*Proceedings of the Bruges Colloquium*

# Current perspectives on regulating means of warfare

**18-19 October 2007**

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*Actes du Colloque de Bruges*

# Les perspectives actuelles sur la réglementation des moyens de combats

**18-19 octobre 2007**

# SPECIAL EDITION

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Les Actes de ce Colloque ont été rédigés par les orateurs ou par la Délégation du CICR à Bruxelles sur base d'enregistrements audio du Colloque. Ces textes ont alors été revus par les orateurs et n'engagent que ces derniers. Ils ne représentent pas nécessairement les vues ni du Collège d'Europe ni du Comité international de la Croix-Rouge (CICR).

Sidonie Thomas

Stéphane Kolanowski

**Délégation du CICR à Bruxelles**



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Collegium No.37, Summer 2008

SPECIAL EDITION



## Session 1: Current and emerging norms

Chair person: **Stéphane Kolanowski**, International Committee of the Red Cross

## Session 2: Implementation challenges

Chair person: **Dr. Jeno Czuczai**, Legal Service of the General Secretariat of the Council of the EU and College of Europe



## Session 3: New weapons

Chair person: **Dr. Heike Spieker** German Red Cross, Head of International Law Department

# ALLOCUTION DE BIENVENUE

**Rector Paul Demaret**
Recteur du Collège d'Europe

Accueillant les participants du 8ème Colloque de Bruges, le Recteur Paul Demaret évoque l'excellente coopération qui s'est instaurée depuis plusieurs années déjà entre le Comité international de la Croix-Rouge et le Collège d'Europe : celle-ci se manifeste, avec succès, à travers l'organisation conjointe, chaque année, d'un Colloque rassemblant à Bruges des experts internationaux autour d'un problème de droit international humanitaire. En outre, et fidèle là aussi à sa vocation d'institution d'éducation, le Collège et le CICR organisent chaque année un séminaire de DIH ouvert aux étudiants du Collège et des universités du voisinage - tant à Bruges que sur le campus de Natolin.

# ALLOCUTION DE BIENVENUE

**Françoise Krill**
CICR Bruxelles

Monsieur le Recteur,

Je tiens à vous remercier infiniment de vos très aimables paroles.

Excellences, Mesdames et Messieurs,
Au nom du Comité international de la Croix-Rouge, j'ai l'honneur de vous accueillir pour ce 8ème Colloque de Bruges, qui est cette année dédié à l'étude de certains aspects juridiques liés à l'utilisation d'armes.

Monsieur Demaret, Recteur du Collège d'Europe, vous a rappelé l'étendue de la collaboration académique que le Collège d'Europe et le CICR ont initiée en 1999. Cette collaboration se base sur un intérêt commun au Collège et au CICR de promouvoir la connaissance du droit international humanitaire et de favoriser le débat portant sur des sujets d'actualité et d'importance dans le cadre du développement des institutions européennes et atlantiques.

Outre des échanges d'idées et de points de vue de grande qualité, le Colloque a pu fournir de solides bases de réflexion tant pour le Collège, que pour le CICR, mais aussi pour les institutions européennes aujourd'hui représentées. Je pense par exemple aux lignes directrices adoptées par l'Union européenne en décembre 2005, sur l'amélioration du respect du droit international humanitaire. Ce fut du reste le thème du Colloque de Bruges en 2003.

Au vu des thèmes qui seront abordés pour les deux jours à venir, je n'ai aucun doute que les discussions que nous allons avoir permettront d'avancer dans différents dossiers juridiques liés aux armes.

En effet, cette année marque deux anniversaires importants, à savoir les 10 ans de la signature du Traité d'Ottawa interdisant les mines antipersonnel et les 10 ans de l'entrée en vigueur de la Convention sur les armes chimiques. Deux traités qui ont, au cours de ces dix années,

acquis une importance considérable, tant par le nombre d'États qui en ont accepté les termes – respectivement 155 et 182 États parties – que par leur présence dans les débats juridiques et politiques. Par ailleurs, le Colloque nous amènera à discuter également des bombes à sous-munitions, qui sont aujourd'hui en passe de subir un processus similaire au processus d'Ottawa qui permettra, on l'espère, une meilleure réglementation de l'utilisation de ces armes.

Les chiffres le montrent, ce sont les petites armes qui tuent et blessent le plus à travers le monde. Le problème n'est là pas tant l'arme elle-même, mais la disponibilité de ces armes. Un panel sera consacré à ce thème en fin de journée. Enfin, demain nous nous tournerons vers le futur et discuterons de la manière d'aborder juridiquement, en se basant sur le droit existant, les nombreux développements techniques liés aux armes.

Fort de 164 années d'expérience sur de nombreux terrains de conflits armés, le CICR a acquis une grande expertise en droit international humanitaire. Il a mené, au début de cette décennie, une étude portant sur la pertinence et l'adéquation du droit international humanitaire aux situations actuelles de conflits. Même si certaines règles méritent d'être précisées, même si une évolution naturelle du droit, basée sur des règles fondamentales existantes, est nécessaire – et ici, tant le domaine de la répression de violations que celui des armes sont des domaines particulièrement actifs –, le droit international humanitaire reste indispensable pour assurer un minimum de protection de la personne humaine en situation de conflit armé, et sans aucun doute pertinent et adéquat dans les situations que l'on rencontre aujourd'hui, à condition qu'il soit correctement compris et appliqué.

C'est à cette tâche là que nous nous appliquons dans le cadre de ce Colloque, mais également dans tous les autres pays où le Comité international de la Croix-Rouge est actif.

Le CICR est particulièrement heureux de voir d'une part l'intérêt que porte le Collège d'Europe à ces questions et d'autre part l'importance qu'il attache à la formation de ses étudiants dans ces matières et à la promotion du débat académique sur le droit humanitaire. Je ne saurais terminer sans remercier les participants d'avoir été si nombreux à répondre favorablement à notre invitation à participer à ce Colloque.

Je vous souhaite, je nous souhaite, des débats stimulants et fructueux.

# OPENING ADDRESS

**Prof. Yves Sandoz**
Membre du Comité international
de la Croix-Rouge

Monsieur le Recteur, Excellences, Mesdames, Messieurs, Chers amis,

Je suis très heureux de participer une fois encore au Colloque de Bruges, le huitième déjà, qui concrétise la collaboration fructueuse et amicale entre le Collège d'Europe et le CICR.

Le sujet du Colloque de cette année me pousse à avoir une pensée pour le Tsar Alexandre II de Russie. C'est en effet lui qui a convoqué à Saint-Pétersbourg en 1868 une Conférence visant à interdire les projectiles explosifs de moins de 400 grammes, qui provoquaient des blessures particulièrement meurtrières.

Mais la Déclaration de Saint-Pétersbourg a surtout énoncé le principe que « les belligérants n'ont pas un droit illimité quant au choix des moyens de nuire à l'ennemi ». Ce faisant, elle a ainsi ajouté son deuxième poumon au squelette du droit international humanitaire moderne, la Convention de Genève de 1864 protégeant les blessés et malades sur le champ de bataille constituant le premier. La Convention de 1864 introduisait en effet l'idée de la protection des personnes qui se trouvent à la merci ou au pouvoir de leur ennemi ; la Déclaration de 1868 celle que certaines limites sont fixées aux combattants dans la manière de conduire la guerre, notamment dans l'usage de certaines armes par trop cruelles.

Certes, certaines règles avaient été observées dans les conflits armés depuis le début de l'humanité, notamment sur la base de principes religieux. Des traités bilatéraux avaient également été conclus dans ce domaine. Mais comme le rappelle Geoffrey Best, grand historien du droit humanitaire, ces principes ont rarement résisté à la passion meurtrière des conflits et il faut tuer le mythe des belles guerres d'autrefois. Et ce qui est véritablement nouveau depuis le milieu du XIXème siècle, c'est l'ambition de dépasser le cadre purement moral ou celui des traités bilatéraux, pour tenter de formuler des règles dans des traités « à vocation universelle », soit des traités ouverts à la signature de tous les États et dont on souhaitait que les règles deviennent universelles.

Depuis l'introduction de ces deux poumons, le droit international humanitaire s'est considé-

rablement développé. Aux blessés de la Convention de 1864 se sont ajoutés les naufragés, les prisonniers de guerre, la population civile… L'interdiction des engins explosifs de moins de 400 grammes a été complétée par celles du poison, des gaz, des mines antipersonnel, des armes chimiques et biologiques…

Ce dont on va parler ces deux jours, ce sont des développements récents dans le domaine de la limitation ou de l'interdiction de certaines armes. Notre discussion sera donc une prolongation de celle qui s'est ouverte à Saint-Pétersbourg en 1868. C'est aussi la partie la plus délicate du droit international humanitaire, car elle peut peser sur l'issue de la guerre. Bien ou mal nourrir des prisonniers n'aura en effet pas une incidence déterminante sur celle-ci, mais utiliser ou non une arme peut avoir un effet décisif. C'est la raison pour laquelle les négociations sont souvent âpres quand il s'agit de s'entendre sur l'interdiction ou la restriction de certains moyens de guerre, de certaines armes.

Cette difficulté est apparue très clairement en 1949, lors de la négociation des Conventions de Genève. Comme on l'a dit, la deuxième guerre mondiale a été « un échec de la civilisation » et on peut difficilement le nier. Elle a en tout cas été aussi l'échec absolu du droit international humanitaire, l'étouffement des deux poumons évoqués tout à l'heure. Avec d'une part l'extermination de civils au pouvoir de l'ennemi, l'horreur des camps et des chambres à gaz; et d'autre part les bombardements massifs de villes par les puissances de l'Axe d'abord : Varsovie, Londres, Rotterdam… ; puis par les puissances alliées : Dresde, Hambourg, Hiroshima, Nagasaki…

On a dès lors tout repris à zéro en 1949, introduisant enfin une Convention protégeant spécifiquement les civils. En revanche, l'on n'est pas parvenu à se mettre d'accord pour reprendre et renforcer également le second poumon du droit international humanitaire, les règles concernant la conduite des hostilités. Et la raison de cet échec nous démontre parfaitement la difficulté particulière de ces règles.

Les États-Unis d'Amérique possédaient l'arme nucléaire et en avaient encore le monopole. Celle-ci était donc en quelque sorte l'arme absolue, l'arme de la dissuasion, et il était exclu pour les États-Unis de renoncer à cet avantage décisif à l'aube de la guerre froide. Mais de nombreux autres États ne voulaient pas entrer en matière sur des interdictions ou restrictions d'armes sans parler aussi de l'arme nucléaire. D'où un blocage qui a perduré jusqu'à la conférence diplomatique de 1974-1977. L'arme nucléaire est restée un tabou, les nouvelles puissances nucléaires ne souhaitant également pas entrer en matière du fait non plus de la dissuasion nucléaire unilatérale, mais de ce que l'on a appelé « l'équilibre de la terreur », qui a de fait maintenu une certaine stabilité dans les relations internationales durant la guerre froide. Et

d'autres États continuaient de s'opposer à l'ouverture de négociations sur les méthodes et moyens de combat sans parler aussi des armes nucléaires.
L'on est toutefois parvenu à un compromis en admettant que la négociation sur les armes de destruction massive (les fameuses armes ABC : atomiques, biologiques et chimiques) ne pouvait pas seulement porter sur leur emploi à la guerre, mais que, au vu de leur importance stratégique, il convenait aussi de parler de leur possession, de leur commerce, de leur transfert et de leur destruction. Le forum adéquat pour parler de ces armes n'était dès lors pas celui du droit international humanitaire, mais celui du désarmement.

Ayant ainsi écarté cette question particulièrement délicate, on a dès lors pu reprendre, dans le cadre d'une conférence diplomatique sur le droit international humanitaire, la question de la réaffirmation et du développement des principes et règles concernant la conduite des hostilités. Ces discussions ont abouti aux nombreuses dispositions sur le sujet que l'on trouve dans le Protocole additionnel I aux Conventions de Genève, adopté le 8 juin 1977.

Le Protocole I n'a toutefois pas formulé d'interdictions spécifiques concernant les armes. Les discussions spécifiques se sont donc poursuivies dans le forum du désarmement pour les armes de destruction massive (comme je viens de l'indiquer) et dans le cadre d'un nouveau forum de l'ONU pour les armes dites « classiques », qui a donné un nouveau cadre à celles-ci, la Convention de 1980 sur l'interdiction ou la limitation de certaines armes classiques.

Où en sommes-nous aujourd'hui dans ces deux domaines ?

En ce qui concerne les armes de destruction massive, la situation est aujourd'hui satisfaisante pour les armes chimiques et les armes biologiques. Elle reste floue pour les armes nucléaires.

Une Convention a été adoptée en 1993 sur les armes chimiques, interdisant non seulement l'emploi, mais aussi la fabrication, la possession et le commerce de ces armes. Cette convention, largement ratifiée, est pourvue d'un imposant mécanisme de vérification. L'interdiction d'utiliser les armes chimiques est par ailleurs reconnue aujourd'hui comme faisant partie du droit international coutumier. Le problème des armes chimiques « incapacitantes » a toutefois surgi ces dernières années et le Docteur Coupland en parlera plus tard dans ce colloque.

Les armes biologiques sont aussi interdites dans un traité qui a même été adopté antérieurement – le Traité de 1972 sur les armes biologiques (bactériologiques) et à toxines – mais qui a le défaut de ne pas être pourvu d'un mécanisme de vérification. Même si l'interdiction de l'utilisation à la guerre des armes biologiques fait également partie du droit international coutumier, l'absence d'un tel mécanisme est indéniablement une faiblesse. Or les négociations

entreprises ces dernières années pour introduire un tel mécanisme n'ont malheureusement jusqu'ici pas abouti. La difficulté pour ces deux types d'armes est qu'elles sont fabriquées à partir d'agents qui ont aussi des applications civiles indispensables: un laboratoire fabricant des vaccins est potentiellement capable de produire des armes biologiques terrifiantes. C'est la raison pour laquelle des mécanismes et procédures de vérification sont d'une grande importance.

L'échec des négociations visant à introduire un mécanisme de vérification dans la Convention sur les armes biologiques a conduit le CICR à lancer un appel visant à provoquer une prise de conscience, notamment de la part de scientifiques impliqués dans ces domaines. Il s'agissait en effet de les mettre devant leurs immenses responsabilités dans un monde où les actions terroristes peuvent se développer dans tous les domaines, y compris celui de la biologie.

Quant aux armes nucléaires, elles sont encore bien présentes dans l'actualité avec les affaires coréennes et iraniennes. On sait qu'il n'y a pas de traité interdisant spécifiquement leur usage, même si on ne voit guère, comme la Cour internationale de Justice (CIJ) l'a dit dans son avis consultatif de 1996, comment un tel usage pourrait être conforme aux principes et règles réaffirmés et développés dans le Protocole additionnel I de 1977, notamment celui qu'une arme doit être suffisamment précise pour n'atteindre que l'objectif militaire, en épargnant la population civile. La CIJ a toutefois laissé une petite porte ouverte pour l'usage éventuel (elle n'a pas tranché) de l'arme nucléaire dans certaines situations exceptionnelles. Mais elle a aussi dit – et l'on a trop tendance à l'oublier – que les États, et particulièrement les puissances nucléaires, avaient le devoir de régler cette question et de s'engager sérieusement dans la négociation d'un traité. Cela reste donc certainement un défi essentiel de ce siècle, la multiplication des puissances nucléaires faisant de la dissuasion nucléaire, toujours davantage, une dangereuse illusion.

En ce qui concerne les armes classiques, le système mis en place par la Convention de 1980 est astucieux. A une convention de base, elle-même révisable de manière souple, s'ajoutent pour chaque arme des Protocoles, auxquels on peut ajouter de nouveaux protocoles en cas de besoin et qui, eux aussi, peuvent être régulièrement révisés, avec une certaine souplesse. Le système peut ainsi s'adapter aux évolutions dues au développement de la science et à l'imagination, toujours en éveil, des fabricants d'armes.

