dignity. Reintegration activities should adopt an integrated community approach, and interventions should avoid singling out former child soldiers. Both of these practices were employed in

Afghanistan.¹⁰⁰ In order to support community reintegration activities for children formerly associated with armed forces or groups, long-term donor support is required.¹⁰¹ Children who escape, are released, or are captured from any armed force or group should not be considered or treated as enemy combatants.¹⁰²

20.23

While it is standard practice for peacekeepers to defend themselves against hostile acts or hostile intent, complications are to be expected when they are confronted with threats from child soldiers. Peacekeepers should realize that armed children can be more volatile and unpredictable than adults, even if they are poorly trained.

Although permitted to use force in self-defence, use of force against children will raise moral questions and may have far-reaching consequences when situations are reported worldwide. Failure to act adequately and appropriately may also result in extreme reactions in the mission area as well as from public opinion. Commanders should raise awareness at all levels of the existence of child soldiers in the mission area. The collection of information is key to successful and peaceful disarmament of child soldiers. Adequate scenario-driven training of troops for encounters with armed children could save lives on all sides.

Footnotes:

¹ See International Society for Military Law and the Law of War (ed.), *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press, 2017); T. D. Gill and D. Fleck, *The Handbook of the International Law of Military Operations*. 2nd edn (OUP, 2017); J. Koops, N. Macqueen, T. Tardy, and P. Williams (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (OUP, 2015); *United Nations Peacekeeping Operations Principles and Guidelines* (2008), https://peacekeeping.un.org/sites/default/files/capstone_eng_0.pdf. For an overview of national peacekeeping practices and legal implications, see the General Report and Recommendations on 'The Rule of Law in Peace Operations', XVII *Recueils de la Société de Droit Militaire et de Droit de la Guerre* (2006), Scheveningen Congress 108-57, 416-17.

² United Nations Truce Supervision Organization, SC Res. 50 (1948), 29 May 1948. Since then, UNTSO has performed various tasks, including the supervision of the General Armistice Agreement of 1949 and the observation of the ceasefire in the Suez Canal area and the Golan Heights following the Arab-Israeli War of June 1967.

³ United Nations Military Observer Group in India and Pakistan, SC Res. 91 (1951), 20 March 1951.

⁴ United Nations Emergency Force, SC Res. 118 (1956) of 13 October 1956, established to monitor the withdrawal of British, French, and Israeli forces from the Suez Canal. Peacekeeping missions were generally composed of small military contingents, lightly armed, from contributions of many different, mostly neutral or non-aligned countries, following principles of balanced geographic distribution.

⁵ United Nations Operation in Congo, SC Res. 143 (1960).

⁶ See: United Nations Peacekeeping, <<https://peacekeeping.un.org/en/what-is-peacekeeping>>.

⁷ SC Res. 688 (1991).

- ⁸ United Nations Operation in Somalia (UNOSOM I) was established as a humanitarian relief operation by SC Res. 751 (1992) of 21 April 1992. The Security Council welcomed the US offer to help create a secure environment for the delivery of humanitarian aid in Somalia and authorized, under Chapter VII, the use of 'all necessary means' to do so. President George H. Bush responded to the resolution with a decision to initiate *Operation Restore Hope*, under which the US would assume the unified command UNITAF/Restore Hope, SC Res. 794 (1992) of 3 December 1992. Following a transition period, UNOSOM II was established under Chapter VII, SC Res. 814 (1993) of 26 March 1993.
- ⁹ Report of the Secretary General, Implementation of the recommendations of the Special Committee on Peacekeeping Operations, UN Doc. A/61/668, 13 February 2007, para. 7.
- ¹⁰ See: United Nations Peacekeeping, <https://peacekeeping.un.org/en/data>.
- ¹¹ The modern peacekeeping environment is often remote and difficult, with little infrastructure or communications. The largest UN peacekeeping operation, the mission in the Democratic Republic of Congo (MONUSCO) is deployed in a country the size of Western Europe that has only 300 miles of paved road. Most UN field missions face practical challenges, such as limited or severely weakened local markets for goods and services, lack of housing stock, potable water, or sufficient fresh-food supply. The logistic and supply challenges facing many missions make deployment a highly complex issue.
- ¹² African Union–United Nations Hybrid Operation in Darfur (UNAMID) 2007, United Nations Organization Interim Security Force Abyei (UNISFA) 2011, United Nations Mission in the Republic of South Sudan, (UNMISS) 2011, Mission Multidimensionnelle Intégrée des Nations Unies pour la Stabilisation au Mali MINUSMA) 2013, and United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) 2014.
- ¹³ UNMIS 2011.
- ¹⁴ MINURCAT was established in 2007 and concluded in 2010.
- ¹⁵ United Nations Supervision Mission in Syria (UNSMIS) was established in April 2012 and concluded in August 2012.
- ¹⁶ Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo (MONUSCO).
- ¹⁷ United Nations Peace Operations, Year in Review 2008, 3.
- ¹⁸ UNOMIG (2009).
- ¹⁹ UNMIT (2012).
- ²⁰ UNOCI (2017).
- ²¹ UNMIL (2018).
- ²² MINUSTAH (2017) and MINUJUSTH (2019).
- ²³ See SC Res 2245 (2015). The mission is responsible for support to AMISOM, UNSOM, the Somalia Security Forces (SSF) and the Somalia Police Force (SPF) on joint operations with AMISOM.
- ²⁴ UN Department of Political and Peacebuilding Affairs (DPPA) and Department of Peace Operations (DPO), United to Reform, <https://reform.un.org/news/peace-and-security-pillar>; UNGA Res A/72/262 C III (18 July 2018).
- ²⁵ DPPA has global responsibility for political and peacebuilding issues, and manages a spectrum of tools and engagements across the conflict continuum to ensure a more holistic approach to conflict prevention and resolution, electoral assistance, peacebuilding, and sustaining peace. DPPA combines the strategic, political, and operational responsibilities of

the Department of Political Affairs (DPA) and the peacebuilding responsibilities of the Peacebuilding Support Office (PBSO).

²⁶ UN reform: Two new departments for the peace and security pillar (23 August 2018), <https://www.un.int/news/un-reform-two-new-departments-peace-and-security-pillar>.

²⁷ Ibid.

²⁸ For a detailed overview of Organisation-Specific Legal Framework and Procedures *see* Chapter 4 in the Leuven Manual, above (n. 1).

²⁹ This role is envisaged in Chapter VIII of the UN Charter.

³⁰ In Burundi, Ethiopia, and Eritrea, the Democratic Republic of the Congo, and the Sudan.

³¹ In Côte d'Ivoire, Sierra Leone, Liberia, Guinea-Bissau, Mali, and the Gambia; Member countries making up ECOWAS are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal, and Togo, *see* <https://www.ecowas.int/about-ecowas/basic-information>.

³² The Common Security and Defence Policy (CSDP) provides the Union with the operational capacity to deploy both civilian missions and military operations. The range of tasks as set out in the EU Treaty encompass: humanitarian and rescue tasks; conflict prevention and peace-keeping tasks; tasks of combat forces in crisis management, including peacemaking; joint disarmament operations; military advice and assistance tasks; post-conflict stabilisation tasks. The first EU missions launched were the EU's policing mission in Bosnia and Herzegovina (2003) and a military operation in the Former Yugoslav Republic of Macedonia (now North Macedonia). Since then, the EU has launched and run thirty-four operations and missions on three continents; twenty-two civilian and twelve military. In 2019 there were sixteen ongoing CSDP operations, ten civilian and six military, *see* for a detailed overview: https://eeas.europa.eu/sites/eeas/files/eu_csdp_missionsops_dec19.pdf.

³³ In 2019 around 20,000 military personnel were engaged in NATO operations and missions around the world. NATO was leading operations in Afghanistan, Kosovo, and the Mediterranean. It was also supporting the African Union, conducting air patrols over the Baltic States, and air defence support activities in Turkey on the request of its Allies. It also has a training mission in Iraq and carries out disaster relief operations and missions.

³⁴ SC Res. 1631 (2005).

³⁵ Operation Desert Storm (Second Gulf War; coalition forces led by US), SC Res. 661 (1990) and SC Res. 678 (1990). The Security Council first made reference to 'the inherent right of individual or collective self-defence, in response to the armed attack by Iraq on Kuwait' later authorized 'Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area', acting under Chapter VII. This construction, combining elements of self-defence and collective security, can be interpreted as the exercise of collective self-defence under the authorization of the Security Council, or as an enforcement action under Article 42 of the Charter.

³⁶ SC Res. 1973 (2011), para. 4, authorizing Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in co-operation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of SC Res. 1970 (2011) to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.

- ³⁷ See D. Fleck (ed.), *The Handbook of the Law of Visiting Forces*, 2nd edn (OUP, 2017).
- ³⁸ See below, Sections 20.10–20.16.
- ³⁹ See *United Nations Peacekeeping Operations Principles and Guidelines*, above (n. 1), Chapter 1.2.
- ⁴⁰ The human rights component would normally act under the authority of the Special Representative of the Secretary General (SRSG) who can also provide guidance on how to most effectively pursue a human rights agenda within the particular circumstances of a mission.
- ⁴¹ See for example the MoU concluded between the Department of Peacekeeping Operations (DPKO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), November 2002.
- ⁴² See United Nations, *Guiding Principles on Internal Displacement* (1998), <https://drc.ngo/media/1217434/guiding-principles-on-internal-displacement.pdf>.
- ⁴³ ECtHR, *Behrami and Behrami v France* (application no. 71412/01), admissibility decision of 31 May 2007.
- ⁴⁴ ECtHR, *Saramati v France, Germany and Norway* (application no. 78166/01), admissibility decision of 31 May 2007.
- ⁴⁵ Van Diepen en Van der Kroef advocaten, Writ of summons Srebrenica, <http://www.vandiepen.com>.
- ⁴⁶ District Court of The Hague, Judgment of 10 July 2008, *The Association et al. v The State of The Netherlands*, LJN: BD6796.
- ⁴⁷ Court of Appeal of The Hague, Judgment of 30 March 2010, *The Association et al. v The State of The Netherlands*, LJN: BL8979.
- ⁴⁸ Court of Appeal of The Hague, Judgment of 5 July 2011, *Nuhanovic v State of The Netherlands*, LJN: BR0133 and Judgment of 5 July 2011, *Mustafic c.s. v State of The Netherlands*, LJN: BR0132.
- ⁴⁹ Court of Appeal of The Hague, *Mustafic c.s. v State of The Netherlands*, Judgment of 5 July 2011, LJN: BR0132, para. 5.8.
- ⁵⁰ The Court refers to M. Hirsch, *The Responsibility of International Organizations Towards Third Parties: Some Basic Principles* (Nijhoff, 1995), 64; F. Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to Un-authorized forces and the Power of the Security Council to displace Human Rights' (2009) 65 *Netherlands International Law Review* 35–61, at 41–2; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) *Human Rights Law Review* 151–70, at 164; T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) *Harvard International Law Journal* 113–92, at 140–1.
- ⁵¹ Court of Appeal of The Hague, Judgment of 5 July 2011, *Mustafic c.s. v State of The Netherlands*, LJN: BR0132, LJN: BR0132, para. 5.9.
- ⁵² ECtHR, *Behrami and Behrami v France* (application no. 71412/01), admissibility decision of 31 May 2007.
- ⁵³ ECtHR, *Saramati v France, Germany, and Norway* (application no. 78166/01), admissibility decision of 31 May 2007.