Et, de fait, ce système fonctionne. La convention initiale a été révisée, et cela de manière essentielle puisque l'on a étendu son applicabilité aux conflits armés non internationaux. Un des Protocoles initiaux, celui sur les mines et pièges, a par ailleurs été révisé et deux protocoles se sont ajoutés aux trois protocoles initiaux: l'un interdisant l'usage contre des personnes

d'armes à laser aveuglantes – une invention barbare qui était à la disposition de certaines armées –, l'autre concernant les restes explosifs de guerre, un protocole adopté en 2003 visant à responsabiliser les États pour l'enlèvement de tels restes qui se trouvent sur leur territoire, responsabilité conjointement assumée par l'État qui a utilisé les armes dont l'utilisation a laissé subsister de tels restes.

Tout va-t-il donc pour le mieux ? Ce n'est jamais le cas dans ces domaines en constante évolution, qu'il faut suivre avec une vigilance permanente. Que peut-on encore faire, où les réflexions en cours nous mènent-elles ? Trois pistes méritent d'être approfondies.

La première est celle qui s'est illustrée par ce que l'on a appelé le « processus d'Ottawa », processus qui a abouti à la Convention d'Oslo – c'est là qu'elle a été signée – sur les mines antipersonnel, dont, Madame Krill nous l'a rappelé, on vient de fêter le 10ème anniversaire. De quoi s'agit-il? Dans le cadre de la Convention de 1980, comme c'est généralement le cas lors des négociations de traités multilatéraux, on cherche à tout prix à adopter des textes par consensus. Or c'est une remise en question de cette manière de faire qui a engendré le processus d'Ottawa. Cette remise en question a été provoquée par les difficultés rencontrées dans les négociations menées dans le cadre de la Convention de 1980 pour réviser le Protocole sur les mines antipersonnel, qui n'a pas permis d'aller aussi loin que certains le souhaitaient, à savoir l'interdiction totale de ces mines. Certes, le système du consensus, en ralliant l'ensemble des négociateurs, a l'avantage – en apparence en tout cas – de faciliter ensuite la ratification du traité par les États. Mais on constate que certains États jouent en quelque sorte un double jeu. Ils font payer, lors des négociations, un lourd tribut à leur participation au consensus, affaiblissant la portée du traité, mais sans pour autant le ratifier ensuite (et parfois, sans avoir véritablement l'intention de le faire). Devant cet état de fait et sous la pression d'une société civile très fortement mobilisée pour l'interdiction absolue de l'usage des mines antipersonnel, de nombreux États ont décidé de sortir de la routine habituelle des négociations et d'adopter entre eux, sans concession au consensus à tout prix, un traité interdisant sans ambiguïté l'usage des mines antipersonnel et imposant leur destruction. Ce pari fut un grand succès et, comme Madame Krill l'a rappelé, plus de 150 États sont aujourd'hui parties à ce traité. Madame l'Ambassadeur Millar va tout à l'heure nous parler de ce succès, mais aussi des défis qui restent à relever pour ce traité.

Est-ce à dire que l'on va dorénavant toujours procéder ainsi ? Ce serait aller vite en besogne car il reste utile, dans la mesure du possible, d'avoir tous les grands acteurs de la scène internationale autour de la table de négociation. Et l'on ne peut pas ignorer que plusieurs facteurs doivent être réunis pour que réussisse un processus comme celui d'Ottawa. Il y avait en l'occurrence une très forte mobilisation populaire et médiatique; un très grand nombre de

gouvernements disposés à se lancer dans cette aventure; et un appui important venant aussi de militaires qui considéraient que les conséquences humanitaires des mines antipersonnel outrepassaient largement leur intérêt militaire.

Cette question se pose d'ailleurs très concrètement aujourd'hui à nouveau à propos des armes à dispersion (les « cluster bombs »). Certes, une première discussion sur ces armes dans le cadre de la Convention de 1980 a abouti en 2003 au Protocole sur les restes de guerre, dont nous parlera tout à l'heure le Colonel Darren Stewart. C'est un succès non négligeable. Mais il reste insuffisant pour beaucoup, qui souhaitent aller plus loin et obtenir au moins l'interdiction d'utiliser ces armes dans des zones très peuplées (à l'instar des armes incendiaires, qui font également l'objet d'un protocole de la convention de 1980), voire leur interdiction totale.

Obtiendront-ils assez dans le cadre de la Convention de 1980 ? Les conditions d'un nouveau processus d'Ottawa sont-elles réunies? La discussion sera ouverte tout à l'heure, notamment suite à la présentation de Madame Gro Nystuen.

La deuxième piste de réflexion que je souhaite mentionner est celle des mesures à prendre unilatéralement par les États. N'oublions pas que si le Protocole additionnel I aux Conventions de Genève de 1977 n'a pas formulé d'interdictions d'armes précises, il a réaffirmé et développé les principes qui s'imposent, que va nous rappeler tout à l'heure Madame Françoise Hampson. Or l'article 36 de ce protocole, dont Monsieur Stéphane Kolanowski nous parlera demain, demande aux États d'examiner la conformité de toutes les armes qu'ils utilisent, qu'ils acquièrent et surtout, qu'ils mettent au point, avec les principes et règles du protocole. Le font-ils vraiment et que peut-on faire pour les inciter à faire mieux ?

Une troisième piste de réflexion mérite enfin d'être explorée. La mise en œuvre des principes et règles concernant les méthodes et moyens de guerre reste un défi considérable. Cela d'abord pour les militaires confrontés à des problèmes pratiques et concrets, ce dont Michaël Schmitt nous parlera. Mais aussi pour convaincre les parties dissidentes à des conflits armés non internationaux – conflits qui sont, comme on le sait, de loin les plus nombreux aujourd'hui – de respecter elles aussi les principes et règles du droit international humanitaire. Comment atteindre ces parties, comment les convaincre, comment leur donner un sentiment d'appartenance au droit humanitaire ? Madame Decrey-Warner nous rappellera les efforts entrepris dans le cadre de « l'Appel de Genève », qui s'est lancé dans cette difficile entreprise.

Mesdames, Messieurs, chers amis, j'ai commencé mon exposé en vous parlant d'un Tsar de Russie et j'aimerais en le terminant avoir une pensée pour un second, Nicolas II. Cela non pas que je sois nostalgique des Tsars de Russie ni même que j'ai une quelconque expertise dans

leur histoire. Mais c'est Nicolas II qui a convoqué la Conférence de la Paix qui s'est déroulée à La Haye en 1899. Horrifié par les horreurs de la guerre et par la potentialité destructrice des inventions scientifiques, il souhaitait réfléchir avec les autres États non pas seulement à la modération de la guerre, mais à d'autres moyens de régler leurs différends. Comment ne pas saisir l'actualité de cette ambition à notre époque où la guerre met en péril la survie même de notre planète? Lutter pour atténuer les souffrances de la guerre, pour limiter l'usage de certaines armes, ne signifie pas accepter la guerre, il faut toujours le rappeler. Cela dit, ces derniers efforts restent d'une très grande importance aussi longtemps que des guerres se déroulent et il s'agit de s'y attaquer avec toute l'énergie voulue, comme nous allons le faire lors de ce colloque.

Je vous remercie beaucoup d'avoir bien voulu y participer en apportant votre expertise, vos compétences ou votre curiosité attentive.

# BASIC RULES OF IHL GOVERNING WEAPONS

**Prof. Françoise J. Hampson**
University of Essex, UK

## Abstract

Il existe cinq principes en droit international humanitaire qui établissent que les États parties à un conflit armé ne peuvent choisir les moyens avec lesquels ils font la guerre. Trois d'entre eux concernent une interdiction. Une arme est interdite si elle rend la mort inévitable, si elle cause des maux superflus (considéré comme un principe de droit coutumier et juridiquement contraignant) ou si elle frappe sans discrimination (important de distinguer entre les armes qui sont par nature non discriminantes et celles qui sont simplement utilisées de façon indiscriminée). Ces principes s'appliquent aux combattants et sont présents dans plusieurs textes internationaux, tels que la Déclaration de Saint Petersbourg (1868), la Convention de La Haye de 1907 et le Protocole additionnel I aux Conventions de Genève. Les deux autres principes concernent la règlementation des armes, dont l'utilisation peut engendrer des dommages à long terme sur l'environnement et toucher des victimes sans discrimination (application du principe de distinction et de proportionnalité). En raison de ces risques prévisibles, les armes doivent donc être soumises à une règlementation spécifique.

Les règles concernant les armes de destruction massives sont négociées au sein de la Conférence sur le désarmement. Il faut accentuer les efforts en matière de prévention. En effet, l'utilisation d'armes biochimiques, biologiques ou chimiques pourrait engendrer des problèmes liés au transfert d'armes et à l'emploi de ces armes par des acteurs non étatiques. Dans le cas des armes classiques, des interdictions spécifiques sont contenues dans la Convention sur les armes classiques, mais également dans d'autres textes, tels que la Convention de La Haye de 1907 (interdiction du poison), la Convention d'Ottawa (interdiction des mines antipersonnel)…

En matière de prévention, on peut se référer à l'obligation d'examiner la légalité des armes et de déterminer la licéité de leur utilisation, mentionnée par l'article 36 du Protocole additionnel I aux Conventions de Genève. Mais l'un des défis majeurs à relever reste la mise en œuvre et l'application du DIH. Les principes et règles contenus dans les Conventions de Genève et leur Protocole Additionnel I ne comportent pas de mécanismes pour le suivi de leur mise en œuvre, mais se réfèrent à l'application des règles. Le système le plus élaboré en matière de suivi de l'application des règles est celui présent dans la Convention pour les armes chimiques. Pour les armes classiques, il n'est rien mentionné dans les traités à l'exception du Traité d'Ottawa.

I would like to start by thanking the College of Europe and the International Committee of the Red Cross for inviting me to participate in this Colloquium. It is customary to comment on the distinction of speakers. Going through the list of participants, I was struck by the distinction of the participants.

Two anniversaries have already been commented on. I would like to add two more. It's clear that years ending in seven are good, if not for humanitarian law, at least for humanitarian lawyers. It is the hundredth anniversary of the Fourth Hague Convention (and the other Hague Conventions) and the thirtieth anniversary of the adoption of the Protocols to the Geneva Conventions.

I would like to make three preambular points. First in the area of weapons, we need to consider a possible distinction between principles and rules. Principles explain the rationale behind rules; they explain the reason why a rule is necessary. The rule is the specific manifestation of the principle. Rules are clearly binding. But one of the issues we are going to have to consider is to what extent and in what circumstances are principles binding. I think some of the relevant principles are legally binding, whereas it is less clear for others.

The second preambular point concerns the applicability of the rules governing weapons. Historically, the specific rules only applied to international armed conflicts (IAC). Since 2001, when there was a general amendment to the Weapons Convention, there seems to be a presumption in treaty law that treaties in this field should be made applicable to both international and non-international conflicts. Furthermore, the ICTY, in the Tadic Case, pointed out there is something objectionable in international conflicts. It seems odd to suggest it is not objectionable in non-international conflicts. We would suggest there is support in customary law for the same rules applying in both conflicts. This is, however, not reflected in the Rome Statute of the ICC.
But it is not just a matter of international or non-international. There may be problems as to who is using the weapons. Do the rules apply to soldiers using weapons but not to the police or does it apply by reference to the situation? What do you do if soldiers are engaging in what are normally policing functions in a non-international conflict? What do you do if soldiers are involved in peace support operations where you get what the Americans call "three blocks warfare"? In one place there is traditional peacekeeping, in another there is robust peacekeeping and in another area close-by, there is a full-scale clash going on. It is not practicable to say you can use a weapon on one street corner but not on the other street corner.

The third preambular point is, as a result of Protocol I of 1977, the rules apply to both means

and methods of fighting. Armed conflicts specialists by means, refer to weapons, and by methods, refer to tactics. This Conference is on means of warfare, in other words, the weapons themselves, but sometimes these two issues overlap.

## Principles governing weapons

I think, in essence, there are five principles that are manifestations of the general notion that States that are a part of a conflict are not free to choose the means by which they wage war. The first three principles concern prohibitions. The second two concern regulations. A weapon is prohibited if it renders death inevitable, causes "superfluous injury or unnecessary suffering" (SIrUS) or is inherently indiscriminate. Principles for the regulation of weapons concern those weapons whose use may give rise to indiscriminate casualties or widespread, long-term and severe harm to the natural environment. In both cases, because of the foreseeable risk, the weapons need to be subjected to specific regulation.

### Prohibited weapons

In the Preamble to the Declaration of St Petersburg (1868), it refers to the prohibition of the use of a weapon that renders death inevitable. And it is a principle that applies to combatants, to fighters, and obviously not to civilians because you are not supposed to be targeting them anyway. Since this principle has always been something of a mystery to me, I will leave it there.

The second principle is the prohibition of weapons that cause "superfluous injury or unnecessary suffering" (SIrUS). This is referred to in the Preamble to the Declaration of St Petersburg (1868), the Hague Convention of 1907 (Art.23) and Protocol I of 1977 (Art.35.2). It is very clearly part of customary law. It applies to combatants because again, you are not supposed to be targeting civilians anyway. Those who are not familiar with the law of armed conflicts and are more familiar with human rights law may think this is evidence of military insanity. How can it be the law that you can kill someone but you can't cause them superfluous injury or unnecessary suffering? I would remind human rights lawyers that precisely the same thing arises in human rights law. Torture is prohibited in all circumstances. Killings aren't; only arbitrary killings are prohibited in human rights law. So the oddity of the rule saying that you can kill a guy but you can't cause him unnecessary suffering is, in fact, generally found not only in the law of armed conflicts but also in human rights law. For those not used to the principle, I would like to give an example of a weapon prohibited on this basis, and it seems to me that it is one of the prohibitions within this formula that best illustrates the rule because it's counterintuitive and is, in fact, the Declaration of St Petersburg. Because it prohibits a weapon for not being big enough. This declaration prohibits a particular form of weapon under 400 grams. Why would you prohibit a weapon because it is not big enough? Well, it is because the

weapon in question was supposed to be an anti-matériel weapon to be used against carriages (19th century) and military equipment. It was designed to take out equipment. But if it was under 400 grams, it wasn't big enough to take out the equipment. So it was causing injuries without meeting the military need. Therefore, the resultant injuries were in fact unnecessary suffering. They want the product to achieve in a minimum way possible a military goal. That is what the idea is getting out.
The prohibition of "superfluous injury or unnecessary suffering" raises an extremely difficult question and that is whether the use of a weapon is prohibited on that basis alone or whether it is prohibited only if there is a specific treaty prohibiting it.
Given the number of States Parties to the Hague Convention and Protocol I, and given that it has been held that the Hague Convention of 1907 represents customary law, there can be no doubt that the SIrUS principle is regarded as customary law and therefore presumably legally binding. However, I have very great difficulty in identifying any weapon which has ever been prohibited without also being contained in a treaty specifically binding the weapon in question.

The extension of the rules regulating weapon use from means of warfare to methods of warfare in Protocol I has opened up another area of interest in relation to the SIrUS principle. It enabled the law to address the anti-personnel use of weapons designed as anti-matériel weapons, where the harm to the human person might be regarded as superfluous or unnecessary. One of the great achievements of the customary law study of the ICRC is Rule 85, which suggests that you are not allowed to use anti-matériel weapons intentionally against fighters where the injuries will cause unnecessary suffering or superfluous injury if any other option is available.

What about the third principle? Weapons that are inherently indiscriminate are banned. I would emphasise inherently indiscriminate. One must distinguish between those weapons which by their nature are indiscriminate and those that are simply used in an indiscriminate way. In my view, and I should make it clear that the ICRC or at least certain lawyers in the ICRC don't share this view, anti-personnel mines are not inherently indiscriminate. It is perfectly possible to make discriminate use of anti-personnel mines. But in practice they are and were routinely used in an indiscriminate fashion. I think the same thing is true for cluster munitions. They are routinely used in a way that inevitably causes unnecessary harm to civilians. But that is not an inherent feature of the cluster weapons. They are capable of being targeted. In order for a weapon to be inherently indiscriminate, it must either not be capable of being targeted or it must have characteristics which mean that its effects cannot be controlled. An obvious example and an often cited example of the second is gas. You can see the problem with gas in the nature of its spread and you cannot control the spread.

**Regulated weapons**

A weapon cannot be used in such a way or in such circumstances that are likely to give rise to indiscriminate harm both to civilian people and civilian property. This is, in fact, a simply logical application of the principle of distinction (between civilians and combatants and between civilian objects and military objectives) and the principle of proportionality. This does not mean that it is not worth making the point. Because as we will see in a moment, the fact that something is a product of rules that can be found in Protocol I rather than a product of rules found in a weapons convention offer certain advantages if one is going to be examining enforcement. So, one weapon might be in need of regulation on account of an inevitable risk of indiscriminate harm to civilians. The obvious weapons here are anti-personnel mines, cluster munitions, booby-traps, incendiary weapons, but one should remember that any weapon can be used in an indiscriminate way. The other area where weapons need to be regulated, and one hears unfortunately not enough about this, is weapons that are likely to cause widespread, long-term and severe damage to the natural environment. They are prohibited and therefore one needs to regulate the use of weapons which inevitably might cause serious harm to the environment.

## Rules

In listing the rules, I made a distinction between those weapons that might be regarded as weapons of mass destruction (WMD) and conventional weapons.

Under weapons of mass destruction, I included gas but I think one needs to remember that gas is not negotiated, at least at present through the Conference on Disarmament. The relevant treaty was negotiated before the existence of the UN. I think the fact that WMD are negotiated through the Conference on Disarmament does have certain advantages, but it has disadvantages as well. The WMD emphasise purposes, the oddity of gas, or chemical weapons and biological and bacteriological weapons. At the moment, there is nothing on biochemical weapons, except in so far as the weapon in question comes within either the biological or chemical weapons framework. There may be weapons that are falling in between the two stools. The key thing about such weapons is all the effort needs to go into preventing their use. You cannot run the risk of them being used. That means that issues such as transfer and issues of transparency and the problem of non-state actors is an acute problem with regard to WMD.

In the case of conventional weapons, we have specific prohibitions contained not only in the Conventional Weapons Convention (CCWC), but also some much older prohibitions. And I want to mention one of them, because it's got a more picturesque motivation or part of the motivation. In customary law from time immemorial and in treaty law in the Fourth Hague

Convention of 1907, Article 23, you have a specific ban on the use of poison. This is not just to protect civilians. The military does not like poison because they think it is unfair. It is cheating because you cannot actually see it. This notion of things that are regarded by the military as somehow dishonourable is an important element in the background of the law of armed conflicts. I think it was relevant in the issue of the prohibition of laser weapons. It was thought to be unfair. It is hard to find ways that do not sound flippant of describing it, but it is an important underlined principle. The prohibitions of conventional weapons include expanding bullets, also sometimes known as dum-dum bullets that have been prohibited for over a hundred years, at least in international armed conflicts. Lasers designed to blind are also prohibited weapons that provide or produce non-detectable fragments. Anti-personnel mines are regulated under the CCWC but prohibited for parties to the Ottawa Convention.

I would like to pause for a moment on the Ottawa Convention because I think it is an example of the operation in practice of a principle I am afraid I do not regard as a legally binding principle. The explanation for the Ottawa Convention seems to me to be the Martens Clause. It was a weapon that shocked the public conscious. That explains why States chose to ban it, if they are parties to Ottawa. But the Martens Clause itself can never be a legal basis for banning a weapon. It is an explanation for why separately a weapon might need to be banned and might be banned. There are important conventional weapons, many of the forms of which are banned and some of which are regulated, which are booby-traps. One thing that has been a bit of a problem is that the original protocol on mines was on both anti-personnel mines and anti-vehicle or anti-tank mines. The way in which that Protocol was amended was unfortunate. So I don't know what the status of the rules in the original Protocol with regard to anti-vehicle or anti-tank mines is now for the parties to the new Protocol. Has it been wiped out as an obligation because it has been replaced by the later Protocol? I think that is an issue that needs to be examined and I think it is one of the issues that is beginning to surface on the agenda.

## Prevention of violations

The law contains two tools for preventing violations. The first is an obligation to conduct weapons reviews. This is provided for in Article 36 of Additional Protocol I. There is no equivalent in Protocol II, and it is not clear whether any requirement is customary norm merely in international armed conflict but not in non-international armed conflict. Logically, you default if you are conducting weapons reviews to determine the lawfulness of the use of the weapons. Then you are to subject any weapon that any of your forces might use in any circumstances. But unfortunately there can be a gap between logic and the provision of the law. And as I made clear earlier, there are confusing situations increasingly arising where the military are exercising policing functions or the police are using weapons that the military couldn't use or when you are not sure how to classify a situation, when the question whether you need to conduct weapons review could be very important.

The second tool for preventing violations is one particularly relevant where the risk is a risk of indiscriminate harm particularly after the conflict. The key problem with anti-personnel mines and with cluster weapons is the risk to civilians after the war has ended. In which case the problem is these dangers remain features of the landscape. In Europe and North Africa, you still get every year people being injured or killed as a result of Second World War remnants. Generally speaking, they focus on weapons that might go off with a bang, in other words, explosive weapons, such as anti-personnel mines and cluster munitions. But I think there is another issue we also need to remember and that is the impact of remains of depleted uranium. I was a bit surprised when the ICRC very rapidly appeared to give depleted uranium a clean bill of health. I think the jury is out on what the long-term effects of depleted uranium are in the environment. When identifying what needs to be done, one needs to consider what the problem is. The problem with anti-personnel mines and cluster munitions is the risk of explosion causing harm to people and also animals. That means you need to find ways of clearing the explosive. In the case of depleted uranium, if it's giving rise to long-term problems, then it seems to me that the only solution will be not using depleted uranium and doing what the Americans have done which is to find a different method which you could use.

## Implementation and enforcement of the rules

Obviously, as far as you are dealing with rules of international law, if a State is party to a treaty, you have the normal international law ways of enforcing it. However, it is worth remembering that the Vienna Convention on the law of treaties, in its Article 60 § 5, provides that the normal remedy for a State being in material breach of a treaty, which is suspending the treaty, does not apply to treaties of a humanitarian character. The question then arises of whether Protocol I to the Geneva Conventions is a treaty of a humanitarian character. Because that is the treaty that contains the SIrUS rule as a legal rule and also the principle of distinction and proportionality. I assumed that the CCWC, even if it is intended to protect people, is hardly a treaty of a humanitarian character. Obviously, the truth is to say that in the field of international humanitarian law, the enforcement provisions are the weakest part of it. Perhaps for that reason, it has become common recently to write provisions into treaties for the monitoring of the implementation of the treaty and special provisions for enforcement. So what special mechanisms, if any, are available for the enforcement of the principles and rules regarding weapon use? Any principle or rule contained in the Geneva Conventions or Additional Protocol I of 1977 have no mechanism within the treaty for monitoring implementation but they do have an elaborate system for the enforcement of the rules. There is a requirement of State enforcement in the case of ordinary breaches and the special regime of mandatory universal jurisdiction in the case of grave breaches. Now that is potentially applicable to weapons that cause SIrUS and claim based on indiscriminate harm. So, it is important to have that system of enforcement, particularly because of the lack of a system of enforcement

elsewhere. In the case of WMD, there is nothing except for the Chemical Weapons Convention, which was drafted in 1993. This is the most elaborate system for monitoring compliance and securing enforcement. It is to be regretted that the attempt to provide something similar for the Biological Weapons Convention was recently blocked by the United States. In the area of conventional weapons, there is nothing in the treaties except the Ottawa Treaty. Generally speaking, it is much easier to provide for enforcement if you are banning a weapon than if you are regulating it. Because if you ban all use, then you can ban possession. If you got a weapon you are never allowed to use, it is not rational to possess it. In which case, you cannot monitor possession. It is more complicated if you are trying to regulate a weapon. What about international criminal law? Does that help? I find it shocking that the Rome Statute only contains war crimes relating to weapon use in international armed conflict. There is nothing on non-international armed conflict. It means the best enforcement system available except for the Chemical Weapons Convention is that contained in Additional Protocol I, which is why I was so insistent on pointing out the anniversary.

## Current issues

I think there are four areas of current issues. One is certain particular weapons. That is the question of whether biochemical weapons or some biochemical weapons fall between the Biological Weapons Convention and the Chemical Weapons Convention; there is the whole field of "non-lethal" weapons, which I would like to start a campaign to see reliable less lethal weapons; cluster munitions where the problem is the manner of views rather than existence; depleted uranium where we need to keep an eye on what the effects are; and the anti-personnel use of anti-matériel weapons.

Another current issue is the nightmare of ambiguous or hybrid environments in which weapons are used. You have got the issue of the military using weapons that might be prohibited or regulated in international armed conflicts and non-international armed conflicts. The police using weapons that might be prohibited either in non-international or international armed conflict environment. And you have the problem of weapon use during peace support operations. That issue of these environments and how the rules on weapon use impact those environments needs to be looked at as a whole across the board, and I hope the ICRC might be able perhaps to engage in a study on the issue.

Then there is the issue of non-state actors. Traditionally, by non-state actors we mean non-state armed groups i.e. rebels. I think it is important to recognise we are dealing with different kinds of non-state groups nowadays. You have rebel fighters in organised military groups. You have also private military and private security companies who conceivably, in certain circumstances, might be non-state actors, but they are not the same as rebel fighters. And you have individual fighters. These non-state actors give rise to problems of weapon use and of transfer and proliferation. When we look later today at the rules on transfers, I hope the issue

of the access of non-state groups to weapons and the way in which requirements of weapons reviews could be used to impact that will be examined.

And finally, there is the scandal of the lack of monitoring of implementation and compliance and lack of enforcement provisions with regard to weapon use. If States are willing to accept rules, it seems to be irrational not to be willing to accept rules on monitoring compliance and monitoring enforcement. It is not simply a matter of going around banning weapons, it is a matter of creating a culture for respect of controls. And I hope we will also be dealing with these issues during the course of this conference.

## QUESTION TIME

*According to Mr Schmitt, Mrs Hampson made a revolutionary suggestion with the use of anti-personnel versus anti-matériel weapons. But he wondered how to operationalise it. There are indeed a couple of problems. The first one is how to tell the difference between an anti-matériel and an anti-personnel weapon. What is, for example, a tank shot, a bomb of an aircraft, a rocket propelled grenade? And if one manages to make a difference between the two weapons, how does one do that on the battlefield? Because typically forces will have both anti-personnel weapons and anti-matériel weapons combined. How, in those circumstances, does one say "don't use the tank, let's use the machine-gun"? Finally, Mrs Hampson was asked if she was convinced that weapons that are anti-matériel in nature actually cause greater suffering than anti-personnel weapons. Indeed, it would seem that the opposite might be true in many cases.*

Professor Hampson answered that she did not think this rule applied to all anti-*matériel* weapons. Rule 85 in the ICRC study on customary international humanitarian law is dealing with those anti-*matériel* weapons which, if a human being is at the receiving end of them, will cause injuries regarded as unnecessary or superfluous. So, it is not all such weapons. If you are inside a tank and, because of the weapon use, you are affected, that is a point. If, however, a weapon is used against forces in the open, whereas it was designed for use against objects, and which causes an injury against the human person, it is not the same thing: you are using it intentionally against forces in the open. Then we can say that you should use something else, unless nothing else is available.

For example, if you use white phosphorus against the human person, intentionally using it as a weapon against people, one would rather be shot than die through the use of white phosphorus, because of the nature of the burns. Similarly, if you are using napalm as an anti-personnel weapon, as it is not designed for it. It would have been an issue under the prohibition of cruel, inhuman and degrading treatment. It was precisely when a forensic scientist was going to examine the corpses that they could not bring the case. But napalm had been used against forces in the open. That way of dying is significantly worse than simply being shot. So, it is not just saying all anti-*matériel* weapons. It is those anti-*matériel* weapons which, if you are harmed by them, will give rise to acute suffering where the acute suffering cannot be justified by military necessity. It is not all circumstances; it is intentionally using these weapons against the human person for an effect against the human person. She thought one can operationalise that. If you are dealing with forces in the open, you can say: "you use the following weapons but that type of weapon is not intended to be used against the forces". If you take white phosphorus, you can use it for the smoke, for the illumination... But if one is using it

to take out your military opponents, you will not say: "sorry you have to use something else, but at least they will suffer less on the way to being dead".
Mr Schmitt added that when she was talking about napalm, he thought of napalm as an anti-personnel weapon. He thought that one needs to be careful what type of suggestion we are making beyond the general principle that one may not use weapons or means or methods of warfare with the intention of causing extra suffering to the combatants.

Professor Hampson added that she didn't say the intention is to cause additional suffering to the combatants. She said that if your intention is to take out people and you use for that a weapon which will cause unnecessary suffering to people, then you breach the law. Even if it is not your intention, if you cause that unnecessary suffering then she thought that it is the normal application of the SIrUS principle.

*What is your opinion on the ICJ Advisory Opinion on the use or threat of use of nuclear weapons issued in 1996? It is probably not very satisfactory when the Court said that there is in international law no clear prohibition that in any circumstances, nuclear weapons should not be used, but at the same time the Court said that the rules and principles of IHL are also applicable to nuclear weapons. So what could be your opinion on how to take both sides of the Advisory Opinion together?*

Professor Hampson answered that the question asked to the ICJ was impossible. She has no problem with the idea that customary international humanitarian principles apply to the use of nuclear weapons. The British government has no problem with that idea. The problem is that the customary international humanitarian law principles, even if you take prohibition of indiscriminate harm, prohibition of the use of poison, prohibition of targeting civilians, prohibition of SIrUS, however uncomfortable it is, does not necessarily mean that every use of every form of nuclear weapon is unlawful. If you can control the effects of a certain nuclear weapon and you are using it only against the military, then she thought that you are not breaching IHL. She did not think that it would have been good to push the ICJ much further because if so, the ICJ could have said there are circumstances, not just the survival of the State, in which the use of nuclear weapons might not breach IHL. But because of the symbolic significance of nuclear weapons, it is important to keep it in a separate box; it is important we should not get too detailed; it is important we should not think of the use of certain nuclear weapons, because if we do and we say they are unlawful, it would imply saying some nuclear weapons might be ok. Considering the way in which the question was framed, I do not see how you can expect anything else from the ICJ.

# Session 1: Current and emerging norms

Chair person: Stéphane Kolanowski, International Committee of the Red Cross

**Anti-Personnel Mines under the Ottawa Convention – Successes and Challenges 10 years on**
Ambassador Caroline Millar

**Explosive Remnants of War: Legal and Operational Perspectives**
Lt. Col. Darren Stewart

**Regulating Cluster Munitions?**
Prof. Gro Nystuen

# ANTIPERSONAL MINES UNDER THE OTTAWA CONVENTION – SUCCESSES AND CHALLENGES 10 YEARS ON

**Ambassador Caroline Millar**
Australian Permanent Mission to the United Nations and the Conference on Disarmament, Geneva

## Abstract

À l'occasion du 10ème anniversaire de la Convention d'Ottawa sur les mines antipersonnel, il est utile de dresser un bilan des succès et futurs défis de cette Convention.

Il s'agit du Traité sur les armes classiques le plus ratifié (155 États parties). Depuis 1999, 40 millions de mines ont été détruites, nettoyant ainsi une surface de 1 100 km2, y compris sur les territoires des États les plus touchés, tels que l'Afghanistan ou l'Albanie. 144 États parties ne possèdent plus de stocks de mines antipersonnel. Les États parties ont financé ces actions à hauteur d'un milliard USD. Les États non parties à la Convention ont également versé une contribution totale d'un milliard USD. De plus, la Convention a également modifié les politiques des États non parties. En effet, certains États non parties à la Convention se sont imposés des moratoires sur l'utilisation des mines. D'autres encore ont interdit le transfert des mines (Chine, Russie, Ukraine, Singapour, Corée du Sud et États-Unis).