- ⁵⁴ Court of Appeal of The Hague, Judgment of 5 July 2011, *Mustafic c.s. v State of The Netherlands*, LJN: BR0132, para. 5.17.
- ⁵⁵ Ibid., para. 5.16.
- ⁵⁶ Ibid., para. 5.19,
- ⁵⁷ Ibid., para. 5.20.
- ⁵⁸ Secretary General's Bulletin Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13 of 6 August 1999.
- ⁵⁹ The Bulletin does not affect the protected status of members of peacekeeping operations under the 1994 UN SafetyConv or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.
- ⁶⁰ See *inter alia* H. McCoubrey and N. D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Hants: Aldershot, 1996), 69 *et seq.*; T. Findlay, *The Use of Force in UN Peace Operations* (OUP/SIPRI, 2002), 7–9.
- ⁶¹ Findlay, *ibid.* 9–14.
- ⁶² Examples of such UN Transitional Administrations include Kosovo (1999–present), Timor Leste (1999–2002), Eastern Slavonia (1996–98), and West Papua (1962–63).
- ⁶³ Report on Integrated Missions, Practical Perspectives and Recommendations, Independent Study for the Expanded UN ECHA Core Group, Executive summary, Espen Barth Eide, Anja Therese Kaspersen, Randolph Kent, Karen von Hippel, 19 May 2005, http://www.regjeringen.no/upload/UD/Vedlegg/FN/report_on_integrated_missions.pdf.
- ⁶⁴ In Larger Freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005), para. 114.
- ⁶⁵ Ibid., at n. 33.
- ⁶⁶ Ibid., at n. 33.
- ⁶⁷ Endorsed by the Secretary-General on 13 June 2006, [https://ochanet.unocha.org/p/Documents/UN%20IMPP%20Guidelines%20\(2006\).pdf](https://ochanet.unocha.org/p/Documents/UN%20IMPP%20Guidelines%20(2006).pdf).
- ⁶⁸ 'A more secure world: our shared responsibility—Report of the High-level Panel on Threats, Challenges and Change', UN Doc. A/59/565 of 2 December 2004. See also the earlier Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', December 2001, and UNHCR, 'Note on International Protection', UN Doc. A/AC.96/1008 of 4 July 2005, paras 35 and 72.
- ⁶⁹ Ibid.
- ⁷⁰ See UNHCR; Figures at a Glance, <https://www.unhcr.org/figures-at-a-glance.html>.
- ⁷¹ As of December 2018, 149 states are parties to the 1951 Convention relating to the Status of Refugees and/or to its 1967 Protocol, see: <http://reporting.unhcr.org/sites/default/files/gr2018/pdf>.
- ⁷² Internal note, June 2006, on file with the author.
- ⁷³ Court of Appeals, The Hague, Judgment of 27 June 2017, see ECLI:NL:GHDHA:2017:1761, 27 June 2017.
- ⁷⁴ District Court, The Hague, Judgment of 16 July 2014, see ECLI:NL:RBDHA:2014:8748 and ECLI:NL:RBDHA:2014:8562.

- ⁷⁵ The court estimated the chances of Muslim males' survival if they had stayed in the Dutch compound at around 30 per cent and held the state liable for 30 per cent of the losses suffered by the relatives.
- ⁷⁶ Supreme Court, The Hague, 19 July 2019, *see* ECLI:NL:HR:2019:1284 of 19 July 2019.
- ⁷⁷ *Ibid.*, Summary and conclusion 5.1.
- ⁷⁸ *Ibid.*
- ⁷⁹ *Ibid.*
- ⁸⁰ *Ibid.*
- ⁸¹ UN Department of Peacekeeping Operations, Guidelines for the Development of Rules of Engagement for UN Peacekeeping Operations, March 2002.
- ⁸² *Ibid.* Minimum force is defined as the minimum degree of authorized force, which is necessary and reasonable in the circumstances, to achieve the objective. The minimum degree of force is applicable whenever force is used. Minimum force can be deadly force if appropriate.
- ⁸³ *Ibid.* Armed force is defined as the actual use of weapons, including firearms and bayonets.
- ⁸⁴ *Ibid.*
- ⁸⁵ *Ibid.*
- ⁸⁶ UN Department of Peace Operations and Department of Operational Support, Ref. 2019.23, Policy paper on Authority Command and Control, dated 25 October 2019, *see* <http://dag.un.org/handle/11176/400959>.
- ⁸⁷ *Ibid.* This AC2 framework is unique to UN peacekeeping and differs from the command structures adopted by some other organizations that are more centralized and confer all strategic and even operational responsibilities to HQs outside the mission area.
- ⁸⁸ *Ibid.*, Chapter D 1.10.
- ⁸⁹ Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc A/71/367 (26 August 2016).
- ⁹⁰ *Ibid.*, Summary. Cholera started in Haiti in October 2010, just a few days after the arrival of a new contingent of Nepalese peacekeepers in the United Nations Stabilization Mission in Haiti (MINUSTAH). They had come from a country in which an identical strain of the disease was prevalent. More than 9,000 persons have died in Haiti as a result of the epidemic that ensued. The scientific evidence points overwhelmingly to the conclusion that the arrival of the peacekeepers and the outbreak of cholera are directly linked to one another.
- ⁹¹ *Ibid.*, Chapter II C.
- ⁹² *Ibid.*, Summary. The report further noted that this approach leaves the United Nations vulnerable to eventual claims for damages and compensation in this and subsequent cases, which are most unlikely to be settled on terms that are manageable from the perspective of the Organization.
- ⁹³ A new approach to cholera in Haiti, Report by the Secretary-General, UN Doc A/71/620 (25 November 2016).
- ⁹⁴ UNGA Res/71/161 A (13 January 2017), The new United Nations approach to cholera in Haiti.

95 UNSG A/71/895 (2017), Report of the Secretary-General on the New approach to cholera in Haiti, Report of the Secretary-General, UN Doc. A/71/895 (3 May 2017).

96 UNGA Res (2017). The new United Nations approach to cholera in Haiti, UN Doc. A/71/161 B.

97 Principles and Guidelines on Children Associated with Armed Conflicts or Armed Groups ('Paris Principles') of February 2007, drafted under UNICEF auspices, which update the 'Cape Town Principles' of 1979, http://www.diplomatie.gouv.fr/en/article-imprim.php3?id_article=8638.

98 Some children associated with armed forces or groups in Liberia were actually prevented from entering demobilization sites because they were not armed. The promise of a cash allowance upon presentation of a weapon has also proved problematic in Liberia; reports indicate that commanders have posed as guardians to former child soldiers, or have taken arms away from them and given the weapons to their own children, in order to obtain the cash payments. Commanders have even sold weapons to children so they could enter the disarmament, demobilization, and reintegration programme. Alternatives to cash allowances should be employed in order to prevent these practices and should contribute directly to the education and sustainable livelihood of former child soldiers.

99 In Burundi, approximately 2,260 children were demobilized from armed forces and groups ahead of adult combatants, through the Child Soldiers National Structure. However, many children formerly associated with armed groups were cantoned in assembly areas where they waited for over eight months to return to their families; this delay was due to the lack of commitment of some leaders, lengthy negotiations over global demobilization and inadequate disarmament, demobilization, and reintegration resources. In Liberia, child-specific programmes, including literacy classes, psychosocial care, and recreational activities, were organized by NGOs through interim care centres, where demobilized child soldiers could stay for up to three months.

100 Demobilized child soldiers were provided the same services as other war-affected children through the Afghanistan New Beginnings Programme, and communities played a central role in demobilization efforts by participating in the screening of eligible child participants.

101 The Government of Sierra Leone requested continuing assistance for the reintegration of demobilized children through the Community Education Investment Programme, which provided educational materials to schools whose enrolment included demobilized children and children returning from neighbouring countries. This support facilitated the reintegration of more than 3,000 former child combatants and returnee children.

102 In accord with this principle, and in implementation of Article 6 of the Optional Protocol on the Involvement of Children in Armed Conflict, a group of children associated with a Colombian armed group and arrested by the Venezuelan authorities was immediately offered protection and reintegration assistance. The Government of Colombia established legal and administrative procedures ensuring that children who leave armed groups are handed over to the Colombian Institute for Family Welfare national disarmament, demobilization, and reintegration programme.

(p. 403) 18 Terrorism, Counter-Terrorism, and International Humanitarian Law

1. Introduction

Despite much debate about the coverage, adequacy, and effectiveness of IHL in regulating 'terrorism', international humanitarian law (IHL) does not recognize any specific legal categories for, or special regime governing, terrorists and terrorist groups. Rather, the general norms of IHL, discussed in previous chapters, apply to terrorists according to their conduct. IHL was precisely developed as a kind of exceptional or emergency law comprehensively addressing all forms of violence in armed conflict, including that which is labelled 'terrorist' in other areas of law (international, regional, or national).