Plusieurs défis restent cependant encore à relever. En effet, la Convention n'est pas universellement ratifiée, et les principaux utilisateurs et producteurs de mines restent à l'extérieur de ce cadre normatif. Il faut donc favoriser la ratification de la Convention, particulièrement dans les régions où cela peut avoir un réel impact sur la sécurité, la construction de la paix et le développement (Moyen-Orient par exemple). Par ailleurs, les États parties doivent faire face aux échéances fixées par la Convention pour le nettoyage des zones où se trouvent les mines et la destruction des stocks. Pour certains, le respect de ces engagements sera difficile. La Convention impose donc aux États parties qui le peuvent, d'apporter une assistance aux États en difficultés. Le principal défi reste cependant le soutien aux victimes des mines, qui se traduit à la fois par un soutien médical à court et long terme, une formation et une aide à la réinsertion.

Distinguished Colleagues, Ladies and Gentlemen

Thank you for the opportunity to speak today on the Anti-Personnel Mine Ban Convention.

I have had the great privilege of serving as the President of the 7th Meeting of States Parties to the Convention on behalf of Australia for the past year.

It is now 10 years since the adoption and opening for signature of the Convention. The 10th Anniversary gives us an opportunity to reflect on the Convention's evolution, its successes and the challenges still ahead. And – in line with the theme of this Session – to reflect on the Convention's role in setting norms in the arms control world, as well as for broader human security.

The Mine Ban Convention is unique amongst arms control treaties – both conceptually and in its practical effect.

The Convention addresses the human security concerns of landmines in their totality. It bans an entire class of weapons and provides a comprehensive framework for their elimination. And the Convention includes ground-breaking provisions on victim assistance and international cooperation.

This was made possible by the Convention's evolution. It was negotiated outside the regular United Nations framework by a group of states concerned that Additional Protocol II of the Convention on Certain Conventional Weapons did not adequately address the grave humanitarian hazards of landmines. The negotiations also involved close collaboration between states, civil society and international organisations. This partnership has proven enduring and remains fundamental to the continuing success of the Convention.

## A record of achievement

And there can be no doubt that the Convention has been a success in the past ten years. Its achievements are numerous, substantive and – importantly – measurable.

155 States have now joined the Convention, with Indonesia, Kuwait and Iraq acceding to the Convention this year.

As such, over three quarters of the world's states are bound by the Convention, making it one of the most universal arms control treaties. It has the highest membership of any conventional arms treaty.

And importantly, the Convention's sponsorship program, ably administered by the Geneva International Centre for Humanitarian Demining, is allowing mine-affected developing states to play an active part in the life of the Convention.

To give you a few statistics, since 1999, well over 1100 square kilometres of land have been cleared of landmines and released. Even the most heavily mined States Parties are making progress. Afghanistan reports clearance of 60 per cent of contaminated land and Albania 85 per cent of contaminated land.

In accordance with the Convention, 144 States Parties no longer hold stockpiles of anti-personnel mines. And about 40 million mines have been destroyed.

Statistics on landmine victims vary and data collection remains a constant challenge. Nevertheless, we are seeing a decrease in the number of new casualties in many States Parties. For example, according to the Landmine Monitor, the number of new casualties has decreased in Angola from 673 casualties in 2001 to 96 in 2005. In Cambodia the casualty rate declined from an average of 12 new casualties a day in 1996 to two a day from 2000 through 2003.

Since the adoption of the Convention, over US$1 billion has been generated by States Parties for mine action. And another US$1 billion from States not Party to the Convention.

In fact, the Convention has been crucial in changing the behaviour of not just States Parties, but of States not Party. This is a less measurable but equally important success of the Convention – setting behavioural norms and standards.

The Convention has irreversibly stigmatised anti-personnel landmines. Certain states which remain outside the Convention have self-imposed moratoria on their use. According to the 2006 Landmine Monitor, only three States had used antipersonnel mines since May 2005.

Others, including China, Russia, Ukraine, Singapore, South Korea and the US, have banned the transfer of mines. In fact, the stigmatisation has all but halted the legal trade in landmines since the 1990s.

Even some non-state actors are banning the use of landmines.

In short, the Convention has been successful in addressing human security concerns in a truly global sense. It has been successful in creating behavioural standards and norms. But our ultimate goal must be the creation of legal norms. While we welcome moratoria and self-

imposed standards, this is no substitute for joining the Convention.

We must take this opportunity – the 10th Anniversary of the Convention – to take a hard, clear look at next steps and how best to ensure the global implementation of the Convention.

## The challenge of universalisation

The Convention is not universal and key users and producers of landmines remain outside its purview.

Certain states still need to be convinced that the humanitarian hazards of landmines far outweigh their military utility. The historic uses of landmines include area denial, delay, protection, early warning and security systems. Today there are cost-effective alternatives in respect of each of these uses. And as such the arguments for a continued utility of landmines can be easily rebutted.

I am pleased to see that current and former members of the Armed Forces of many states are joining States Parties and civil society to convince reluctant militaries.

It is vital that more is done to universalise the Convention, especially in regions where adherence to the Convention can have a real impact on security, post-conflict peace-building and development.

This is particularly the case in the Middle East, where there are very few States Parties. I am pleased that Iraq and Kuwait have now joined the Convention and I applaud the outstanding work being done by the 8MSP President-designate Jordan to encourage states in the region to join the Convention.

Australia is active in our own region to boost adherence to and implementation of the Convention. We recently held a workshop on the Convention for Pacific states in Vanuatu and will shortly hold, in partnership with Indonesia and Canada, another such meeting in Bali for South-East Asian states.

Of course the challenges do not end merely by a state joining the Convention. Full and effective implementation of the Convention by States Parties remains a great challenge.

In this regard, the Convention will shortly face a series of critical tests.

## The challenge of clearing mines

Deadlines for States Parties to clear their territory of mines is fast approaching. In accordance with Article 5, this must be done within 10 years of the Convention entering into force for a state.

A number of States Parties will face deadlines in 2009, including Chad, Croatia, Bosnia-Herzegovina, Mozambique, Jordan and Sudan. We have found that many states – especially those worst affected by mines – anticipate that they will not meet their clearance deadlines.

Article 5 allows a state facing such difficulties to apply to the Meeting of States Parties for an extension.

It was a focus of my time as President to put in place practical and efficient procedures in respect of such requests. The objective of the agreed process is to ensure requesting states are in the best possible position to meet their clearance tasks within a granted extension period.

## The challenge of destroying stockpiles

Also of concern, are the fast-approaching stockpile destruction deadlines under the Convention. In accordance with Article 4, complete destruction must occur within four years of the Convention entering into force for a state. Unlike for clearance, the Convention does not allow for an extension to this deadline.

It is a constant challenge to ensure that states meet their stockpile destruction deadline.

We have found that sometimes stockpiles are located in regions of a state's territory over which it does not administer effective control. At other times, pledges of international assistance for stockpile destruction have not materialised. And in some cases, particular mines have created technical destruction challenges.

It is essential that states facing these difficulties receive international assistance to meet their obligations. The obligation of States Parties to provide such assistance, if able, is set out clearly in Article 6 Paragraph 5 of the Convention. We must avoid the situation where States Parties are in technical breach of their obligations – sometimes through no fault of their own.

## The challenge of assisting survivors

The ultimate challenge facing the Convention is fulfillment of its humanitarian objective to reduce the suffering of landmine victims. There are still far too many new landmines victims each year.

The Convention has prompted a multi-faceted approach to victim assistance. States Parties are now viewing their victim assistance obligations in light of broader human security concerns.

Victim assistance should involve not only immediate and long-term medical attention, but re-training, re-integration and rehabilitation. It should involve assistance to an affected community, as well as the affected individual. And it should be closely linked to sustainable development goals.

I am proud to say that Australia is a leader in linking mine action and development, especially in our own region – the Asia-Pacific. We fund integrated mine action programs in Cambodia and Laos which include clearance, provision of water and other community infrastructures, and vocational skills training for vulnerable groups, particularly landmine survivors.

Australia is one of the only countries to recognise the benefit of multi-year mine action pledges. This allows projects to include essential quality assurance and follow-up phases.

In 2005 Australia announced a 5-year $75 million pledge. While some of our mine action funds are allocated for one-off projects, many are multi-year pledges.

Ensuring the most effective use of funds for mine action is a challenge. And while the Convention provides good guidance, we must constantly reassess how funds can be used most efficiently to ensure realisation of the Convention's objectives.

## Conclusion

Ladies and Gentlemen -

The Mine Ban Convention is strong and vibrant. There is no doubt that it has been a success in alleviating the suffering caused by landmines. Its supporting institutions are active and robust. And mine action players throughout the world are forging ahead in fulfilling the Convention's humanitarian goals.

But it is vital that our successes do not make us complacent. In cementing norms on the elimination of landmines, we must strengthen our efforts to universalise the Convention. We must work together to assist States Parties to meet their obligations. And we must continue to ensure the global implementation of the Convention's humanitarian framework.

In doing so, we will realise the Convention's aims to eliminate the harm and suffering caused by anti-personnel landmines once and for all.

# LEGAL AND OPERATIONAL PERSPECTIVES ASSOCIATED WITH THE ISSUE OF EXPLOSIVE REMNANTS OF WAR

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## Abstract

L'article 2 du Protocole V relatif à la Convention de 1980 sur certaines armes classiques distingue deux catégories au sein des restes explosifs de guerre : les munitions non explosées et les munitions explosives abandonnées. Les mines, engins piégés ou autres dispositifs définis dans le Protocole II ne sont pas inclus. Les restes explosifs de guerre constituent une menace à long terme pour la population civile et limitent la liberté de manoeuvre des militaires. Plusieurs causes peuvent être à l'origine d'incidents : mauvaise qualité de contrôle, dégradation due à la détérioration de certains composants, effets de l'environnement, erreur humaine…

Pour endiguer ce phénomène, la coopération et l'assistance de l'OTAN sont une grande valeur ajoutée et se concrétisent par le développement de meilleures pratiques en matière de conception, qualité et fabrication de ces systèmes au sein des États membres, ainsi que l'essor de standards d'assurance qualité et un meilleur contrôle et partage des informations techniques. Au sein du Groupe de sécurité des munitions, la production inclut des accords d'uniformisation, qui devront par la suite être mis en œuvre au sein de tous les États membres de l'Alliance. Enfin, certains États comme la France ont pris l'initiative d'organiser des conférences sur la thématique des restes explosifs de guerre.

Sur le plan opérationnel, les forces de l'OTAN ont été confrontées aux restes explosifs de guerre en Bosnie-Herzégovine ou au Kosovo, où leur présence a notamment restreint les capacités de la force de protéger et reconstruire la société civile. Le nettoyage des zones de conflit est devenue une priorité. L'Afghanistan est un contexte plus compliqué pour l'OTAN. Les restes explosifs proviennent à la fois de combats antérieurs (contre l'Union Soviétique ou pendant la guerre civile) et du conflit actuel, et sont une menace pour les forces de l'OTAN et la population civile, principalement dans le sud et l'est du pays. Pour faire face à cette menace, le partage d'informations sur le type de restes explosifs et le lieu où ils se trouvent est essentiel. L'ISAF participe au retrait et à la destruction des restes explosifs et apporte son soutien aux programmes d'éducation sur les risques des débris non explosés dispensés par les ONG aux populations civiles. La situation sécuritaire actuelle est cependant un défi majeur à relever pour permettre la poursuite de ce travail. Ces mesures de coopération et d'assistance constituent

des applications concrètes du Protocole V et de ses annexes techniques et confèrent à l'OTAN un rôle unique en la matière.

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It is my very great pleasure to address you on the Legal and Operational Perspectives associated with the issue of Explosive Remnants of War (ERW).
In addressing you from the perspective of a NATO staff officer working in one of the NATO High Readiness Force Headquarters, I must take care in ensuring that I do not represent any one NATO Member State's view over another. Hence, I will confine my comments to those areas where there is unanimous thought, or otherwise put; the lowest common denominator. As such, I will focus on the practical application of the law referring where necessary to the provisions of the Convention on Certain Conventional Weapons 1980 (CCW).

## Context

The conference organisers have, however, made my task considerably easier by asking that I direct my attention to ERW covered by CCW Protocol V excluding cluster munitions; although this will no doubt be something the panel discussion will explore in more detail. I shall therefore deal with unexploded ordnance (UXO), including munitions delivered by aerial and ground-based platforms[1] , and abandoned explosive ordnance (AXO).

Why the military interest? Historically, UXO's have posed significant hazards to military forces operating both in armed conflict and peacekeeping operations. In addition to the long term threat posed by ERW to the civilian population, ERW has and continues to constitute a significant limitation on the freedom of manoeuvre available to military commanders to achieve mission success, particularly with respect to force protection.

I intend to consider NATO's involvement in this area in two respects; firstly, those measures taken by the Alliance, collectively, in applying the spirit of CCW Protocol V and its Technical Annex in the areas of weapon production and modification. Secondly, what measures are taken in the field to give effect to the principles outlined in CCW Protocol V, drawing upon current practice in Afghanistan as it has been shaped by NATO experiences in both Bosnia-Herzegovina (BiH) and Kosovo.

NATO has little doctrine on the subject of ERW. What policy it does have (if it can be described as such) is to be inferred from the practical processes at work in Standing Committees, such as the Ammunition Safety Group which promulgates Standardisation Agreements (or STANAGS) designed to reflect best practice and agreed minimum standards across the Alliance which member states undertake to adhere to. In addition, although not specifically described

as policy on ERW, operational documentation (e.g. Operational Plans and Orders – OPLANS/ OPORDS) directing and guiding the conduct of NATO operations will cover matters such as battlefield clearance, which of course involves activity consistent with the application of CCW Protocol V.

All 26[2] NATO Member States are parties to the CCW. 22[3] of these 26 are parties to the CCW Amending Article 1[4], which provides for the application of CCW to those circumstances covered by Common Article 3[5] of the Geneva Conventions, i.e. armed conflicts of a non-international character. The table at the end of this paper shows the positions of NATO Member States in respect of signature, ratification and accession to the CCW, Amending Article and Protocols.

## Definitions

It is perhaps useful in the first instance to remind delegates of the definitions contained within CCW Protocol V (Article 2). UXO is defined as a launched or emplaced munition which has been operationally employed but where its propulsive, pyrotechnic and/or explosive content has failed to function as intended. AXO is explosive ordnance which has not been used during an armed conflict and which has been left behind or dumped by a party to an armed conflict and is no longer under the control of that party. It includes explosive ordnance which may not have been primed or fused or otherwise prepared for use. ERW then includes both UXO and AXO. Importantly the CCW Protocol V definition of explosive ordnance does not include mines (of any type), booby traps or other devices defined in CCW Protocol II.

## Cooperation and Assistance on ERW - the Alliance Perspective

Incidents of UXO can be attributed to a variety of causes including: improper design of the munition and/or weapon delivery system, inadequate quality control during manufacture, improper storage, degradation due to deterioration of either explosive content or certain components, effects of the operational environment including terrain (e.g. elevation) and weather, and human error. Given these realities, NATO sees the mitigation of UXO necessitating a systems engineering approach to address each of the possible failings described. Of these, particular emphasis within NATO has been placed upon initiation systems with a specific desire to develop best practices for design, qualification and manufacture of these systems across NATO Member States.

This work includes the development of increased reliability of self-destruct and neutralisation mechanisms, reducing the requirement for circumstances where weapons are armed manually and factoring explosive ordnance disposal (EOD) tools and tactics into explosive ordnance production. These measures are combined with numerous others including quality assurance standards and monitoring and technical data sharing to produce a systems engineering approach.

The output from groups such as the Ammunition Safety Group in considering these issues

includes the production of STANAGS designed to be implemented across Member States of the Alliance. This, in turn, allows Member States to use various ammunition types interchangeably with a surety as to the technical specification, construction and performance of that ammunition type.

It is clear that such cooperation and assistance is what is anticipated in CCW Protocol V (Articles 8 and 9) and CCW Protocol V Technical Annex (Article 3) on generic preventative measures. Although constituting what is, in effect, a regional initiative, NATO procedures in this area, I would suggest are reflective of international best practice. I am unaware of the existence of any similar multilateral arrangements. Work within the Alliance is not restricted solely to these areas, with a number of Member States taking the lead in convening conferences dedicated to the consideration of ERW. Notable amongst these efforts is that of France, who to date has coordinated several multilateral conferences on ERW, the outputs of which it briefs regularly to fellow Alliance Member States.