Particularly relevant to terrorism are the general IHL rules, discussed in other chapters, on the classification of violence as armed conflict, the categorization of persons during conflict, targeting, detention, criminal liability, and fair trial.¹ Thus, terrorist and counter-terrorist violence may constitute a non-international armed conflict (NIAC) to which IHL applies if the violence is sufficiently intense and organized; a 'terrorist' may be militarily targeted if s/he is a member of an organized armed group performing a continuous combat function, or is otherwise taking a direct part in hostilities (DPH); a 'terrorist' in a NIAC may be detained under national law (consistent with human rights law), and may be liable for war crimes, other international crimes, or crimes under national law (including terrorist offences implementing treaties or UN Security Council resolutions), in a fair trial in a regular court.

The application of all of these general rules in relation to terrorists has been controversial in one way or another, and has produced long-running debates (before and after 9/11) about the adequacy of IHL—whether from a military or humanitarian standpoint. Overall these debates have not produced fundamental normative changes in IHL, or exceptions to its application, even if they have sharpened—or divided—the interpretation of many of the above rules. Where formal normative change has ensued, thus far it has tended not to stiffen the law against perceived 'terrorists' but to relax constraints in their favour, as in the looser conditions of guerilla combatancy and the right to combatant status of liberation movements under Additional Protocol I (API) of 1977.² 'Soft law' processes have also sought to (p. 404) clarify interpretation on some matters (such as the meaning of DPH)³ or strengthen existing norms without creating new law (as with the protection of persons deprived of liberty, or compliance with IHL).⁴

This chapter does not reiterate or particularize the general rules, discussed in previous chapters (often including in the context of terrorism) as they apply to terrorism or terrorists. Instead, it focuses on three key legal issues of particular relevance and specificity to terrorism in armed conflict. First, it examines IHL's specific, narrow prohibitions on 'terrorism' in armed conflict and the connected war crime of intending to spread terror amongst a civilian population, which is distinct from peacetime legal notions of terrorism. The war crimes jurisprudence has been developed by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), and has implications for criminal jurisdiction under customary IHL and before the International Criminal Court (ICC).

Second, the chapter analyses the varied and complicated relationships between IHL and different international counter-terrorism law (CTL) norms and instruments. Depending on the norm and context, CTL can apply, not apply, or partially apply in armed conflict, and there is no general international rule determining whether CTL or IHL is the more special law (*lex specialis*). Often CTL complements and extends IHL's focus on preventing and criminalizing attacks on civilians. Further, CTL often does not directly conflict with IHL.

However, some aspects of CTL interfere with IHL's delicate balance between humanitarian protection and military necessity, by 'taking sides', undermining the equality of the parties, and ultimately reducing incentives for non-state armed groups (NSAGs) to comply with IHL.

The chapter concludes by exploring the related, adverse effects of CTL on humanitarian relief operations in armed conflict. National implementation of CTL has variously chilled, restricted, prohibited, and even criminalized humanitarian engagement by external actors with armed 'terrorist' groups. These measures have both inhibited effective humanitarian assistance to vulnerable civilian populations and undermined the confidence of NSAGs in humanitarian cooperation with the international community.

2. Prohibitions on and Criminal Liabilities for Terrorism in Armed Conflict

A. Prohibitions on Terrorist-Type Conduct

Most terrorist-type conduct committed in any type of armed conflict is already criminalized as various war crimes.⁵ This is because IHL prohibits and criminalizes deliberate attacks on civilians or civilian objects, including by indiscriminate attacks; reprisals; the use (p. 405) of prohibited weapons (including incendiaries, cluster munitions, or chemical or biological weapons); attacks on cultural property, objects indispensable to civilian survival (such as food and water supplies), or works containing dangerous forces (including dams, dykes, and nuclear facilities); or through illegal detention, torture, or inhuman treatment (see chapters 6–12 in this book). In addition, the suite of crimes against humanity applies concurrently in armed conflict to protect civilian populations against widespread or systematic attack, which may be perpetrated by an organized non-state group.

In addition to such protections for civilians, IHL specifically prohibits terrorism. Article 33(1) of the Fourth Geneva Convention 1949 (GCIV) prohibits 'collective penalties and likewise all measures of intimidation or of terrorism' against protected persons 'in the hands of a Party' (as in detention or occupied territory) to an international armed conflict (IAC).⁶ The provision was a response to the mass intimidation of civilians in occupied territory in the Second World War.

All civilians in IAC (including those not 'in the hands of' a party) are protected by article 51(2) of API, which prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. The same acts are prohibited in NIAC by article 13(2) of Additional Protocol II (APII). Both provisions are part of wider prohibitions on attacking civilians.⁷ Article 4(2)(d) of APII further prohibits 'acts of terrorism' in NIACs.

B. The War Crime of Intending to Spread Terror amongst a Civilian Population

In the *Galić* case (2003), the ICTY was the first international tribunal to recognize 'the crime of terror as a violation of the laws or customs of war', based on a violation of article 51(2) of API.⁸ The elements of the crime are as follows:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.⁹

The ICTY clarified that 'acts of violence' do not include legitimate attacks against combatants but only unlawful attacks against civilians.¹⁰ On appeal it found that the crime encompasses both attacks and threats of attacks against civilians; and that it is not limited to direct (p. 406) attacks or threats but includes indiscriminate or disproportionate ones.¹¹ Further, 'extensive trauma and psychological damage form part of the acts or threats of violence'.¹²

The distinctive feature of the war crime of terror is its mental elements. There must first be a general intent to wilfully make civilians the object of acts or threats of violence.¹³ In addition, there must be a 'specific intent', that is, the primary purpose to spread terror amongst civilians, which necessarily excludes '*dolus eventualis* or recklessness'.¹⁴ The accused must specifically intend terror to result and not merely be aware of its likelihood. The actual infliction of terror is not required.¹⁵

Terror was defined simply as 'extreme fear'.¹⁶ The Appeals Chamber clarified that the offence is not concerned with the incidental fear civilians experience in war as a result of legitimate military actions, but rather with acts or threats that are specifically undertaken to spread terror.¹⁷ Further, it observed that the intent to spread terror need not be the only purpose of the act or threat, as long as the intent to spread terror 'was principal among the aims'.¹⁸ It noted that 'intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration'.¹⁹

On the facts in *Galić*, the war crime of spreading terror was found to have been committed by a campaign of sniping and shelling of civilians in the besieged city of Sarajevo, as a result of 'the nature of the civilian activities targeted, the manner in which the attacks on civilians were carried out and the timing and duration of the attacks on civilians'.²⁰ The ICTY found that civilians were targeted 'while engaged in typical civilian activities or where expected to be found' throughout the city,²¹ such as during funerals; in ambulances and hospitals; on trams and buses; when driving, cycling, or walking; at home or in school; while shopping; when gardening, tending fires, clearing rubbish, or collecting water or firewood; at suppertime; and at public festivals and funerals.²² The vulnerable were especially targeted, including women, children, and the elderly.²³ Hundreds of civilians were killed and thousands injured.²⁴

The attacks were found to have no military significance and could not be accounted for by targeting errors or cross-fire.²⁵ They were also not designed to exterminate or deplete the population.²⁶ Rather, the pattern of fire was random and indiscriminate, at unexpected places and times, calculated to achieve surprise and maximize the psychological effects.²⁷ Civilians responded by closing schools, hiding by day and living at night, rarely moving around, and creating barricades.²⁸ The ICTY concluded that the aim was to 'very clearly' (p. 407) send the message 'that no Sarajevo civilian was safe anywhere, at any time of day or night'.²⁹ It found that 'the only reasonable conclusion in light of the evidence ... is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear'.³⁰

The charges in the *Galić* case were based on the terrorism prohibitions in API, which applied by agreement between the parties in that conflict, and normally only applies to IACs. However, the ICTY also recognized that the prohibition on terror was a specific prohibition within IHL's general prohibition on attacks on civilians, which constitutes customary international law.³¹ It further held that there is individual criminal responsibility for violations of the rule under customary international law,³² including in NIACs.

In *Milošević* (2007),³³ the ICTY found another Bosnian Serb commander responsible for the war crime of spreading terror during the Sarajevo siege, again for a campaign of sniping and shelling of civilians, including by the use of inaccurate and indiscriminate modified air bombs. The ICTY has found a number of other defendants guilty of participation in a joint criminal enterprise (JCE) to carry out a campaign of sniping and shelling of civilians in

Sarajevo, the primary purpose of which was to spread terror among the civilian population, namely in *Karadžić* (2016) (concerning the Bosnian Serb political leader and military commander in Bosnia-Herzegovina) and *Mladić* (2017) (the Bosnian Serb army commander).³⁴

The SCSL has also followed the *Galić* jurisprudence to find numerous convictions for the war crime of spreading terror.³⁵ In *Brima et al* (2007),³⁶ it found that the war crime of terror was committed by violent attacks on civilians, including amputation and mutilation. Such acts constituted terrorism because they were committed against unarmed civilians repeatedly, brutally, and not for military advantage; they were often accompanied by perpetrator statements that they were done to cause fear; and they aimed to intimidate civilians not to support the adversary.

In *Sesay et al* (2009),³⁷ the SCSL found that terrorism was constituted by unlawful killings, rape, sexual violence and forced marriage, physical violence, abductions, enslavement and forced labour, threats, and looting and burning of property. Indications of the intent to spread terror included: the lack of a military or other legitimate objective; brutality (such as mutilations and amputations); the location of attacks (such as at public places, protests, homes, and schools); mass attacks to compel obedience; the scale of property destruction out of proportion to the effects of hostilities; the targeting of public officials or collaborators; public demonstration killings and publicizing attacks to intimidate others; indiscriminate attacks; threats, insults, or statements by perpetrators as to their intent; punishment to warn civilians not to support the adversary; evidence of a policy (*gori-gori*) to target and subdue, and seek revenge against, civilians; and civilian efforts to hide from fighters.

(p. 408) Importantly, the SCSL found that rape, sexual slavery, ‘forced marriages’, and other outrages on personal dignity can constitute acts of terrorism.³⁸ It held that ‘the nature and manner in which the female population was a target of the sexual violence portrays a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror’. The ‘deliberate and concerted campaign to rape women’ constituted ‘an extension of the battlefield to the women’s bodies, a degrading treatment that inflicts physical, mental and sexual suffering to the victims and to their community’. Terror was evidenced by perverse methods of violence (including gang rape, rape of pregnant women, forced intercourse, and violence in front of family members); an intent beyond mere personal gratification; the targeting of the most vulnerable; the attendant destruction of the family nucleus, cultural values, and social relationships; the purposeful infliction of psychological injury; the atmosphere of terror, helplessness, and insecurity in the face of attacks and domination; and the shame and stigma resulting from forced marriages and sexual slavery.

In *Taylor* (2012),³⁹ the SCSL found that acts of terrorism had been committed through the burning of civilian property, unlawful killings, sexual violence (including rape and sexual slavery), and physical violence (including amputations and mutilations), with the intent to spread terror.⁴⁰ Such acts were typically done to intimidate civilians into leaving the area; to warn them not to resist; to demonstrate the repercussions of supporting the enemy; and, in the case of sexual violence, to destroy the traditional family nucleus, thus undermining the cultural values and relationships which held society together.⁴¹ The intent to spread terror was inferred where there was no direct evidence of it but the acts followed a similar pattern.⁴²

In a number of these cases, the SCSL found that certain acts of violence did not evidence an intent to spread terror, because the purpose of violence was utilitarian, military, punitive or disciplinary, for personal gain, or isolated.⁴³

The Rome Statute of the ICC does not explicitly include a war crime of terrorism within its jurisdiction. However, as noted by the ICTY in *Galić*, such acts may be regarded as specific instances of the general prohibition of attacks on civilians, breaches of which are within the ICC's jurisdiction.⁴⁴ As noted, the war crime of terrorism is also part of customary IHL.

The war crime of terror is not, however, the same as certain peacetime legal conceptions of terrorism, namely violence committed to compel a government to do or refrain from doing something, or to advance a political, religious, or ideological cause.⁴⁵ The meaning of terrorism in IHL is thus more limited than definitions of terrorism outside of armed conflict. Certain terrorism offences within the jurisdiction of post-9/11 US military commissions were not IHL offences as the US asserted, but were peacetime terrorism offences retroactively applied to a particular armed conflict.⁴⁶ In addition to war crimes, domestic (p. 409) criminal (and/or military) law may apply to certain terrorist acts in armed conflict; terrorism offences under domestic law are discussed further in section D 'Security Council Counter-Terrorism Obligations' below.

3. Relationship between IHL and Counter-Terrorism Law

The interaction between IHL and CTL is complex and varies according to the context. CTL is not a unified field of international law⁴⁷ but comprises disparate norms emanating from multiple sources. Foremost are the nineteen 'sectoral' counter-terrorism instruments adopted since 1963,⁴⁸ which require states parties to criminalize particular methods of transnational violence commonly used by terrorists, establish extensive jurisdiction over the offences, and investigate, apprehend, and 'extradite or prosecute' or offenders. In (p. 410) addition, Security Council resolutions adopted since 1999 have imposed sanctions regimes on specific terrorist actors, while resolutions since 2001 have required broader legislative and enforcement measures to be taken by states against terrorist threats in general. There are also numerous 'soft law' norms on terrorism, including those in UN General Assembly resolutions⁴⁹ and the Assembly's Global Counter-Terrorism Strategy 2006.⁵⁰

It is clear that CTL does not simply displace IHL or vice versa. UN Security Council and General Assembly resolutions have repeatedly emphasized that states must respect their obligations under IHL when countering terrorism.⁵¹ There is, however, no further guidance from the UN organs on the precise relationship between CTL and IHL, nor any general rule of international law specifying the relationship.

The international law principle of *lex specialis derogat legi generali* (more specific law prevails over more general law) does not readily provide a definitive answer to potential conflicts of norms between the two areas, since both CTL and IHL could be viewed as the more specific norms addressing the same subject matter. At the regime level, CTL addresses the sub-set of violence described as terrorism, potentially whether within or outside of armed conflict. IHL addresses the sub-set of violence known as armed conflict, whether also qualifying as terrorism or not. Each could therefore be seen as best adapted to the overlapping, exceptional violence that they address. Beneath the abstract regime level, whether IHL or CTL is more specific may more pragmatically depend on the particular context and rules at issue.

In place of a general rule, different CTL norms themselves often specify various relationships to IHL. Some of the key interactions are discussed below. In broad terms, direct conflicts between international CTL norms and IHL are rare, although national CTL can be much more problematic (as discussion in section D below).

A. International Counter-Terrorism Conventions and IHL

The various sectoral CTL treaties are limited to transnational offences and thus exclude purely domestic violence.⁵² In consequence, violence in NIACs that are purely domestic—such as classic civil wars involving nationals of a single state within the state's territory—will not be covered by the sectoral CTL treaties and instead will be solely regulated by IHL (as well as applicable international criminal law and international human rights law (IHRL)).

The sectoral CTL treaties specify five different relationships to armed conflict and IHL. First, the Hostages Convention 1979 effectively does not apply in IAC (while still applying to hostage taking with a transnational dimension in a NIAC). Specifically, the Convention provides that it does not apply to hostage taking in armed conflict where states parties are (p. 411) bound to prosecute or extradite a hostage-taker under the Geneva Conventions of 1949 and Additional Protocols of 1977.⁵³ IHL is thus accorded precedence as the *lex specialis*. The definition of hostage taking in peacetime and during armed conflict is similar.⁵⁴ IHL prohibits and criminalizes hostage taking in IACs and NIACs,⁵⁵ but only hostage taking in IAC is subject to an obligation on states to extradite or prosecute (being a 'grave breach' attracting individual criminal liability under the Geneva Conventions).

No such obligation arises in NIACs, whether under Common Article 3 of the four Geneva Conventions 1949 or APII, since none of those treaties recognizes hostage taking as a 'grave breach' war crime subject to extradition or prosecution. This is the case notwithstanding that hostage taking in NIAC is a war crime under customary IHL and under the Rome Statute of the ICC; neither custom nor the Rome Statute impose an 'extradite or prosecute' obligation, and even if custom did so, the Hostages Convention is only inapplicable where such obligations arise under IHL *treaties*. As such, the Hostages Convention applies to hostage taking in NIACs, criminalizing it and thereby supplementing the IHL treaty provisions that prohibit but do not criminalize it.

Second, some of the sectoral CTL treaties applying to transnational aviation and maritime safety do not apply to military, customs, or police aircraft or ships,⁵⁶ or do not apply to military air bases (instead only applying to civilian airports).⁵⁷ As a result, attacks on such targets during armed conflict (or indeed peacetime) are not covered by the CTL instruments and are instead exclusively regulated by IHL. On the other hand, transnational attacks on civilian aircraft, ships, or airports during armed conflict, whether by state military forces, NSAGs, or civilians taking a direct part in hostilities, fall within both the CTL treaties and IHL and could simultaneously constitute crimes under both regimes.

Third, in a related vein, the Terrorist Financing Convention 1999 prohibits the financing of terrorist acts, in peace or war, against civilians or others out of combat (such as prisoners of war), but not against persons taking an active part in hostilities.⁵⁸ There is no exclusion for acts by armed forces, such that it is a crime to finance attacks on civilians by state forces, NSAGs, disorganized groups, or individual civilians taking part in hostilities. By contrast, the Terrorist Bombings Convention 1997 prohibits bombings against civilian or military objectives alike,⁵⁹ whether in peace or war, but excludes the activities of armed forces (see below). In armed conflict it thus makes criminal isolated terrorist attacks on the military, but not those against the state's military committed by organized armed groups.

(p. 412) Fourth, the most recent CTL treaties (addressing nuclear terrorism, terrorist bombings, and aviation safety) exclude the 'activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law'.⁶⁰ 'Armed forces' under IHL—an expression used in Common Article 3 of the four Geneva Conventions concerning NIACs⁶¹—refers to both state military forces and organized NSAGs.⁶² Military attacks (as well as other violent or dangerous activities) by such forces in IACs or NIACs are thus excluded from these CTL treaties. On the other hand, violence by

disorganized armed groups or civilians sporadically taking a direct part in hostilities is still covered, and is simultaneously regulated by IHL's prohibitions and criminal liabilities.

A fifth issue relating to IHL does not strictly involve a CTL instrument but a treaty modelled on one such instrument and serving an indirect counter-terrorism purpose. The Convention on the Safety of United Nations and Associated Personnel 1994 is based on the Protected Persons Convention 1973 and similarly requires states to criminalize 'kidnapping or other attack on the person or liberty' of UN and associated personnel⁶³ (who include the military, police, or civilian components of a UN mission, and related UN officials or experts, secondees, contractors, and humanitarian non-governmental organizations (NGOs)).⁶⁴ The Convention explicitly excludes from its scope of application UN enforcement actions under Chapter VII of the UN Charter, where UN personnel are 'engaged as combatants against organised armed forces and to which the law of international armed conflict applies' (article 2(2)), namely in IACs. This clause thus excludes attacks on UN combatants, by state forces in IAC (but probably not by non-state forces in NIAC),⁶⁵ where UN forces are taking Chapter VII enforcement action. IHL will instead govern such situations.

However, the Convention still co-applies with IHL in a number of situations: (i) attacks on non-combatant UN personnel in IAC or NIAC; (ii) attacks by NSAGs on UN personnel taking a direct part in hostilities in an NIAC (even if authorized to do so by the Security Council); and (iii) attacks in IAC or NIAC on UN combatants who are not authorized in an enforcement action by the Security Council—for example where UN peacekeepers, deployed with the consent of a state, take a direct part in hostilities (and are not acting only in self-defence) in the course of their mission. Such attacks on UN personnel would come under the Convention whether committed by state armed forces, organized NSAGs, disorganized groups, or individual civilians.