The aforementioned initiatives focus on improving the reliability of explosive ordnance so as to mitigate the risk of failure associated with their use and which in turn is perceived as the major contributing factor giving rise to ERW. There are several other measures undertaken in the operational environment which deal with the fact of ERW.

## ERW - Operational Aspects

Over the past 12 or so years, NATO forces deployed on operations have consistently encountered ERW, which has to varying degrees influenced the nature and manner of delivery of a particular NATO mission. In BiH, the existence of ERW constituted not only a significant movement and force protection restriction; it also fundamentally undermined the capacity for reconstruction of the civil society. Battlefield clearance of ERW therefore became a major priority with substantial resources allocated to addressing the issue.

By comparison, Kosovo, with the exception of ERW arising from the aerial bombardment and certain AXO left behind by the FRY[6] military, did not see the same emphasis (and in turn resource allocation) on ERW clearance. That is not to say this did not occur, as ERW when encountered by NATO forces was subject to battlefield clearance procedures. However, greater

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1 This includes munitions such as TLAM (cruise missiles) and gunfire delivered by naval platforms.
2 Source: ICRC website. Note: Iceland has signed but not ratified the CCW.
3 ibid
4 CCW Amendment article 1, 21 December 2001.
5 Geneva Conventions of 12 August 1949.
6 Federal Republic of Yugoslavia.

reliance was placed upon and assistance given to non-governmental organisations (NGO's) dedicated to this type of activity. A largely benign security environment greatly aided this approach.

Afghanistan by contrast poses one of the most challenging environments for NATO forces to operate in. Not only are there substantial ERW which are the legacy of a decade of insurgency aimed against Soviet occupation followed by a period of civil war, but current combat operations, of significant intensity and duration, have resulted in certain areas in the South and East of Afghanistan posing a considerable ERW threat to NATO ground forces and the civilian population.

What measures then has NATO (ISAF[7]) taken to deal with this threat? Central to military engineering efforts in ISAF is the sharing of information with all interested parties concerning the whereabouts of ERW. This includes details of grid references for the location of ERW, types of ERW found/observed and any marking which has been carried out. Headquarters ISAF has and continues to encourage maximum information sharing between all interested parties (especially NGO's) in order to increase overall situational awareness and, in turn, improve either ERW removal or protection measures. This is seen as an important 'two-way' discourse with benefits ascribed to both the military and civil actors. In addition, ISAF participates in the destruction of large dumps of AXO which pose a significant threat throughout Afghanistan, as well as assisting NGO's in education programmes for the civilian population on the threat of ERW. Such measures are consistent with the provisions articulated in CCW Protocol V (Articles 4, 5 and 6) and CCW Protocol V Technical Annex (Articles 1 and 2).

The passage of information, recording of data, warnings and where possible, battlefield clearance of ERW, given the relatively limited ERW clearance capability within ISAF must be seen as part of a broad, civil-military effort encompassing the Afghan government, ISAF, NGO's and the international community if it is to be successful in reducing the ERW threat in Afghanistan.

I would, however, add a cautionary note here. Whilst in many respects NATO forces in Afghanistan seek to meet either national obligations or NATO best practice with respect to ERW, the underlying security situation in parts of the country has a significant impact on our ability to deal with ERW in those areas. In particular, the ability to mark, clear, inform, communicate warnings of and monitor ERW. The last of these challenges is perhaps the most problematic and is not only influenced by the tactical situation on the ground, but by the availability of re-

7 International Security Assistance Force for Afghanistan.

sources to monitor ERW on anything more than an occasional basis; even then often by remote means. Indeed, in an environment where national capacities to conduct comprehensive battlefield clearance of ERW continue to be limited, the degree of compliance with CCW Protocol V through measures designed to warn the civilian population and monitor ERW will very much rely upon the qualifying language of Article 5 as to what feasible precautions are practicable taking into account the circumstances ruling at the time. The challenges associated with conducting ERW clearance in a difficult security environment should not be underestimated.

## Conclusion

In each successive deployment of NATO forces, lessons have been learned from dealing with ERW. Coupled with initiatives in the area of munitions development, NATO is addressing the issue of ERW in a positive manner. This of course will be seen by some as too little, not quickly enough and without addressing the difficult issues of type and use of certain weapon systems. I would, however, point to the fact that no other regional alliance such as NATO has taken steps similar to those I have described and that, by definition, an Alliance governed by the founding principle of consensus will always find it difficult to address issues which are contentious.

Notwithstanding these factors, both in terms of weapon and ammunition system development and the tactical consideration of ERW in the field, NATO practice has taken considerable steps towards furthering the principles enshrined in Protocol V if not de *jure* then certainly as a matter of policy.

**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**

STATUS OF NATO MEMBER STATES (updated October 2007)

| COUNTRY | CCW 1980 | CCW 2001 Amdt | Protocol I | Protocol II | Protocol III | ProtocolIV | ProtocolV |
|---|---|---|---|---|---|---|---|
| Belgium | 07/02/1995 | 12/02/2004 | 07/02/1995 | 07/02/1995 | 07/02/1995 | 10/03/1999 | |
| Bulgaria | 15/10/1982 | 28/02/2003 | 15/10/1982 | 15/10/1982 | 15/10/1982 | 03/12/1998 | 08/12/2005 |
| Canada | 24/06/1994 | 22/07/2002 | 24/06/1994 | 24/06/1994 | 24/06/1994 | 05/01/1998 | |
| Czech Republic | 22/02/1993 | 06/06/2006 | 22/02/1993 | 22/02/1993 | 22/02/1993 | 10/08/1998 | 06/06/2006 |
| Denmark | 07/07/1982 | 15/09/2004 | 07/07/1982 | 07/07/1982 | 07/07/1982 | 30/04/1997 | 28/06/2005 |
| Estonia | 20/04/2000 | 12/05/2003 | 20/04/2000 | | 20/04/2000 | 20/04/2000 | 18/12/2006 |
| France | 04/03/1988 | 10/12/2002 | 04/03/1988 | 04/03/1988 | 18/07/2002 | 30/06/1998 | 31/10/2006 |
| Germany | 25/11/1992 | 26/01/2005 | 25/11/1992 | 25/11/1992 | 25/11/1992 | 27/06/1997 | 03/05/2005 |
| Greece | 28/01/1992 | 26/11/2004 | 28/01/1992 | 28/01/1992 | 28/01/1992 | 05/08/1997 | |
| Hungary | 14/06/1982 | 27/12/2002 | 14/06/1982 | 14/06/1982 | 14/06/1982 | 30/01/1998 | 13/11/2006 |
| Iceland[8] | 10/04/1981 | | | | | | |
| Italy | 20/01/1995 | 01/09/2004 | 20/01/1995 | 20/01/1995 | 20/01/1995 | 13/01/1999 | |
| Latvia | 04/01/1993 | 23/04/2003 | 04/01/1993 | 04/01/1993 | 04/01/1993 | 11/03/1998 | |
| Lithuania | 03/06/1998 | 12/05/2003 | 03/06/1998 | | 03/06/1998 | 03/06/1998 | 29/09/2004 |
| Luxembourg | 21/05/1996 | 13/06/2005 | 21/05/1996 | 21/05/1996 | 21/05/1996 | 05/08/1999 | 13/06/2005 |
| Netherlands | 18/06/1987 | 19/05/2004 | 18/06/1987 | 18/06/1987 | 18/06/1987 | 25/03/1999 | 18/07/2005 |
| Norway | 07/06/1983 | 18/11/2003 | 07/06/1983 | 07/06/1983 | 07/06/1983 | 20/04/1998 | 08/12/2005 |
| Poland | 02/06/1983 | 15/09/2006 | 02/06/1983 | 02/06/1983 | 02/06/1983 | 23/09/2004 | |
| Portugal | 04/04/1997 | | 04/04/1997 | 04/04/1997 | 04/04/1997 | 12/11/2001 | |
| Romania | 26/07/1995 | 25/08/2003 | 26/07/1995 | 26/07/1995 | 26/07/1995 | 25/08/2003 | |
| Slovakia | 28/05/1993 | 11/02/2004 | 28/05/1993 | 28/05/1993 | 28/05/1993 | 30/11/1999 | 23/03/2006 |
| Slovenia | 06/07/1992 | | 06/07/1992 | 06/07/1992 | 06/07/1992 | 03/12/2002 | 22/02/2007 |
| Spain | 29/12/1993 | 09/02/2004 | 29/12/1993 | 29/12/1993 | 29/12/1993 | 19/01/1998 | 02/09/2007 |
| Turkey | 02/03/2005 | 02/03/2005 | 02/03/2005 | | | 02/03/2005 | |
| United Kingdom | 13/02/1995 | 25/07/2002 | 13/02/1995 | 13/02/1995 | 13/02/1995 | 11/02/1999 | |
| United States of America | 24/03/1995 | | 24/03/1995 | 24/03/1995 | | | |

Source: ICRC

8 Iceland has signed but not ratified the CCW 1980.

# REGULATING CLUSTER MUNITIONS?

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## Abstract

L'existence des bombes à sous-munitions a de nombreuses conséquences en termes humanitaires : leurs portée et implication durant une attaque, et les restes non explosés après une attaque. L'arme en elle-même peut être considérée comme problématique, au regard du principe de distinction et de l'interdiction des attaques indiscriminées. Enfin, l'utilisation d'une telle arme peut être une violation de nombreuses règles, qui portent notamment sur les précautions dans l'attaque et la proportionnalité. Les règles pertinentes à l'égard des bombes à sous-munitions se trouvent dans l'Article 51 (4) b et 51 (5) b du Protocole Additionnel I. Dans un jugement rendu en juillet 2007, le Tribunal pénal international pour l'ex-Yougoslavie a estimé que le M-87 Orkan (bombe à sous-munitions) était une arme indiscriminée (en raison du taux d'échec de cette arme à détoner à l'impact très élevé) et violait le droit international humanitaire.

Il existe plusieurs catégories de bombes à sous-munitions : celles qui contiennent un grand nombre de sous-munitions non guidées et qui n'ont pas de mécanismes d'auto-destruction ou d'auto-neutralisation (ex : Orkan) ; celles qui contiennent un grand nombre de sous-munitions non guidées et qui ont des mécanismes d'auto-destruction ou d'auto-neutralisation (ex : arme M-85 utilisée au Liban en 2006) ; et les munitions sophistiquées, très performantes techniquement, peu nombreuses par container, et ayant des sous-munitions individuellement guidées. Se pose donc un problème important : quelle(s) catégorie(s) de bombes à sous-munitions doit-on interdire ?

Un processus d'élaboration d'un traité international juridiquement contraignant est actuellement en cours. Étant donné que le processus au sein de la Convention sur les armes classiques stagnait, certains États ont lancé parallèlement le processus d'Oslo (succession de réunions d'experts), qui a débuté en février 2007 avec l'adoption de la Déclaration d'Oslo, dont l'aboutissement est l'adoption d'un traité international pour 2008. Celui-ci interdira l'utilisation, la production, le transfert et le stockage des bombes à sous-munitions, et établira un cadre pour la coopération internationale, l'assistance aux victimes et le nettoyage des zones contaminées. Trois autres textes ont finalement vu le jour dans le cadre de la Conventions sur les armes classiques. La différence entre les textes issus du processus d'Oslo et de la Convention sur les armes classiques réside dans le champ d'application et la définition : il semblerait que la définition du texte issu du processus d'Oslo ait un seuil plus élevé et couvre un ensemble plus large de bombes à sous-munitions.

I am very honoured to have been invited to this Colloquium. Firstly, I will speak briefly about cluster munitions in general, what they are and their relationship with international humanitarian law, and then secondly I will talk about the ongoing international process aimed at banning cluster munitions.

The definition of a cluster munition could be "any canister or shell containing more than one sub-munition". But as you know, the term is normally used for munitions containing large numbers of small sub-munitions. They can be air-delivered, like in bombs or cargo ammunition, or they can be surface launched, from land or from sea. Typical examples are artillery ammunition such as missile launched rocket systems (MLRS). This is another example of weapons that potentially could be banned because they are "not big enough", as Françoise Hampson mentioned. The fact that they are "not big enough" is underscoring the point that there are so many of them, and that is the core of the problem here.

There are many different types of cluster weapons or cluster munitions. They can be everything from very high-tech missiles with a small number of individually guided sub-munitions, each capable of detecting targets. These are called advanced munitions or sensor fused weapons. At the other end of the scale, there are wide area weapons which cover "footprints" with large numbers of non-guided sub-munitions, used for what is known as carpet-bombing for example.

If we look at cluster weapons and international humanitarian law, there are humanitarian concerns, especially with regard to two aspects of cluster weapons. The first is the wide area effect and the implications of this effect during an attack. The second are the unexploded remnants or "duds", which will remain after an attack. The weapon itself can be seen as problematic with regard to the principle of distinction and the prohibition against indiscriminate attacks. In addition to that, the use of the weapon can be in violation of a number of rules, for example on precautions in attack and proportionality. But, as we know, all weapons can be used in an unlawful manner.

One very relevant rule with regard to cluster munitions is article 51 (4) b of Additional Protocol I. It describes indiscriminate attacks, which are prohibited, and says that those attacks employ means of combat, which cannot be directed at a specific military objective, that are to be seen as indiscriminate.

Another very relevant rule is article 51 (5) b which specifies that 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. The term "expected" is particularly interesting with regard to cluster munitions. Does the user of this weapon have to take into account the long-term effects? What is covered by the word "expected"? Is it what is going to happen in the next couple of hours, the next two days or the next twenty years? The relationship between the term "expected" and the term "excessive" is therefore very important. Are unexploded sub-munitions to be expected and are they therefore excessive after the conflict is over? Article 51 (5) b only prohibits the use of weapons in cases where civilian losses are excessive. But for how long after the hostilities?

The International Criminal Tribunal for the former Yugoslavia addressed the issue of cluster munitions as an indiscriminate weapon, in a judgement concerning Milan Martic in the summer of 2007. The Trial Chamber discussed the use of cluster munitions, more specifically the weapon called M-87 Orkan, where it notes the characteristics of the weapon being a non-guided high dispersion weapon and concludes that the Orkan by virtue of its characteristics, as well as its extensive firing range, was incapable of hitting specific targets. For these reasons, the Trial Chamber found that the weapon was an indiscriminate weapon and concluded that the weapon itself was in violation of international humanitarian law. I think this is a very interesting development even if this judgement has no immediate legally binding effects on States and their weapons arsenals; nevertheless, it is interesting because it points in a clear direction and it contributes to stigmatizing the weapon.

The ICTY did not discuss whether the injury resulting from duds after the attack could be covered by the term "expected". The Trial Chamber said that "having regard in particular to the nature of the M-87 Orkan and the finding that Milan Martic knew about the effects of this weapon, the Trial Chamber finds that Milan Martic wilfully made the civilian population of Zagreb the object of this attack".

One key aspect of this case in my opinion was the failure rate. Of the sub-munitions fired over Zagreb in this attack, somewhere between 40 and 69 % failed to detonate on impact. And I think it is correct to say the indiscriminate nature of this weapon is particularly due to the duds. The wide area effect of such a weapon *during* an attack is not necessarily indiscriminate if directed at a military target area. Such area targets do exist. It is however very difficult to see how the failure rates, leaving unexploded ordnance possibly for years after the attack, should not be in violation of the principle of distinction.