(p. 413) B. The UN Draft Comprehensive Terrorism Convention

The UN Draft Comprehensive Terrorism Convention, under negotiation since 2000, initially proposed to replicate the above exclusionary provision, based on the consensus reflected in the Terrorist Bombings Convention 1997. The proposal was challenged by alternative proposals sponsored by the Organisation of Islamic Cooperation (OIC), which led to an impasse in the drafting from 2002 to the present (2020). The OIC proposed that a convention should exclude the activities of the 'parties'—rather than 'armed forces'—during armed conflict,⁶⁶ 'including in situations of foreign occupation'.⁶⁷ The alternative proposals reflect semantic, legal, and political considerations.

The OIC reference to the 'parties', a technical IHL term for both state and non-state forces, may be designed to counter those states (nowadays including the US, France, and Russia) that interpret 'armed forces' as only encompassing state militaries.⁶⁸ In that sense, it is unobjectionable and indeed preferable, in order that belligerent parties are equally exempted and so that states are not placed in a more favourable position. As already noted, however, properly interpreted 'armed forces' also means state and non-state forces, so the competition between the two formulations is more semantic than substantive.

On the other hand, some states fear that the OIC intends the term 'parties' to embrace a wider array of actors, such as disorganized armed groups⁶⁹ or occasional violence by civilians loosely affiliated with such groups (including those sporadically supporting terrorism). Self-determination movements, for example, typically comprise not only armed wings but wider (and larger) political memberships, whether the Palestine Liberation Organisation, Hamas, or Polisario. On the flipside, a wider range of state actors might also be excluded under the rubric of the 'parties' to a conflict, such as civilian police and intelligence agencies (although some states treat these as part of the 'armed forces' in armed conflict). On that approach, most violence during a conflict, with the exception of

unaffiliated civilians committing isolated acts, would be excluded from a convention, not just acts by armed forces.

To some extent, the distinction is one without difference, since IHL applies to violence whether by armed forces or other actors (including individual civilians). Exempting conduct from a terrorism convention would not confer impunity, but would leave liability to war crimes law. The exclusion debate is thus partly a political struggle over labelling and the stigmatization and delegitimization it brings, rather than a push to evade liability whatsoever.

As discussed further below, there are sound policy arguments for leaving armed conflict to be exclusively regulated by IHL, and for reserving crimes of terrorism for peacetime. As noted earlier, however, existing CTL treaties do not preserve a neat separation, but endorse co-regulation of certain acts in conflict. There are also real questions of liability at stake. From a law enforcement standpoint, sweeping preventive offences and special powers may (p. 414) accompany terrorism offences but not war crimes. The dual criminalization of attacks on civilians as a war crime or the crime of terrorism is largely (but not wholly) unobjectionable, even if hostilities between armed forces ought to be properly left to the exclusive domain of IHL.

The OIC's proposed exclusion of 'foreign occupation' is redundant in that an occupation is by definition an international armed conflict under Common Article 2 of the four Geneva Conventions 1949, regardless whether there are also hostilities involving state forces.⁷⁰ The view that occupation is NIAC⁷¹ is legally incorrect. In addition, organized NSAGs involved in hostilities in occupied territory would still be 'armed forces' in a NIAC that are also excluded from the convention.

Notably, the OIC has not formally sought a wider exclusion of all self-determination violence, including that committed outside of armed conflict. In contrast, three recent regional counter-terrorism conventions, of the OIC, African Union, and Arab League, exempt altogether struggles for national liberation or self-determination. Pakistan also lodged a reservation purporting to exclude self-determination struggles from the application of the Terrorist Bombings Convention 1997, triggering formal objections from many states on the basis that it was contrary to the treaty's object and purpose.⁷² UN General Assembly and Security Council resolutions have repeatedly affirmed that all acts of terrorism are 'criminal and unjustifiable, wherever and by whomever committed'.⁷³

Sixth, some CTL instruments have a different kind of partial application in armed conflict. The Nuclear Material Convention 1980 establishes offences relating to interference in 'nuclear material used for peaceful purposes while in international nuclear transport'. It thus has no application to attacks (whether lawful or unlawful under IHL) on a military's nuclear weapons facilities during conflict. However, the offences of dealings with peaceful nuclear materials in ways that cause death or injury or substantial property damage (article 7) could still be committed during armed conflict, for instance by stealing nuclear material and dispersing it against civilian or military targets.⁷⁴

C. Lesser Situations of Violence

Some CTL treaties raise a further issue at the margins of IHL. Recent treaties exclude the (peacetime) 'activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law'.⁷⁵ Official duties could include legitimate law enforcement and counter-terrorism operations (including hostage rescue), evacuation operations, peace or UN peacekeeping operations, or humanitarian relief. While the exemption arguably concerns only peacetime duties (though there is (p. 415) some ambiguity whether it also overlaps with the exclusion for

armed forces in armed conflict, which is part of the same provision), situations such as peacekeeping can involve the application of military force approaching armed conflict.

The exclusion only extends to state military forces and not to other state entities (such as police, security, or civilian intelligence agencies) that might be similarly deployed and may also need to use coercive force (for instance, to control a riot at a food distribution centre or disorder within a displaced persons camp). The provision does, however, contemplate that state military forces may include 'persons acting in support of those armed forces who are under their formal command, control and responsibility', which could include police or other civilian personnel coopted by the military.

Violence outside of 'official duties' will still come within these conventions. The concept is undefined in the conventions but acts outside official duties would foremost include purely private conduct by military personnel. It is less clear whether 'official duties' would also exclude acts by military personnel that are unlawful under domestic law (for instance, for being outside the scope of authority, and even if performed under apparent authority). It is likely, however, that 'official duties' includes acts contrary to other rules of international law (thus carving out from the conventions, for example, France's bombing of the Greenpeace ship, *Rainbow Warrior*, in New Zealand in 1986, since the operation was carried out by French military intelligence⁷⁶ acting on orders of the French government).

In the Draft Comprehensive Terrorism Convention, the OIC has sought to restrict this exemption to state military forces that are 'in conformity' with, and not merely 'governed by', international law. The proposal thus aims to qualify excessive state violence as 'terrorism', notwithstanding the application of existing international law to state breaches. Again, political labelling is at stake, but also real legal consequences. Presently, state violations of international law (including human rights and state responsibility) do not always attract criminal liability, whereas non-state actors would be asymmetrically liable under a terrorism convention. At the same time, states enjoy special legal personality and are lawfully entitled to utilize force in circumstances where non-state actors are not. States and non-state actors are therefore not similarly situated, even if it is desirable, from a rule-of-law standpoint, to equally criminalize state and non-state conduct that can be sensibly equated.

D. Security Council Counter-Terrorism Obligations

Counter-terrorism obligations imposed on states by the UN Security Council also raise issues of interaction with IHL. First, individuals and entities listed, under Security Council sanctions resolutions, as associated with Al Qaeda, the Taliban (until the suspension of its listing in 2019), and Islamic State of Iraq and al-Sham (ISIS) are subject to those restrictive financial measures even if they are also NSAGs that are parties to a NIAC, or individual members of such armed groups, and are thus already governed by IHL. The implications of such designation for compliance with IHL is considered below.

Second, the decentralized national implementation of the Security Council's CTL norms has generated normative and policy-oriented friction between CTL and IHL. In resolution (p. 416) 1373 (2001), the Security Council required states to criminalize terrorist acts in domestic law but failed to provide a common international definition of such acts or stipulate the relationship of such offences to IHL (such as through any of the exemption-type clauses found in the sectoral CTL conventions). Further, in resolution 2178 (2014), the Security Council required states to criminalize certain conduct relating to so-called 'foreign terrorist fighters', again without defining the operative concept of terrorism.

Many states have duly enacted their own terrorism and foreign terrorist fighter offences under these resolutions. National approaches to the relationship between terrorism and IHL vary.

1. Exclusion of certain conduct in armed conflict

EU law largely reflects the exemption clauses found in the recent CTL treaties, by providing that EU terrorism offences do 'not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law'.⁷⁷ The EU law thus excludes acts by (state or non-state) armed forces regardless of whether they are IHL compliant or non-compliant. Various decisions of European national courts have applied the exemption.

For example, a Belgian law implementing the EU offences was applied by a Belgian court in 2019 to acquit Kurdistan Workers' Party (PKK) members charged with terrorism offences, on the basis that the PKK was a party to a NIAC and was not engaged in terrorist acts outside of it.⁷⁸ Likewise in an Italian case of 2011, the court held that the LTTE in Sri Lanka was a party to a NIAC and could not be qualified as a terrorist organization under international law (without more evidence that its acts were preponderantly terrorist, not militant), including because terrorism is not an international crime in armed conflict and the EU law on terrorist crimes excludes activities of armed forces in armed conflict.⁷⁹

Also in 2011, a Dutch court dismissed charges of participation in a terrorist organization, namely the LTTE in Sri Lanka, on the basis that the LTTE was an armed group in a NIAC, and that 'incidental' terrorist acts by its members, without a nexus to the conflict, were not sufficient to qualify it as a terrorist organization.⁸⁰ The court implicitly incorporated the EU exemption into Dutch law, which had not expressly replicated it.

Canadian law (and similarly New Zealand law) more narrowly excludes 'an act or omission that is committed during an armed conflict' and that is in accordance with applicable international or customary or treaty law.⁸¹ Violence consistent with IHL and committed by state or non-state forces is thus excluded, whereas state or non-state violence in breach of IHL may be treated as terrorist offences. Little difficulty arises where national laws duplicate or complement war crimes against civilians under IHL, or are otherwise limited to protecting civilians (such as by criminalizing the financing of attacks on civilians). International criminal law already enables certain underlying conduct to be qualified as different but overlapping crimes, whether war crimes, crimes against humanity, or genocide.

(p. 417) 2. No exclusion of conduct in armed conflict

More problematically, some national laws have criminalized violence in armed conflict without any exception whatsoever to accommodate armed conflict and the special regime of IHL, as in the UK, Australia, and the Netherlands.⁸² Such laws may criminalize acts which are not prohibited or criminalized by IHL, such as proportionate attacks on state military forces or military objectives by NSAGs, or direct participation in hostilities by civilians. National laws may then trigger exceptional domestic powers of search, seizure, and surveillance; extend inchoate or preparatory criminal liability; or modify criminal procedure in favour of national security. They may also serve as a basis for transnational criminal cooperation with other states to suppress terrorism.

The UK and Dutch courts, and the EU Court of Justice, have accordingly upheld the co-application of national terrorism offences to armed conflicts governed by IHL. In 2004 the Dutch Supreme Court held that IHL does not apply exclusively in a NIAC to the exclusion of common criminal law; that the criminalization of war crimes in a NIAC does not preclude

the punishment of such acts alternatively as common crimes; and that conduct not amounting to war crimes under IHL may also be punishable as common crimes.⁸³

In *R v Gul* [2013],⁸⁴ the UK Supreme Court found that international law does not prohibit the national criminalization as terrorism of hostile acts in NIACs, even those confined to targeting military objectives. It found that the counter-terrorism treaties, and national laws, were inconsistent in regard to the existence and scope of exclusionary provisions, and did not establish a general rule excluding national terrorism offences.⁸⁵ It further noted that no combatant immunity exists in NIACs.⁸⁶ While international law may not prohibit such hostilities, nor does it positively authorize them.

In *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union* (2014),⁸⁷ the Court of Justice of the EU (CJEU) held that the existence of an armed conflict under IHL does not preclude the application of EU counter-terrorism financing law; that terrorist acts are in fact expressly forbidden by IHL; and that there are no exceptions for 'freedom fighters' or those resisting 'oppressive government' under either EU or international law. The Court additionally observed that Security Council resolution 1373, which the EU financing measures implement, does not exempt activities of armed forces in armed conflict.⁸⁸

The case illustrates, however, that even within regional law there are different approaches to the interaction between CTL and IHL. The case concerned the listing of the LTTE for the purpose of asset freezing under an EU CTL of 2001 which contained no exception for armed forces in armed conflict.⁸⁹ In contrast, as mentioned earlier, EU law establishing terrorism offences *does* exclude such acts,⁹⁰ including by non-state armed forces in NIAC, (p. 418) notwithstanding that they do not enjoy combatant immunity. EU terrorist financing measures thus apply to armed conflict where EU terrorist offences do not.

Complicating matters, in 2014, the District Court of the Hague approved of the above decisions of the CJEU and the Dutch Supreme Court (in 2004) in finding that IHL does not apply exclusively in armed conflict and that Dutch criminal law—including its *terrorist offences*—co-applied to a NIAC in Syria.⁹¹ It found that members of organized armed groups do not enjoy combatant immunity in NIAC and that their mere participation in the conflict can be punished. It regarded such principles as flowing from IHL treaties, 'settled' case law, and authoritative writers. While the Dutch terrorism offences implemented the EU terrorism offences of 2002 (which exempt armed forces in armed conflict), the Dutch law does not *expressly* include such exemption. The Court did not discuss this discrepancy, despite the defendants invoking the above-mentioned Dutch case of 2011 which *had* excluded armed forces from the Dutch terrorism offences on the basis that they implemented the EU offences.

Setting aside jurisdiction- or treaty-specific exemptions for armed conflict, while applying national terrorism offences to hostilities in NIAC may otherwise be strictly lawful as a matter of general international law, an adverse policy impact of this approach may be to undermine the effectiveness of IHL and its humanitarian purposes. The International Committee of the Red Cross (ICRC) warns against criminalizing acts that are not already unlawful under IHL.⁹² IHL does not prohibit attacks on military objectives.⁹³ Criminalizing fighting by NSAGs as terrorism undermines their incentive to comply with IHL, for there is no longer any difference in legal consequence between proportionately attacking the military or indiscriminately targeting civilians. All armed resistance to state forces becomes 'terrorism', regardless of how one fights or whether one respects IHL.

Admittedly, in NIACs the state has long been entitled to criminalize members of non-state armed forces for offences against national security, whether labelled terrorism or otherwise. There is no combatant immunity in NIACs and at most IHL encourages states to grant the widest possible amnesty at the end of the conflict for hostile acts that did not violate IHL.⁹⁴ The incentives for armed groups to comply with IHL have always been rather

limited, resulting from state's concerns to protect their sovereign right to restore law and order within their territories.

However, the additional criminalization of non-state hostilities as terrorism accentuates the existing disincentives for armed groups to comply with IHL.⁹⁵ First, current national legislative efforts carry the imprimatur of implementing UN Security Council obligations, according them a greater legal authority than ordinary offences. Second, such measures are intended to enable transnational criminal cooperation on terrorism, whereas hostile acts in NIAC (which are not war crimes) were hitherto typically treated as non-extraditable, quintessentially 'political' offences. Foreign states are thereby encouraged to cooperate in the repression of domestic political rebellion.

(p. 419) Third, the labelling of hostilities as terrorism carries a special stigma which widens political and social divisions between the parties and dampens the prospects for peace negotiations; disarmament, demobilization, and reintegration (DDR); and post-conflict reconciliation (including prospects for conferring amnesties at the end of the conflict for participation in hostilities, as recommended by IHL).⁹⁶ Fourth, the criminalization or proscription of terrorists may stimulate armed groups to distrust the international community and discourage them from engaging in humanitarian assistance to civilians, discussed in section 4 'Impact of Counter-Terrorism on Humanitarian Relief Operations' below.

Finally, there is also a broader international legal concern about the over-extension of domestic criminal jurisdiction. The right of a state to criminalize hostile acts by armed groups in a NIAC historically arose in the context of NIACs being civil wars; it was thus a simple exercise of prescriptive territorial criminal jurisdiction. In contrast, the internationalization of terrorism offences, flowing from national implementation of Security Council resolution 1373, has resulted in the expansive extraterritorial criminalization of conduct in NIACs by states other than the territorial sovereign of the place of the conflict.

The sovereign territorial jurisdictional nexus is thus no longer apparent. It is one thing for a state to suppress non-state violence which challenges its political authority in its own territory, but quite a different proposition for other states to suppress such violence. The latter interferes, on the side of the foreign government, in domestic political struggles in other states—which historically was avoided by, for example, the application of the political offence exception in extradition law and treaties. As such, there are good reasons to be cautious about criminalizing hostilities in foreign NIACs (other than that deliberately targeting civilians); military combat should arguably be left to regulation by IHL.

E. A Customary International Crime of Terrorism?

Finally, CTL norms in customary international law also relate to IHL. In identifying a customary international law crime of transnational terrorism, the Special Tribunal for Lebanon (STL) held that such crime only exists in peacetime and not in armed conflict.⁹⁷ As such, there can be no overlap between IHL and this CTL norm. The STL indicated, however, that 'a broader norm that would outlaw terrorist acts *during times of armed conflict* may also be emerging'.⁹⁸ The STL's decision that there exists a customary crime of terrorism at all is controversial and arguably unsupported by state practice.⁹⁹

4. Impact of Counter-Terrorism on Humanitarian Relief Operations

In armed conflict, humanitarian activities (including aid, assistance, relief, or protection) are essential to protect civilian lives, basic needs, and human rights (including such as food (p. 420) or medical care, or humane treatment in detention). Under IHL, parties to a conflict must allow and facilitate the rapid and unimpeded passage of impartial humanitarian relief for civilians in need,¹⁰⁰ subject to reasonable measures of control. The

wounded and sick must also receive the necessary medical care,¹⁰¹ and medical personnel, units, and activities are protected.¹⁰² States may not override these obligations in countering terrorism.

In practice, however, many humanitarian actors have expressed concern at the impact of CTLs on their activities during armed conflict. Humanitarian actors often have to negotiate or cooperate with all parties to a conflict (including 'terrorist' groups) to undertake their humanitarian activities. International and national CTLs generally do not prohibit mere contact or engagement with non-state actors for humanitarian purposes.¹⁰³ However, since 9/11, some national laws and policies have restricted or even prohibited engagement with 'terrorist' groups in various ways,¹⁰⁴ particularly through expansive terrorism offences (such as financing, training, support, or association) as well as financial restrictions relating to charitable or humanitarian activities.

First, even purely humanitarian dealings with terrorist groups have been criminalized. For example, it is an offence under US law to provide 'material support or resources to a foreign terrorist organization',¹⁰⁵ which is defined to include any training, advice, finance, or other assistance to a group. In *Holder v Humanitarian Law Project* (2010),¹⁰⁶ the US Supreme Court interpreted this strictly to include training groups such as the Kurdistan Workers' Party (PKK) on how to use IHL and international law to peacefully resolve disputes and how to petition UN bodies for relief. Any support was thought to facilitate the terrorist activity of the group, even if it does not contribute to a specific attack. Thus, international law training could potentially lend a group legitimacy, strain the US' relationship with its allies, or enable the group to use the international legal system to buy time, 'threaten, manipulate, and disrupt', or seek humanitarian financial aid that could be diverted to terrorism.

Second, some donors have adopted 'no contact' policies, which prohibit humanitarian actors (such as aid agencies or NGOs) from dealing with certain groups (such as Hamas in Gaza), even to secure access or safety for humanitarian personnel, or the passage of relief supplies. Third, some donors have imposed restrictive conditions on funding, which require humanitarian actors, and their partners and contractors, to exercise due diligence in their operations, or which impose vetting and monitoring requirements, to prevent diversion of funds to terrorist activities.

Restrictive laws and policies have adversely impacted on humanitarian operations, for instance by limiting funding to particular places, populations, partners, or programmes. For example, after Al-Shabaab was labelled as a terrorist group, US aid to southern Somalia was reduced by almost 90 per cent between 2008 and 2010¹⁰⁷—in the midst of a famine (p. 421) that killed 260,000 people by 2012.¹⁰⁸ Islamic charities have been particularly hard hit by restrictions.¹⁰⁹

In addition to increasing the administrative burdens on humanitarian actors, restrictive laws and policies have led to self-limitation because of uncertainty about legal liabilities and the related chilling effect on humanitarian operations. It can result in actors refusing funding from some donors, ceasing operations in some places or to some populations, or passing on risk to partners and contractors. It can also impede information sharing, cooperation, and coordination between actors.