There are many ways of categorising cluster munitions. I will try to outline a very simplified description of the different categories to give you an idea of where the discussions are at the

moment. The first category are cluster munitions that contain large number of non-guided sub-munitions, which have no self destruct or self neutralisation mechanisms. The Orkan is a typical example of this. The second category are cluster munitions that contain large number of non-guided sub-munitions, which do have self destruct or self neutralisation mechanisms. One example of this is the weapon M-85 which was used in Lebanon last summer. This weapon was tested extensively by the Norwegian military forces about a year ago because they believed that these weapons had a failure rate of less than 1%. This was contested by several NGOs. In the tests, the failure rate was actually a little bit higher than 1%. However, following research in Lebanon, the Norwegian military experts found that the failure rate in Lebanon was sometimes 20%. The average failure rate of the M 85 was approximately 12%; demonstrating that testing results will never match reality. And this is one of the reasons why the Norwegian Ministry of Defence has issued a moratorium on the use of these weapons in Norway. The third category are the ones I referred to earlier, the so-called sensor fused weapons or the advanced munitions, which are high tech, very few per container, individually guided sub-munitions and which have also very advanced and sophisticated self neutralisation mechanisms. Because they are much more sophisticated technically, they are also larger and therefore contain fewer sub-munitions.

These three categories illustrate the key problem with regulating cluster munitions. What should be prohibited? Should one prohibit only the first category? That would certainly help from a humanitarian point of view, but it would not resolve the problem. Should one go further and ban the second or even to the third category?

This brings me to the issue of a new treaty. After years of discussions on regulating cluster munitions which appeared to lead nowhere in the CCW, a group of states got together in February 2007 in Oslo with organisations such as the United Nations, the International Committee of the Red Cross and the Cluster Munitions Coalition (CMC). In this meeting, a declaration was adopted with the aim of starting a process towards a new treaty. 46 of the 49 States which were in Oslo agreed to this declaration. More than 70 States participated in the following meeting in Lima in June 2007, and 136 States participated in the subsequent meeting in Vienna in December 2007.

The Oslo declaration says that the States agreed to conclude by 2008 a legally binding international instrument that will prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians. The term “unacceptable harm to civilians” should not be seen as a qualification in the sense that harm to civilians can ever be acceptable; it is a statement that cluster munitions do cause unacceptable harm to civilians. This is of course not a definition of cluster munitions; it is just a justification for a ban on cluster munitions.

In addition to the prohibition of a category of weapons, a very important part of this instrument is to establish a framework for cooperation and assistance and particularly to ensure rehabilitation and support for victims of cluster munitions. It also includes assistance for clearing contaminated areas.

The process that was set out in the Oslo Declaration was a sequence of meetings. First of all, the meeting in Lima which took place in June 2007, then the meeting in Vienna December 2007, then a meeting in Wellington (February 2008) and finally the diplomatic conference in Dublin in June 2008. This is how the process is seen to move forward.
For the meeting in Lima, a discussion text was put on the table. It is not called a draft treaty, simply because it was a text with the aim of generating discussions. The Mine Ban Treaty was a model for this discussion text, but there are many differences because it is a very different weapon.

Among the key features of such a treaty is the scope of application which in this case is "never under any circumstances" which means that one does not have to qualify the situation. The prohibition applies in all situations of international or non-international armed conflict, or when there is no clear situation of an armed conflict. This is the same scope of application as the Biological Weapons Convention, the Chemical Weapons Convention and the Mine Ban Treaty have. Secondly there is a prohibition on the use, transfer, production and stockpile, the same list that would be found in other treaties. And then of course the very difficult question of definitions. Which cluster munitions would in fact be subject to a prohibition here? Then there are provisions on the destruction of stockpiles and of clearance of contaminated areas and last but not least, on victims' assistance and on international cooperation. A discussion text was circulated before the Lima meeting, and again before the Vienna meeting. The discussion text does not represent any national position. None of the States working on this text had finished or finalized their national positions at the time (November 2007).

There are also alternative texts circulating now in the CCW. As far as I know, there are three draft Protocols in circulation. There is a German text which was presented in the ICRC meeting in Montreux this summer, there is a British text and there is apparently also a thirteen's State group text. I have only seen the German text so I cannot speak on the others. There are some differences between the CCW protocol draft and the Lima/Vienna draft, for example with regard to the scope of application. Because of course, as a Protocol under the CCW, it would only pertain to situations covered by common article 3 and above. The key issue where these texts differ, however, is on the question of definitions. Which cluster munitions should in fact be prohibited? The discussions so far show that at least as far as I have been able to see from the German text, the definition presented in the CCW draft would only cover cluster

munitions without self destruction or self neutralization mechanisms so it would cover the first category that I described. Such a prohibition would take care of many of those weapons which constitute a humanitarian problem, but it would not cover for example the M 85, which has a failure rate of 12% in actual use. The definition which was presented in the Lima and Vienna texts has a higher threshold. It would cover also the cluster munitions with wide area effect, including those with self destruction or self neutralization mechanisms. The definitions of the Lima/Vienna texts are not linked to self destruct or self neutralise mechanisms at all. The Cluster Munitions Coalition (CMC) has recently come out with a definition as well, which simply say that all cluster munitions containing explosive sub-munitions should be banned. States would thus have to argue for those exceptions that they think should be included. Of course there must be some exceptions from this definition because one must have exceptions for smoke or flare for example. But the CMC position is that all of the exceptions would have to be justified by States.

I will end with some comments on the political aspects of cluster weapons. First, I would like to explain why the Norwegian government and other governments see this as a winning cause in the long term. This is because armed conflicts today are increasingly about building peace, democracies, supporting peace processes etc. To have a lot of unexploded ordinance lying around and killing civilians cannot be seen as conducive to those processes. Therefore, it is not rational in the long term to use non-precision weapons which affect civilian populations negatively for years after the fighting is over.

As has been the case with antipersonnel landmines following the Mine Ban Convention, it will become increasingly difficult politically for States to use cluster weapons. I think, as the Australian Ambassador said, that the Mine Ban Convention has had an enormous effect when it comes to the decrease of new victims, when it comes to decrease in production and export. American weapons companies now produce weapon systems that they call "Ottawa compliant" which are like antipersonnel landmines but which are not victim activated. They do not have to follow the rules of a treaty which is not binding for them, but they do it anyway. Anti personnel mines are clearly stigmatized weapons. Cluster munitions, by comparison, are not a humanitarian problem to the same extent as APMs were. The problem with the cluster munitions is not so much the current use, but the stockpiles. There are hundred of millions of sub-munitions stockpiled all over the world of this weapon and that is the main task of this process: to prevent these weapons from ever being used.

Prof. Schmitt reminds that the use of indiscriminate clusters or the indiscriminate use of clusters is already forbidden by IHL. He also says we need to be careful if we have a total ban on cluster munitions and gives a circumstance where cluster munitions would produce a more humanitarian result. For example, during the attack of a village, cluster munitions would allow soldiers to hit only the people they want to hit, and not civilians who would take refuge inside. He thinks we should just establish a limit on the dud rate, because ban will deprive war fighters' commanders in the field of a tool to keep down injury to civilians in some cases.

Prof. Nystuen agrees that using these weapons is already forbidden in some circumstances in IHL but that, as Prof. Hampson pointed out, these general rules do not seem to be applied and that a specific ban is needed in order to take a weapon out of use. It seems to her that whenever there is a critical situation, one will use the weapons that are at disposal and that is one of the reasons why the stockpile destruction is a key point.

Lt. Col. Stewart adds that responsible militaries do not take decisions to use cluster munitions for austere reasons, because of the impact on the civilian population but also the impact on humanitarian forces and in particular the Explosive Remnants of War (ERW) effects of cluster munitions on their own forces. Therefore, he disagrees with the proposition that one uses them any way, because one has to use everything in one's toolbox. People say that cluster munitions are bad because we see children and civilians dying around the world and therefore we must ban them as a weapon system. However, the debate will not be successful, if it is marginalized in terms of its focus. It has to be on areas that relate to the efficient use of these weapons systems in compliance with IHL, where technology is used to improve their effects.

*Prof. Sandoz states that the question of a total ban or not of cluster munitions is not the issue, since it depends on the definition. As long as you have not defined the weapons, you cannot discuss total ban or not total ban. Prof. Sandoz asks a question about the Oslo process and the CCW process. Considering the States who are in the Oslo process, do they decide to go until the end of this process anyway or do they see what is going on in the CCW process and would possibly renounce? In the competition between these two processes, what are the positions of those who are engaged in the Oslo process?*

Prof. Nystuen thinks that one of the reasons why the Ottawa process was a success in terms of substance is the fact that it was taking out of the CCW which is closely linked to the requirement of consensus. It means that we will only arrive at what is the lowest common denomina-

tor among those States. Therefore, it is inherently difficult to get a strong norm within the CCW and that is the position of many States participating actively in the Oslo process. Most of the States active in the Oslo process are also members of the CCW and would of course support the CCW process if in fact it would be seen to go somewhere. The rules of procedure which were used during the negotiations of the Ottawa Treaty were the ordinary rules of procedure which allow voting and it would not have been possible to get a ban on antipersonnel landmines if that had not been the case. On the question of total ban or not total ban, Prof. Nystuen thinks there is some confusion about what it means. The term "total ban" is understood in the sense that is a prohibition of the specific weapons. However, it has not been decided which weapons would be covered. It would certainly not be every weapon with more than two sub-weapons.

As a State Representative, Ambassador Millar adds that many countries, including her own, would be very keen to see something coming out of the CCW because major producers and users are in the CCW. The prospects for that are not looking particularly brilliant right now but one certainly has not given up and many countries are trying to look at that dual-track approach to both processes, because there are some issues that we still have to work on, particularly definitions.

Prof. Hampson points out the problem of the dud rate (degradation and increase of risk by virtue of age) and in certain circumstances the way in which they are used, which appears to be indiscriminate. However, if the way in which they are used is the problem, the Additional Protocol I already covers it. On the issue of consensus in the CCW, her understanding is this is not an inevitable rule and she thinks the CCW is a better forum for these negotiations. It enables you to keep on board those States that will certainly not accept a ban. If you put all your assets into the Oslo process, the risk is to lose those States that might be persuaded to go further than they have already gone. She thinks it is better to get involved in a party where most States will take part rather than to have an even better party for a much smaller group. It is the wrong way to have a dual-track. It is not necessarily an advantage to have the "Oslo track" undermining the other track.

Mrs Waszink adds that the decision to use cluster munitions is not taken lightly by militaries and even if they probably try to make great efforts to use these weapons in accordance with the general rules of IHL, the consequences on the ground are very serious for civilian populations in almost every case where these weapons have been used. And this is not only referring to Lebanon, but also to Laos, where thirty years later these weapons are still causing a significant number of casualties every year. There seems to be some inherent characteristics of these weapons that make them difficult to use in accordance with the general rules of IHL and that may call for some specific restrictions or prohibitions. Mrs Waszink also says that

the effort going on to restrict cluster munitions or prohibit certain types of them must be a preventive effort. Most of the stockpiles of cluster munitions in States' stocks around the world are actually very old and would probably have a low height on reliability rate. Another concern is related to the proliferation. Some States do take their IHL obligations seriously. But it would be terrible if ever these weapons get spread to some other States or non-state armed groups that would not take the obligation equally seriously and which will use them with much less restraint.

Lt. Col. Stewart underlines that seeing the practice in Afghanistan, the USA understands the impacts of the ERW and take their responsibility, as funding ERW clearance or the allocation of resources on a military perspective in theatres of operations. He also says the USA, UK and France have been key players in the ammunitions safety group within NATO and the development of technical advances to improve reliability of this type of weapons system. While noting that cluster munitions are inherently indiscriminate in nature, saying there are serious consequences on a civilian population is true of any weapons system used by armed forces. He grants respect to the CCW process and agrees with the concept that having a small select group is not always the best way of achieving what we want to achieve. He also agrees with the point raised by Mrs Waszink about the transfer of these weapons system, particularly in terms of the stockpiling aspects.

Prof. Nystuen adds that not all States are party to the CCW. The Oslo process is about victims' assistance, cooperation, clearance of contaminated areas as well as actually regulating the use or prohibiting the use of specific weapons. It has a humanitarian component which is much more important, than the normal CCW Protocol would probably be. She does not think the Oslo track undermines the CCW. We can speculate about that but there would probably be nothing going on in the CCW on cluster munitions, if it had not been for the Oslo process. In addition, she would not be too optimistic on the consensus rule. She adds that the key here is the relationship between short-term military utility and long-term political utility and concludes that this is a winning cause, because it is not politically viable in the long term to build democracy through the use of this kind of weapon.

# Session 2: Implementation challenges

Chair person: Dr. Jeno Czuczai, Legal Service of the General Secretariat of the Council of the EU and College of Europe

**Proportionate and discriminate use of weapons: challenges for a military commander**
Prof. Michael Schmitt

**Non-state actors and weapons**
Elisabeth Decrey-Warner

**Arms transfer and IHL: an overview**
Jacqueline Macalesher

**Arms transfer criteria based on international humanitarian law and their practical application**
Camilla Waszink

**The EU code of conduct on arms exports**
Margit Bruck-Friedrich

# THE PRINCIPLE OF DISTINCTION AND WEAPON SYSTEMS ON THE CONTEMPORARY BATTLEFIELD: A US PERSPECTIVE ON CHALLENGES FOR A MILITARY COMMANDER

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## Abstract

Le principe de distinction est codifié par l'article 48 du Protocole Additionnel I et reconnu comme un principe de droit international humanitaire coutumier. Les États-Unis ne sont pas parties au PA I mais reconnaissent qu'il s'agit d'une norme de droit coutumier. Les forces américaines présentes en Afghanistan et en Irak ont été confrontées à de nouveaux défis liés à l'application de ce principe. Ces deux conflits illustrent en effet le phénomène de l'avantage technologique (qualité des armes, niveau de commandement et de contrôle des forces très élevé, systèmes de communication très performants), qui conduit l'ennemi désavantagé à adopter des moyens et méthodes asymétriques et à chercher ses propres avantages, mettant ainsi en danger l'application de ces normes prescriptives.

Les opposants aux forces US en Afghanistan et en Irak ont contourné la supériorité américaine en utilisant des artilleries moins performantes dans les combats ouverts face à un combattant technologiquement performant, mais très utiles dans les opérations urbaines ou guérilla. Les opposants aux forces US se sont également tournés vers des dispositifs explosifs improvisés, construits avec des téléphones portables, des voitures, des fils de cuivre, de l'engrais, de l'essence ou provenant de restes explosifs de guerre.

La partie désavantagée dans les conflits asymétriques adopte des moyens de guerre illégaux, à l'exemple des corps piégés des personnes décédées ou blessées, en violation des normes de droit international coutumier, codifiées dans le Protocole II de la Convention sur les armes classiques. Ils ont aussi recours aux attaques suicides. Donner sa vie pour tuer l'ennemi combattant ou les civils participant à la conduite des hostilités n'est pas une violation du DIH. Cependant, c'est une violation de feindre de façon perfide un statut civil afin de se rapprocher de l'ennemi et de conduire une attaque suicide.

Pour les commandants US, il est important de développer des contre-systèmes. Sur un plan opérationnel, il serait possible de faire détoner les dispositifs explosifs improvisés avant qu'ils ne soient utilisés dans des attaques. Mais le manque de connaissance, par exemple quant à la localisation de la bombe au moment de l'explosion, complique le calcul de proportionnalité. Beaucoup d'objets utilisés par la partie désavantagée sont d'un double usage et ont à la fois des buts militaires et civils. Il est donc

* The views expressed herein are those of the author in his personal capacity.

difficile pour les forces US de distinguer les armes, leurs composantes et d'autres objets militaires de leurs équivalents civils. Quand l'asymétrie technologique génère une perception d'inégalité des forces, les commandants US s'inquiètent que même leurs actions légales soient considérées comme injustes ou illégales.