Some humanitarian actors, such as the ICRC and the United Nations, enjoy international immunities from national legal liabilities,¹¹⁰ but NGOs, civil society actors, and contractors do not. Informal engagement is often tolerated in practice, although this can still leave organizations facing legal uncertainty or self-restriction.¹¹¹ In some cases, specific UN mandates enable limited engagement, as with Hamas in Gaza or Al Shabaab in Somalia,¹¹² but this does not necessarily immunize NGOs from their home states' laws. Restrictive

measures have also affected NGOs and civil society actors working in conflict areas, such as human rights groups engaged in advocacy, monitoring, or fact-finding.

The designation of some armed groups as ‘terrorist’ also challenges the principles of humanitarianism.¹¹³ The four principles of humanitarian action are humanity (addressing suffering wherever it is found); neutrality (not taking sides in hostilities or preferring some political, racial, religious, or ideological causes over others); impartiality (acting on the basis of need and without discrimination); and independence (remaining autonomous from the political, economic, military, or other agendas of other actors).¹¹⁴ CTL, on the other hand, ‘takes sides’ by criminalizing and/or ostracizing some groups. Neutrality and independence can also be compromised by humanitarian actors being pressured to participate in multinational stabilization or counter-insurgency efforts,¹¹⁵ in which humanitarian assistance is co-opted and militarized as part of strategies to win civilian ‘hearts and minds’. Humanity and impartiality are further undermined by restrictive policies which discourage aid to certain populations or places even if they are in most need.

While the Security Council has emphasized that counter-terrorism must comply with international law (including IHL and human rights), which implicitly safeguards humanitarian activities, it has not expressly provided for humanitarian exceptions to states’ (p. 422) counter-terrorism obligations (as it has done, for instance, in relation to country or situation specific sanctions regimes). At most, in Resolution 2462 (2019), concerning terrorist financing, it:

Urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.¹¹⁶

Beyond financing, the UN Secretary General has likewise urged states ‘to consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for... humanitarian purposes’.¹¹⁷ An example of good practice in relation to counter-terrorism is in EU law, which excludes ‘[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law’.¹¹⁸

5. Conclusion

IHL has proved capable of accommodating the historical and contemporary challenges presented by terrorism and counter-terrorism. In part this is because IHL focuses on regulating objectively harmful conduct rather than being preoccupied by the pejorative and contested labelling of actors. IHL thus prefers neutral terminology like ‘armed groups’ or ‘parties’ over politically loaded and stigmatizing terms such as ‘terrorist’ or ‘terrorist organization’. Many of its proscriptions apply equally to both parties to a conflict and in principle it aims to avoid ‘taking sides’, even if IHL’s regulation of NIACs undoubtedly favours states and reduces incentives for any armed group, including ‘terrorists’ to comply with IHL.

Further, the generality and ambiguity in some IHL rules—such as the threshold of a NIAC or the meaning of DPH—have also enabled it to be flexibly, constructively, and dynamically interpreted to accommodate emerging concerns. Sometimes the cost of generality has been claims by certain states that there are gaps in IHL or that it is otherwise inadequate; it has also brought prolonged uncertainty about the precise content of norms and difficulty in achieving consensus. Proposals to ratchet down IHL’s protections for ‘terrorists’ have not, however, gained serious currency and the fifteen years after 9/11 broadly affirmed IHL’s

applicability—despite serious non-compliance—and later course correction—by some powerful states.

Where IHL has developed terrorism-specific rules, these have been tightly focused on IHL's core business of protecting civilians, rather than taking sides with states against non-state adversaries. Thus IHL's prohibitions on terrorism, acts of terror, and intending to spread terror amongst a civilian population target state and non-state conduct alike. The (p. 423) war crime of spreading terror recognizes the additional wrongfulness of attacking civilians for the ulterior purpose of psychologically intimidating or terrorizing them.

More problematic has been the overlaying of CTL instruments and norms on armed conflict, which take varied approaches to their interaction with IHL. While CTL instruments and norms often reinforce or complement IHL's protections for civilians, some have interfered in IHL's regulation of violence by prohibiting or criminalizing conduct that is not unlawful under IHL. The problem is most acute in those national laws, implementing Security Council obligations, that criminalize all war fighting by armed groups in NIACs. When CTL takes sides in this way, it can undermine the already weak incentives for armed groups to respect IHL. It can also inhibit humanitarian engagement and cooperation by external actors with armed groups—and thereby undermine IHL's guarantees of civilian protection in conflict.(p. 424)

Footnotes:

1 See generally Ben Saul, 'Terrorism and International Humanitarian Law', in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 208–231; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart 2011).

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) articles 44(3) and 1(4), respectively.

3 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

4 32nd International Conference of the Red Cross and Red Crescent, Resolution 1: Strengthening international humanitarian law protecting persons deprived of their liberty (32IC/15/R1) (8–10 December 2015). The outcome of an ICRC study and consultation from 2012–2015 was a directive to pursue further work to produce 'concrete and implementable outcomes' of a 'non-legally binding nature' para 8.

5 See Hans Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' (2002) 84 *IRRC* 547.

6 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) article 4.

7 API article 51(2) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) article 13(2).

8 *Prosecutor v Galić* (Trial Chamber Judgment and Opinion) ICTY-98-29-T (5 December 2003) paras 65–66, 138; affirmed in *Prosecutor v Galić* (Appeals Chamber Judgment) IT-98-29-A (30 November 2006) paras 87–90.

9 *Galić* (Trial Chamber Judgment) (above n 8) para 133.

- 10** *ibid* para 135.
- 11** *Galić* (Appeals Chamber Judgment) (above n 8) para 102.
- 12** *ibid*.
- 13** *Galić* (Trial Chamber Judgment) (above n 8) para 136.
- 14** *ibid*.
- 15** *ibid* para 134; *Galić* (Appeals Chamber Judgment) (above n 8) paras 103–104.
- 16** *Galić* (Trial Chamber Judgment) (above n 8) para 137.
- 17** *Galić* (Appeals Chamber Judgment) (above n 8) para 103.
- 18** *ibid* para 104.
- 19** *ibid*.
- 20** *Galić* (Trial Chamber Judgment) (above n 8) paras 592, 596–597.
- 21** *ibid* para 593.
- 22** *ibid* paras 569, 584–585.
- 23** *ibid* paras 584, 593.
- 24** *ibid* para 591.
- 25** *ibid* paras 567, 593, 598.
- 26** *ibid* para 593.
- 27** *ibid* paras 563, 568, 570, 573, 589.
- 28** *ibid* para 586.
- 29** *ibid* paras 592–93.
- 30** *ibid* para 593.
- 31** *Galić* (Appeals Chamber Judgment) (above n 8) paras 87–90.
- 32** *ibid* paras 91–98.
- 33** *Prosecutor v Milošević* (ICTY Trial Chamber Judgment) IT-98-29/1-T (12 December 2007).
- 34** *Prosecutor v Karadžić* (ICTY Trial Chamber Judgment) IT-95-5/18-T (24 March 2016) paras 4632–4634; *Prosecutor v Mladić* (ICTY Trial Chamber Judgment) IT-09-92-T (22 November 2017) para 4921.
- 35** The crime of ‘acts of terrorism’ in NIAC is expressly included in article 3(d) of the Statute of the Special Court for Sierra Leone (SCSL).
- 36** *Prosecutor v Brima et al* (Trial Chamber Judgment) SCSL-0416-T (20 June 2007) paras 662, 666; also *Prosecutor v Taylor* (SCSL Trial Chamber Judgment) SCSL-03-1-T (26 April 2012) paras 112, 1430–1633.
- 37** *Prosecutor v Sesay et al* (SCSL Trial Chamber Judgment) SCSL-04-15-T (2 March 2009) paras 1032–1036, 1124–1130, 1347–1352, 1357, 1361, 1491, 1596–1604.
- 38** *ibid* paras 1347–1352, 1602.
- 39** *Taylor* (above n 36) paras 402–410, 1964–2192.
- 40** *ibid* paras 2048, 2055, 2192.
- 41** *ibid*, respectively paras 2006, 2017; 2040; 2021, 2041; 2035.

42 *ibid* para 2026.

43 *Sesay* (above n 37) paras 1034, 1363, 1494, 1126, 1358-1359, 1362, 1128; *Taylor* (above n 36) paras 1969, 1971 1975-1977, 2047.

44 See eg Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) articles 8(2)(b)(i)-(v) (IACs) and 8(2)(e) (i)-(v) (NIACs).

45 See Ben Saul, *Defining Terrorism in International Law* (OUP 2006) chapters 3-4.

46 US Department of Defense (DoD), 'Military Commission Instruction No 2: Crimes and Elements for Trials by Military Commission' (30 April 2003) clause 18 (terrorism as 'intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation and coercion'); Military Commission Act 2006 (US) s 950v(25) (A); see also DoD, *Military Commission Manual*, Part IV-18-19 (DoD 2007) 261-262 ('material support for terrorism'). The latter offence was found to be unlawfully retrospective in *Hamdan v United States* US Court of Appeals (DC Circuit) (16 October 2012) and *Hicks v Australia*, UN Human Rights Committee Communication No 2005/2010 (5 November 2015) para 4.8.

47 Ben Saul, 'The Emerging International Law of Terrorism', in Ben Saul (ed), *Terrorism: Documents in International Law* (Hart 2012) 67.

48 Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 (Tokyo Convention 1963); Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hague Convention 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 178 (Montreal Convention 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 (Protected Persons Convention 1973); International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostages Convention 1979); Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 101 (Vienna Convention 1980); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989) 974 UNTS 177 (Montreal Protocol 1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (Rome Convention 1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304 (Rome Protocol 1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 2122 UNTS 359 (Plastic Explosives Convention 1991); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256 (Terrorist Bombings Convention 1997); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (Terrorist Financing Convention 1999); Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (adopted 14 October 2005; entered into force 28 July 2010) 1678 UNTS 201 (Protocol 2005 to the Rome Convention 1988, creating the consolidated Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005); Protocol 2005 to the Rome Protocol 1988 (adopted 14 October 2005, entered into force 28 July 2010) 1678 UNTS 201 (Protocol 2005 to the Rome Protocol 1988); Amendment to the Convention on the Physical Protection of Nuclear Material 1980

(adopted 8 July 2005, entered into force 8 May 2016) UN Registration No 24631 (Amendment 2005 to the Nuclear Material Convention 1980); International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89 (Nuclear Terrorism Convention 2005); Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010 (adopted 10 September 2010, entered into force 1 July 2018) ICAO Doc 9960 (Beijing Convention 2010, consolidating the Montreal Convention 1971 and Montreal Protocol 1988); Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, done at Beijing (adopted 10 September 2010, entered into force 1 January 2018) ICAO Doc 9959 (Beijing Protocol 2010); Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 4 April 2014, entered into force 1 January 2020) ICAO Doc 10034 (Montreal Protocol 2014).