Les forces US s'inquiètent également des méthodes utilisées par les opposants technologiquement désavantagés. Les parties les plus faibles ont en effet tendance à se déplacer dans les zones peuplées de civils : ils sont ainsi plus difficiles à localiser, identifier et cibler, essentiellement en raison du fait qu'ils ne portent a priori pas d'uniformes. Il est ainsi difficile pour les soldats US de distinguer les combattants et civils participant directement aux hostilités de la population civile. Les forces US adoptent donc parfois des règles d'engagement d'auto-défense, qui mentionnent qu'un individu doit exécuter un acte hostile ou démontrer une intention hostile avant d'être considéré comme combattant. Les opposants utilisent en outre des groupes vulnérables à des fins militaires, emploient des boucliers humains (volontaires et involontaires), feignent de façon perfide un statut de civil afin de conduire des attaques surprises et exploitent les lieux qui jouissent d'une protection spéciale en vertu du DIH. Ces méthodes, qui constituent des réponses tactiques égales à l'asymétrie technologique, sont des violations du DIH coutumier et du PA I pour ceux qui y sont parties. Les opposants aux forces US ont adopté une stratégie d'attaque avec des arguments juridiques (lawfare) comme méthode de guerre pour contrebalancer l'avantage US. Ainsi, une partie dépeint l'autre comme agissant illégalement afin de lui retirer ses soutiens nationaux et internationaux et de soutenir la résistance de ses propres militaires et du public. Cette tactique est souvent employée en absence de violation. L'un des moyens classiques est de s'assurer que les médias ont accès aux scènes cruelles de morts et de souffrances des civils. Par ailleurs, dans certaines situations, les opposants aux forces US ont attaqué des individus ou groupes qui étaient qualifiés de civils sous le DIH (police, ONG, CICR et ONU, politiciens…). En déplaçant le centre de gravité du militaire à la population civile, les insurgés cherchent à dissuader la coopération avec le régime d'occupation et à créer une forte instabilité.

Enfin, les forces US doivent tenir compte de sensibilités culturelles dans l'application du principe de distinction. Il arrive par exemple que les insurgés utilisent les mosquées pour stocker des armes et les forces US hésitent à pénétrer dans ces lieux. De même, ils ne fouillent pas systématiquement les femmes aux points de passage, ce que les opposants savent et mettent à profit.

Les violations du principe de distinction et d'autres normes de DIH par leurs opposants ont clairement affecté l'attitude des soldats sur le terrain. Selon une étude menée en 2006 en Irak, par des militaires américains spécialistes de la santé mentale, seulement 47% des soldats et 38% des marines interrogés estiment qu'ils doivent traiter tous les non combattants avec dignité et respect. En effet, quand une partie viole la loi, il devient difficile pour les commandants de l'autre partie de garantir le respect de la loi parmi leurs troupes.

For United States forces on the modern battlefield, application of the principle of distinction poses novel challenges. Quite paradoxically, many result from the extraordinary technological edge the US military enjoys over its enemies. This contribution examines such challenges, primarily at the tactical level of warfare.

In its Nuclear Weapons advisory opinion, the International Court of Justice labelled distinction one of two "cardinal" principles of international humanitarian law. This "intrangressible" norm rises to the level of customary law in both international and non-international armed conflict, a status acknowledged by the United States in the 2007 *Commander's Handbook on the Law of Naval Operations*, its most current IHL manual.

Article 48 of the 1977 Protocol Additional I, which provides that "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," codifies the core principle, while specific rules prohibiting attacks on civilians, civilian objects, and specially protected individuals and objects, such as those who are *hors de combat* and medical facilities, further operationalise it. The United States, which is not a Party to the Protocol, recognises most such rules as customary law.

Within the general framework of distinction, the proportionality principle and the requirement to take precautions in attack are of particular valence for US forces. The former prohibits attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The latter requires an attacker to take precautions that minimise effects on the civilian population. These include, *inter alia*, doing "everything feasible" to verify that the proposed target is a lawful military objective; choosing weapons and tactics so as to minimise collateral damage to civilian objects and incidental injury to civilians; and selecting that target from among potential targets offering "similar military advantage," the attack on which causes the least collateral damage and incidental injury. Although the Commander's Handbook sets out the precautions requirements in less detail than the Protocol, US practice demonstrates general acceptance of its core notions.

The conflicts in Afghanistan (Operation Enduring Freedom) and Iraq (Operation Iraqi Freedom) aptly illustrate the phenomenon of asymmetrical technological advantages driving a disadvantaged enemy to adopt asymmetrical means (weapons) and methods (tactics) of its own that endanger application of these prescriptive norms. Asymmetry involves avoiding enemy strengths, leveraging

one's advantages and exploiting enemy weaknesses and vulnerabilities. Generally conceived of in "methods and means" terms, it may also encompass direct and indirect communication (with one's own public, the enemy public, other States, and the international community), often through diplomacy, the media and non-governmental organisations; economic wherewithal, both in terms of ability to fund the war effort and the use of sanctions and other economic tools; logistics; law, particularly limitations on the use of force; and morality.

With regard to asymmetry, technological superiority best characterises US operations in Afghanistan and Iraq. US weapons have greater firepower, range and precision. High-tech surveillance and reconnaissance platforms, together with other intelligence assets, render the battlefield incredibly transparent. Communications systems are redundant, pervasive and secure, thereby allowing US commanders an unprecedented degree of command and control over their forces. From conducting attacks with unmanned combat aerial vehicles piloted from the United States, such as the MQ-9 Reaper, to logging into military "chat rooms" with Blue Force Tracker laptops in the remote mountains of Afghanistan, the technological wizardry is nothing short of eye-watering.
These assets allow US forces to "get inside the enemy's OODA (observe, orient, decide, act) loop." In other words, they can observe enemy forces, analyse their actions, disseminate information, determine an effective course of action, act, and evaluate the effects of their operations much more quickly than their opponents. In theory, repeatedly doing so stuns the enemy into a purely reactive mode, for it can only act once US operations are either well underway or complete. In extreme cases, the enemy simply shuts down out of a sense of helplessness.
Although pundits might dispute the purported benefits of asymmetry, there is no denying that technological asymmetry on any battlefield the United States has found itself on, or is likely to for the foreseeable future, is a dominant reality. This reality generates a number of consequences.

First, the reach and precision of US weapon systems is such that range, geography, weather and enemy defences pose only slight obstacles to the conduct of operations across the enemy's land, sea, air and cyber-territory. Battlelines have become battlespaces in which legal norms (such as the prohibition on conducting operations in neutral territory), not technological limitations, define operational boundaries. Recall that the first attack of Operation Iraqi Freedom consisted of a cruise missile strike near Baghdad against Saddam Hussein.

Second, an enemy identifiable on an open battlefield will usually be killed by his or her technologically advantaged opponent, often with *de minimus* risk to the attacker. As a result, hostilities inevitably migrate to urban or other built-up areas. Yet even in such areas, identification as a participant in the hostilities places one at extreme risk. The same dynamic applies to weapon systems and other equipment. Once located and identified as such, the technologically advantaged opponent can typically destroy them…almost effortlessly.

In such an environment, the disadvantaged party must seek its own asymmetrical advantages. Predictably, US opponents have done exactly that. Consider the means of warfare (weapons) to which they have turned. Lacking access to the global high-tech weapons acquisition network (or the financial wherewithal to acquire such systems and know-how to employ them), the enemy in both Afghanistan and Iraq is countering US superiority by leveraging low-tech weaponry. This has been accomplished in a number of ways.

Small arms from the vast licit and illicit global market have found their way into both countries. Furthermore, in Afghanistan small arms were already widely possessed by the warring factions, whereas in Iraq they soon became available when Coalition forces failed to secure and safeguard Iraqi weapons storage areas. Although small arms might not be horribly useful when facing a high-tech enemy on the open battlefield, they are effective in urban and guerrilla operations, which typically involve ambushes and other hit-and-run tactics.

US opponents have also turned to "unconventional" weapons. For instance, improvised explosive devices (IEDs) and vehicle-borne improvised explosive devices (VBIEDs) can be built using such "off-the-shelf" material (commercially available and intended for civilian use) as mobile phones, cars, copper wire, fertilizer and gasoline. Explosive material can also derive from US and Coalition unexploded ordnance (UXO) or indigenous abandoned ordnance (AXO), like that recovered from Iraqi army ammunition depots.

In another example, computers linked to the Internet are increasingly employed for such tasks as communications and gathering information from open sources, especially as the Iraqi network comes back online. In the future, computer network attacks directly against US military (and perhaps civilian) systems are inevitable, for the heavy US military reliance on computers surely represents an irresistible US vulnerability for the enemy. Similarly, low-tech forces have turned to mobile phones as excellent tools for command and control and intelligence gathering and dissemination.

Sadly, the disadvantaged side in today's asymmetrical conflicts has also adopted unlawful means of warfare. For instance, bodies and the wounded have been booby-trapped in violation of the customary international law norm codified in Protocol II of the Convention on Certain Conventional Weapons. US opponents have also resorted to the use of suicide bombers. While it is not a violation of international humanitarian law to give one's life to kill enemy combatants and civilian direct participants in hostilities, it is a breach to perfidiously feign civilian status in order to get close enough to the enemy to conduct a suicide attack. If an attack is designed to kill even a single civilian, the suicide bomber would be guilty of a war crime.

Such asymmetrical means of warfare present US commanders with a number of distinction challenges. The most obvious is developing effective counter-systems. Consider IEDs and VBIEDs. The United States and its allies have successfully used existing electronic warfare platforms like the

EA6B Prowler to "jam" radio signals that detonate IEDs. Although jamming sometimes interferes with civilian activities or damages civilian equipment, by and large the harm is minimal, at least relative to the military advantage accruing from protecting one's own forces.
Operationally speaking, it would be preferable to detonate the IEDs in advance because destruction precludes their use in future attacks. Therefore, US forces are turning to new counter radio-controlled IED systems that transmit signals which cause the IEDs to explode before they can be effectively used. The challenge for any commander employing such systems should be apparent – lack of knowledge as to the location of the bomb at the time of detonation complicates the proportionality calculation enormously. Might it detonate while a civilian vehicle is passing? What if the IED is being carried though a crowded civilian area on its way to placement alongside a road? What if an undeployed IED is in a house or other building containing civilians? What if there are a number of such devices in the same location, such that the resulting explosion will be huge? And so on.

As these examples illustrate, counter-systems intended for use against threats (whether individuals or weapons) that are difficult to reliably locate or identify can heighten the risk to civilians and civilian property. Unfortunately, in an asymmetrical conflict, a difficult-to-locate or identify weapon or combatant is exactly what one needs to offset an adversary's technological advantage.

Commanders face countless other challenges when seeking to apply the distinction principle in such an environment. Many items used by the weaker side are dual-use, that is, they have both military and civilian purposes. This fact makes it difficult for US forces to distinguish weapons, weapon components and other military items from their civilian equivalents. As an example, when soldiers spot an individual on a mobile phone, what conclusion should they draw? That the caller is gathering intelligence? Preparing to detonate a bomb? Calling home? Is a truck carrying fertilizer which has been stopped at a roadblock transporting bomb-making material or farming chemicals? Does an empty car by the side of the road contain a VBIED or has it been parked by its owner while running errands? Is an individual spotted at night carrying a rifle doing so to attack US forces or to defend himself from violent criminals or sectarian militia?

Dramatic asymmetry in weaponry has a particularly pernicious effect – creation of a sense that somehow the fight is unfair, that the advantaged party is a "bully." Sensitive to this reality, commanders are concerned that their actions might be characterised as disproportionate, not necessarily in the sense of the legal principle, but rather in terms of inequality of force. For example, a video clip that has circulated on the Internet depicts an Iraqi insurgent with an AK-47 automatic rifle being killed by a US tank shot. The video evoked a visceral reaction on the part of some viewers that the tank crew had acted wrongfully. Yet, there is no legal issue as between killing a combatant with a tank shell or a rifle bullet (except that of the expected relative collateral damage and incidental injury, if any). When technological asymmetry generates a "bully" perception, commanders justifiably worry that even their lawful actions will be styled unfair or unlawful.

Finally, US forces today wield an impressive array of information operations (IO) capabilities, including the ability to conduct computer network attacks (CNA). IO assets offer an astonishing technological advantage. However, the legality of "striking" certain "target sets" against which such capabilities would be useful – like broadcasting facilities, websites, email systems, and financial assets – remains unsettled. Two schools of thought dominate. The first, based on a strict reading of the definition of "attack" found in Article 49 of Additional Protocol I, argues that the prohibition on attacking civilians or civilian objects applies only to "violent" operations, i.e., those likely to cause death of or injury to the former or destruction of or damage to the latter. The other embraces an expansive reading of the notion of attack, focusing on Article 48's language limiting operations to those directed against military objectives (and combatants). This interpretation would prohibit most forms of CNA against civilian "cyber-targets," even if the consequences did not involve death, injury, destruction or damage. US forces controlling CNA and other IO assets must therefore be sensitive to the possibility that their operations, even if compliant with the law as interpreted by the first school of thought, may generate criticism from those adopting the more restrictive approach.

As problematic for US commanders as the means used by technologically disadvantaged opponents are the methods they adopt. There is, as noted above, a general tendency for weaker forces to move into areas populated by civilians. This tactic makes them difficult to locate, identify and target, particularly since they are unlikely to be wearing uniforms. Additionally, because disadvantaged forces are likely to lose any direct battle with the superior US forces, they tend to engage in "shoot and scoot" tactics. In other words, they fire at US forces and immediately flee. There is also a growing tendency to use vulnerable groups for military purposes. In particular, US opponents have used women to gather intelligence, transport supplies and conduct attacks, sometimes in the form of suicide bombings.

Especially troublesome from a distinction perspective is adoption of unlawful tactics that leverage the protection the principle extends to civilians and civilian objects. US opponents have, inter alia, employed both voluntary and involuntary human shields, perfidiously feigned civilian status in order to conduct surprise attacks, and exploited locations enjoying special protection under IHL. During the 2004 battle for Fallujah, as an example, Iraqi insurgents used 60 of the 100 mosques in the city for military purposes. In some cases, they used them for weapons storage and mustering points. The minarets were particular valuable as sniping locations and observation points.

These tactics amount to patent breaches of customary international humanitarian law, as well as violations of Additional Protocol I for the Parties thereto. However, it is important to understand that they equally constitute logical tactical responses to technological asymmetry. They variously improve the enemy's ability to avoid detection, hinder US attacks, locate US forces and get close enough to conduct attacks against them.

More than the immediate battlefield implications of such methods and means of warfare must be considered. US opponents have now adopted "lawfare" as a method of warfare to counter US ad-

vantage. In lawfare, one side in a conflict attempts to paint the other as unlawful so as to undercut the adversary's domestic and international support and to bolster the resistance of its own military and public. There is certainly no problem with conducting lawfare against an opponent that is, in fact, violating the law; to do so enhances the likelihood of IHL's enforcement. But lawfare is often employed in the absence of violation. One classic technique is to ensure the media has access to gruesome scenes of civilian death, suffering and destruction. How can anyone fairly evaluate such images and reports in the absence of knowledge as to the military advantage the attackers expected to gain through the operation?

In Iraq, the enemy has even "baited" US forces in an attempt to create exploitable collateral damage and incidental injury. The use of civilian shields best exemplifies this practice. Likewise, Iraqi insurgents have launched mortar shells from civilian areas in the hope that US forces will respond with counter-battery fire. That lawfare has become an accepted counter to technological advantage was perhaps best illustrated by Hezbollah's adoption of similar tactics, such as firing rockets from civilian apartment complexes, during the 2006 Israeli incursion into Lebanon.
There have even been cases of US opponents dispensing altogether with the principle of distinction, especially during the occupation of Iraq. Unable to prevail by targeting occupation forces, they attacked individuals and groups who qualified as civilians under IHL, including police, politicians, representatives of non-governmental organisations (including, tragically, the ICRC and UN), and the public itself. By shifting the conceptual centre of gravity from the military to the civilian population, the insurgents sought to deter cooperation with the occupation regime and to create instability ripe for exploitation. The civilian violence also weakened international support for continuation of Coalition operations, including that in troop contributing nations.

Such tactics have presented US commanders with an array of distinction challenges. Significantly, the phenomenon of combat migrating to populated areas has made application of the principle arduous; after all, in urban warfare many legitimate targets lie in close proximity to civilians and civilian objects. Thus, proportionality issues loom large, as do precautions in attack requirements regarding weapons, tactics and target selection. At times, proportionality even bars US forces from striking valuable targets at all because the likely collateral damage and incidental injury would be excessive relative to the anticipated military advantage. Additionally, potential civilian casualties sometimes result in a moral pause that exceeds legal requirements. US troops have often refrained from executing operations that would otherwise be lawful out of concern for the affected civilian population.