49 See Saul (ed), *Terrorism: Documents in International Law* (above n 47) ch 4.

50 UNGA Resolution 60/288 (20 September 2006).

51 *ibid* para 3; UNSC Resolutions 1456 (20 January 2003) annex para 6 and 1624 (14 September 2005) para 4.

52 Specifically, the treaties typically do not apply where an offence is committed in a single state, the offender and victims are nationals of that state, the offender is found in the state's territory and no other state has jurisdiction under those treaties: Tokyo Convention 1963 article 5(1); Hague Convention 1970 article 3(3)–(4); Hague Convention 1970 article 3(5) as amended by the Beijing Protocol 2010; Montreal Convention 1971 articles 4(2)–(5); Rome Convention 1988 article 4(1)–(2); Rome Protocol 1988 article 1(2); Hostages Convention 1979 article 13; Vienna Convention 1980 article 14; Nuclear Terrorism Convention 2005 article 3; Terrorist Bombings Convention 1997 article 3; Terrorist Financing Convention 1999 article 3.

53 Hostages Convention 1979 article 12.

54 While IHL treaties do not define it, the *Elements of Crimes* of the Rome Statute of the International Criminal Court follows the definition of the Hostages Convention 1979 in requiring an intent 'to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons': Rome Statute: *Elements of Crimes* (2002): common element 3, article 8(2)(a)(viii) and (c)(iii).

55 Four Geneva Conventions 1949, Common Article 3(1)(b); GCIV article 34; APII article 4(2)(c); Rome Statute article 8(2)(a)(viii) (IACs) and article 8(2)(c)(iii) (NIACs); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (CUP 2005) (CIHL) rule 96.

56 Tokyo Convention 1963 article 1(4); Hague Convention 1970 article 3(2); Montreal Convention 1971 article 4; Rome Convention 1988 article 2.

57 Montreal Protocol 1988 article 2.

58 Terrorist Financing Convention 1999 article 2(1)(b).

59 Daniel O'Donnell, 'International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces' (2006) 88 *IRRC* 653, 684.

60 Nuclear Terrorism Convention 2005 article 4(2); Terrorist Bombings Convention 1997 article 19(2); Terrorist Financing Convention 1999 article 2(1)(b); Vienna Convention 1980 (as amended by the Amendment 2005) article 2(4)(b); Hague Convention 1970 (as amended

by the Beijing Protocol 2010) article 3 *bis*; Rome Convention 1988 (as amended by the Protocol 2005) article 2 *bis* (2); Plastic Explosives Convention 1991 articles 3–4.

61 Jelena Pejic, 'Armed Conflict and Terrorism', in Ana Maria Salinas de Frias, Katja Samuel, and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (OUP 2012) 171, 189.

62 O'Donnell (above n 59) 866.

63 Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363 article 9(1).

64 *ibid* article 1.

65 The reference to 'the law of international armed conflict' in article 2(2) is not intended to limit the exclusion to IACs, given that article 2(2) also refers to UN combatancy against 'organized armed forces', thus encompassing NIACs. Rather, that phrase is intended to refer to the applicable body of law, namely IHL. On the drafting of the Convention, see Antoine Bouvier, 'Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis' (1995) 35 *IRRC* 638.

66 UNGA Sixth Committee (59th Session), 'Report of the Working Group on Measures to Eliminate International Terrorism' UN Doc A/C.6/59/L.10 (8 October 2004); UNGA, 'Report of the Ad Hoc Committee Established by UNGA Res 51/210' (17 December 1996) 8th Session UN Doc Supp No 37 (A/59/37) (2004) 11 para 6; see also UNGA, 'Report of the Ad Hoc Committee Established by UNGA Resolution 51/210' (17 December 1996) 7th Session UN Doc Supp No 37 (A/58/37) (2003) 11–12.

67 OIC proposal, in UNGA, 'Report of the Ad Hoc Committee Established by UNGA Res 51/210' (17 December 1996) 6th Session UN Doc Supp No (A/57/37) (2002) annex IV, 17.

68 Pejic (above n 61) 192.

69 *ibid* 193.

70 *ibid* 189, 193.

71 O'Donnell (above n 59) 868.

72 Austria, Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Spain, Sweden, UK, US.

73 UNGA Resolution 49/60 (9 December 1994) annex: Declaration on Measures to Eliminate International Terrorism para 1.

74 O'Donnell (above n 59) 862.

75 Nuclear Terrorism Convention 2005 article 4(2); Terrorist Bombings Convention 1997 article 19(2); Terrorist Financing Convention 1999 article 2(1)(b); Vienna Convention 1980 (as amended by the Amendment 2005) article 2(4)(b); Hague Convention 1970 (as amended by the Beijing Protocol 2010) article 3*bis*; Rome Convention 1988 (as amended by the Protocol 2005) article 2*bis* (2); Plastic Explosives Convention 1991 articles 3–4.

76 Direction générale des services spéciaux (DGSS).

77 EU Directive of 15 March 2017 on Combating Terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA recital 37.

78 Chamber of Indictments of the Court of Appeal of Brussels (8 March 2019) (applying the Belgian Criminal Code article 141 *bis*).

- 79** *Republic of Italy v TJ (aka Kumar) and Twenty-Nine Others*, Court of Naples (23 June 2011) (there was also insufficient evidence that the defendants had raised funds specifically to finance terrorist acts).
- 80** District Court of The Hague (Judgment) (21 October 2011) (ECLI: NL: RBSGR: 2011: BU2066 and BT8829).
- 81** Criminal Code (RSC 1985 c C-46) (Canada) s 83.01(1); see also Terrorism Suppression Act 2002 (NZ) s 5(4).
- 82** Terrorism Act 2000 (UK) s 1; Criminal Code 1995 (Australia) s 100.1.
- 83** Dutch Supreme Court (Judgment) (7 May 2004) (ECLI: NL: HR: AF6988) paras 3.3.7–3.3.8.
- 84** *R v Gul (Appellant)* [2013] UKSC 64 (affirming *R v Gul* [2012] EWCA Crim 280).
- 85** *ibid* paras 48 and 50.
- 86** *ibid* para 51.
- 87** *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union* (Judgment of the General Court) T-208/11 European Court of Justice (Sixth Chamber, Extended Composition) (16 October 2014) paras 54–83.
- 88** *ibid* para 74.
- 89** EU Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism (OJ 2001 L 344, 93), as implemented by EC Regulation No 2580/2001 and Decisions 2001/927/EC and 2006/379.
- 90** EU Framework Decision 2002/475 on Combating Terrorism 2002/475/JHA (13 June 2002) (since replaced by the EU Directive of 15 March 2017 (above n 77)).
- 91** *Prosecutor v Maher H*, Case No 09/767116-14, District Court of The Hague (Judgment) (1 December 2014) para 3.
- 92** ICRC, *Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law* (ICRC 2002).
- 93** Pejic (above n 61) 177.
- 94** APII article 6(5).
- 95** Pejic (above n 61) 185.
- 96** Protocol II article 6(5).
- 97** *Prosecutor v Ayyash et al* (STL Appeal Chamber) (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) (16 February 2011) para 85.
- 98** *ibid* para 107.
- 99** Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 *LJIL* 677.
- 100** CIHL rule 55; see eg GCIV article 23; API article 70(2); APII article 18; Rome Statute article 8(2)(b)(xxv).
- 101** CIHL rule 110.
- 102** CIHL rules 25–30.

- 103** See Kate Mackintosh and Patrick Duplat, 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action' (Commissioned by UN Office of the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, July 2013).
- 104** Kate Mackintosh and Ingrid Macdonald, 'Counter-Terrorism and Humanitarian Action' (2013) 58 *Hum Exch Mag* 23, 24.
- 105** USC Title 18, Part I, Chapter 113B, para 2339B.
- 106** *Holder v Humanitarian Law Project*, 561 US (2010) Nos 08-1498 and 09-89 (US Supreme Court) (21 June 2010).
- 107** Mackintosh and Duplat (above n 103).
- 108** 'Somalia Famine "Killed 260,000 people"' *BBC News* (London, 2 May 2013) www.bbc.com/news/world-africa-22380352.
- 109** Mackintosh and Duplat (above n 103).
- 110** Mackintosh and Macdonald (above n 104) 25.
- 111** Naz Modirzadeh, Dustin Lewis, and Claude Bruderlein, 'Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape' (2011) 93 *IRRC* 1, 19-20.
- 112** UNGA Resolution 46/182 (19 December 1991) para 35(d) mandated UN humanitarian actors to negotiate with relevant parties. On Somalia, see UNSC Resolution 1916 (19 March 2010) para 5 (creating a temporary humanitarian exception to counter-terrorism financing sanctions).
- 113** Ashley Jackson and Eleanor Davey, 'From the Spanish Civil War to Afghanistan: Historical and Contemporary Reflections on Humanitarian Engagement with Non-State Armed Groups', Humanitarian Policy Group Working Paper (Overseas Development Institute, July 2014) 1, 2.
- 114** UNGA Resolutions 46/182 (19 December 1991) and 58/114 (17 December 2003).
- 115** Jackson and Davey (above n 113) 17; Ashley Jackson, 'Talking to the Other Side: Humanitarian Engagement with Armed Non-State Actors', Humanitarian Policy Group Brief 47 (Overseas Development Institute, June 2012) 3.
- 116** UNSC Resolution 2462 (28 March 2019) para 24.
- 117** UN Security Council, 'Report of the UN Secretary General on the Protection of Civilians in Armed Conflict', UN Doc S/2010/579 (11 November 2010) para 57.
- 118** EU Directive of 15 March 2017 (above n 77) recital 38.