Self-evidently, methods of warfare that directly exploit civilian protections for military ends only exacerbate matters. If enemy combatants elect, for instance, to dispense with uniforms, the US soldier on the field has little way to distinguish combatants and civilians directly participating in

hostilities from innocent civilians. As a result, US forces sometimes adopt "self-defence" style rules of engagement (ROE) by which an individual must perform a "hostile act" or demonstrate "hostile intent" before being engaged. Doing so is driven by policy, not legal, concerns about the practical problem of distinction in contemporary conflict; IHL's much more liberal scheme would allow engaging an enemy combatant or civilian directly participating in hostilities at almost anytime and anywhere, regardless of whether he posed an immediate threat.

Even when ROE impose restrictions exceeding those of IHL, civilians can remain at risk. As mentioned, the disadvantaged side in an asymmetrical fight often adopts a "shoot and scoot" approach to attacks. One common tactic adopted by Iraqi insurgents is to fire a rocket propelled grenade (RPG) down an alley at a US vehicle passing on a cross street. In the vehicle under attack, confusion momentarily reigns as young soldiers look through smoke to see civilians running in every direction. Since insurgents wear civilian clothing, the soldiers struggle to determine who launched the attack. If the crewmembers spot a young male fleeing through the streets, they will logically assume he had attacked them and engage him. But, in fact, the real attacker probably fled the scene as soon as he fired, since it would be suicidal to stay and fight the US forces. What the US soldiers actually saw was innocent civilians running for shelter in the knowledge that a gunfight was about to break out. The risk posed to civilians by adoption of tactics designed to compensate for technological weakness should be clear.

Along the same lines, US commanders are being forced to deal with the enemy practice of baiting them into causing collateral damage and incidental injury. They are cognizant of the lawfare dynamic, and, therefore, highly sensitised to the consequences attendant to civilian casualties, even when not excessive as a matter of law. For example, US forces seldom respond with counter-fire against mortars fired from urban areas and there are no reported cases of striking targets that were voluntarily or involuntarily shielded by civilians. Inequitably, then, tactics that include knowing IHL violations can prove highly effective in offsetting an adversary's technological advantage.
A further challenge for US commanders is how to use their weaponry effectively in this type of battle. Once the enemy collocates with the civilian population and fails to distinguish itself, high-tech systems become dramatically less effective. In the first place, many involve indirect fire, i.e., the weapons used do not rely on visual (or other reliable sensors) monitoring of the target area in real-time. But absent a real-time picture, collateral damage and incidental injury estimates for urban attacks become increasingly unreliable over time. Of course, known patterns of civilian behaviour (e.g., fewer civilians will be on a bridge at 2AM than during the day) can alleviate the likely incidence of civilian harm, but as every combat commander grasps, unpredictable fluidity always characterises the urban battlespace. Inability to view the target in real-time also facilitates baiting tactics, particularly those executed through "shoot and scoot" methods. The example of counter-battery fire against mortar attacks cited above exemplifies this reality.

It must also be recognised that the intended usage of some weapons fielded by US forces assumes a relatively identifiable target. The sniper rifle is highly effective, for instance, but only if the sniper can reliably pick out his victim. The same applies to night vision goggles. Imagine an individual walking with a shovel along a road at night. Absent a uniform or other distinguishing clothing, is he an insurgent burying an IED or a farmer going home? Or consider pre-planned aerial attacks, i.e., those against fixed targets, planned in advance. In classic hostilities, they are conducted against military objectives readily identifiable as such – bases, airfields, naval docking facilities, rail lines and other lines of communications serving military purposes, armament factories, and the like. Such entities, consistent with the mandate of Article 58 of Additional Protocol I, are usually located away from concentrations of civilians. But in Iraq, by contrast, "military" objectives against which pre-planned operations might be useful were often originally civilian in character and are present in urban areas, factors which render attack with weaponry designed for easily identifiable targets problematic.

Finally, commanders are struggling with cultural sensitivities bearing on the principle of distinction, both those of the enemy population and its own soldiers. For instance, and as noted, insurgents regularly use mosques for weapons storage and other purposes. The fact that US forces are hesitant about entering mosques (or conducting operations which might damage them) has not been lost on their opponents. Similarly, US forces, because of their own sensitivities (and those of the population), hesitate to search women; typically, only female soldiers do so. Again, this lesson has not been missed by the enemy. The October 2007 capture in Afghanistan of a tall Siberian red-headed blue-eyed male foreign fighter wearing a burqa is bizarrely illustrative.

Violations of the principle of distinction and other IHL norms by US opponents have clearly affected the attitude of soldiers in the field. A 2006 survey by US military mental health specialists in Iraq produced shocking results. Only 47 per cent of the soldiers and 38 per cent of the marines surveyed believed they should treat all non-combatants with dignity and respect. Seventeen per cent of both groups suggested that all non-combatants should be treated as insurgents, while 39 per cent of the marines and 36 per cent of the soldiers would accept torture to gather critical intelligence about insurgents. Twelve per cent of the marines and nine per cent of the soldiers had unnecessarily damaged or destroyed Iraqi property and only 40 per cent of the marines and 55 per cent of the soldiers would report another for "injuring or killing an innocent non-combatant," despite having received training that doing so is required. The point is that when one side violates the law, it becomes very difficult for the other side's commanders and non-commissioned officers to maintain respect for that law among the troops.

As is usually the case, the news is not all bad. The advanced technologies that contribute to a technologically disadvantaged party's unlawful methods and means of warfare can clearly serve

humanitarian ends. The precision of modern weaponry allows an attacker to avoid much of the collateral damage and incidental injury it might otherwise cause. The attacker also has a greater capability to estimate likely collateral damage in advance of an attack using modern intelligence, surveillance and reconnaissance assets and its ability to asses the results of a strike, thereby lowering the requirement for restrikes (which might harm civilians and civilian property) in order to ensure the target has been neutralised,. Additionally, advanced visual, voice and computer communications equipment allows for better command and control of forces in contact with the enemy, helping them to avoid civilian consequences. Of course, the variety and diverse capabilities of systems available to modern militaries measurably increases the options available to them in terms of verifying potential targets and selecting those weapons, tactics and targets to achieve their objectives, while minimising civilian casualties. In that regard, the distinction requirement to take precautions in attack is fostered.

## Conclusion

Somewhat paradoxically, the vast superiority in weapons systems and other military technology enjoyed by US forces has impelled their enemies toward methods and means of warfare that often violate distinction norms, thereby complicating compliance with their own distinction obligations. One might conclude that the problem lies in asymmetry and that, therefore, the remedy lies in somehow equalising the battle. It does not, nor would militarily powerful States accept such a premise. Rather, the key lies in the fact that technologically disadvantaged parties to a conflict often rationally conclude that it is more advantageous to violate the norms of IHL than it is costly. It is this cost-benefit calculation that must be altered. How to do so in a way that is practical, while preserving the existing protections for the civilian population inherent in the principle of distinction, is a subject that merits further study.

# ARMED NON-STATE ACTORS AND WEAPONS

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## Abstract

L'Appel de Genève offre aux acteurs armés non étatiques un mécanisme (l'Acte d'engagement pour une interdiction totale des mines antipersonnel et pour une coopération dans les actions contre les mines) qui leur permet d'adhérer aux mêmes obligations que celles figurant dans le traité pour l'interdiction des mines antipersonnel (Traité d'Ottawa). L'accord est signé par trois parties : l'acteur armé non étatique, l'Appel de Genève et le Gouvernement de la République du Canton de Genève (gardien). En signant l'Appel de Genève, les acteurs non étatiques s'engagent à une interdiction totale de l'utilisation, la production, l'acquisition et du transfert de mines antipersonnel. Ils promettent également de coopérer dans le déminage, l'assistance aux victimes et l'éducation des risques liés aux mines.

Au-delà de la signature de l'Acte d'engagement, l'Appel de Genève soutient sa mise en œuvre au travers de formations, de la promotion d'activités pour interdire les mines antipersonnel dans les territoires contrôlés par les acteurs non étatiques signataires, et du contrôle du respect des engagements pris (présentation d'un rapport par chaque signataire, comparable au rapport demandé à l'article 7 du Traité d'Ottawa). En cas d'allégations de non-conformité avec l'Acte d'engagement, l'Appel de Genève mène des missions de vérification sur le terrain. Depuis 2000, 35 acteurs non étatiques ont signé l'Acte d'engagement en Asie, Afrique, Europe et au Moyen-Orient, et 25 autres sont en cours de discussions. Dans certains cas, la signature de l'Acte d'engagement par des acteurs non étatiques a encouragé les États concernés à signer le Traité d'Ottawa. L'Appel de Genève adopte une approche inclusive, qui grâce au dialogue et à la persuasion permet d'obtenir un engagement délibéré et volontaire.

Le refus de certains acteurs non étatiques de signer l'Acte d'engagement est un défi majeur. Dans ce cas, l'Appel de Genève adopte une approche progressive qui s'appuie sur l'adoption de règles basées sur la Conventions sur les armes classiques et de lois nationales inspirées par les lois des États qui ont signé le Traité d'Ottawa, ainsi que l'inclusion de la question des mines dans les négociations de paix. La scission de certains groupes, l'accès difficile à certaines zones, l'insécurité, le manque de coopération de certains États concernés, et la difficulté dans le suivi et la vérification restent des défis importants. Il est par ailleurs essentiel de noter que

soutenir des activités de lutte contre les mines dans des territoires contrôlés par des acteurs armés non étatiques ne signifie pas les soutenir, leur donner reconnaissance et légitimité, et prendre part dans le conflit. Les problématiques des enfants soldats et des listes d'organisations terroristes (États-Unis, UE) ont un impact important sur le travail de l'Appel de Genève avec les acteurs armés non étatiques.

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Geneva Call has developed an innovative mechanism, the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action (hereafter the "*Deed of Commitment*"), which enables armed non-State actors (NSAs) - which by definition cannot accede to the 1997 Mine Ban Convention - to subscribe to its norms.

In order to understand this article, it is first important to define the term « armed non-State actor » (NSA). This definition may differ widely depending on whether it is proposed by an academic, a field worker, a politician or a person with a military background. On the basis of several years of experience gained in the field, Geneva Call defines NSAs as any group that has a basic structure, a chain of command and that operates outside of any State control, using weapons to achieve its political or quasi-political objectives. However, since Geneva Call works in conflict zones that display a great variety of different situations, there must be flexibility with regard to this definition and the parameters that determine which actors to engage. Yet, it is mainly within these criteria that Geneva Call decides on whether or not to engage an armed group.

Globally, this definition excludes criminal groups from the field of activities of Geneva Call, as well as paramilitary groups, if they are clearly controlled by or linked to government forces. In addition this framework and the name « armed non-State actor » instead of « armed group » or « rebel group » makes it possible to include non-recognized States or « de facto authorities ».

Geneva Call was created - and started its activities – as part of the efforts to ban anti-personnel (AP) mines soon after the signing of the Mine Ban Treaty. The importance of engaging NSAs in the struggle against anti-personnel mines arose from several observations:

1) Approximately 60 NSAs are listed as users of AP mines in about 25 different countries.
2) These NSAs do not only use AP mines, they also have the capacity of making and storing them.
3) Some NSAs operate in regions that are affected by the use of landmines. In some cases, these regions are even under their control. The communities that live in these areas are affected by the presence of mines and do not receive the adequate assistance.

4) NSAs may prove to be an important hurdle for the governments they are fighting as far as the implementation of the obligations of the Mine Ban Treaty and the universal application of this Treaty are concerned. The fact that these regions are not under State control may hinder the government as it strives to undertake campaigns to demine and to lend assistance to the victims, which are obligations that signatory countries are submitted to. The presence of NSAs that use landmines may also deter a State from committing itself to the same Convention.

Considering the nature and, above all the types of actors with whom the organisation works, Geneva Call defines anti-personnel mines as those devices which effectively explode by the presence, proximity or contact of a person, including other victim-activated explosive devices and anti-vehicle mines with the same effect whether with or without anti-handling devices. This includes commercially manufactured AP mines, victim-activated improvised explosive devices (IEDs) and anti-vehicle mines that can be triggered by the weight of a person.

Geneva Call is an impartial and independent NGO and was launched in 2000 by a few members of the International Campaign to Ban Landmines (ICBL). Its aim is to engage NSAs in a landmine ban and to get them to respect other norms of humanitarian law. Geneva Call offers these actors a mechanism that enables them to adhere to the same obligations as those stated in the Mine Ban Treaty. This mechanism is called the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel mines and for Cooperation in Mine Action (Deed of Commitment)*. The *Deed of Commitment* is, in fact, a parallel and complementary tool to the Mine Ban Treaty. It is a « tri-lateral » agreement signed by three protagonists: the armed non-State actor, Geneva Call and the Government of the Republic and Canton of Geneva that also serves as its custodian. The signature of the *Deed of Commitment* happens during a ceremony that takes place in the historic Alabama Hall in Geneva, which is a setting symbolic of humanitarian Geneva, since this is where the first Geneva Convention was signed.

By signing Geneva Call's Deed of Commitment, NSAs commit to a total ban on the use, production, acquisition and transfer of AP mines. They also pledge to start and/or cooperate in efforts to ban landmines (demining, victim assistance, mine risk education), to cooperate with the monitoring of their commitment and to facilitate it, including field verification missions, to ensure the implementation of the *Deed of Commitment*, to provide for internal sanctions if the Deed of Commitment is not respected by their combatants in the field and to further take into account the respect of International Humanitarian Law.

Geneva Call has therefore chosen to develop an inclusive approach with NSAs, thus including them in a negotiation that aims to obtain their deliberate and voluntary commitment. It is an opposite approach - but not necessarily contradictory - to the process known as «

naming and shaming ». Nearly eight years of experience demonstrate today that persuading rather than denouncing, discussing rather than condemning, is a successful strategy. This has been observed in other fields, and it seems that commitment, dialogue and an inclusive approach tend to strengthen the moderates within an armed non-State actor, whereas exclusion and isolation strengthen the hardliners. Engagement with the international community « *stimulated us to observe the standards of that community* » while, when the moderate political leadership is ignored it "*contributes to a sense of futility and…therefore to an enlargement of the ranks of those who see terrorism as the only way*". (Akhmadov, Chechnya) Finally, the *Deed of Commitment* does not only contain banning obligations; it also includes a pledge of commitment to other tangible activities to fight against the use of landmines. There is therefore an implementing process that enables the signatories to take ownership of the commitment they have undertaken.

Although the signing of the *Deed of Commitment* is clearly the first objective of any negotiation process with a NSA, Geneva Call often has to deal with NSAs that are not yet ready to renounce the use of AP mines. In this case, Geneva Call doesn't break off the dialogue, but chooses to use a progressive approach while continuing to try to develop arguments in favour of a total ban that are more likely to convince the interlocutor. It sometimes takes several years for the NSA to come to the decision to ban AP mines after having carefully considered the consequences of such a decision on its military strategy.

If this is the case, the progressive approach developed by Geneva Call with the NSA rests on policies that match some of the principles of the Convention on Conventional Weapons (CCW): What are the measures that need to be taken in order to reduce the impact of AP mines on civilian population as much as possible? In this case the aim for Geneva Call is not to establish a « manual for good use » of landmines, but rather to take into account the humanitarian urgency by making the military leaders realise that their choice to continue to use landmines must be limited to the shortest period possible and must at least integrate strategies that aim to avoid civilian casualties. These measures include mainly marking mined areas, informing the population about these dangerous areas, removing landmines when military camps are being moved, keeping maps and information concerning the location of the mines that have been set, etc.

For non-recognised States and *de facto* authorities Geneva Call tries to entice them to adopt national laws that are inspired by the laws of the countries that signed the Mine Ban Convention. Finally Geneva Call regularly calls for the landmine issue to be included in cease-fire negotiations and peace treaties.

Although the signing of the *Deed of Commitment* by a NSA is always a victory over the arbitrary and the inhumane, Geneva Call's work does not end with it, since its aims are not to collect signatures but to see a real change on the ground in order to reduce the suffering of civilian

populations. The steps that need to be implemented after the signature include the preparation and concretisation of various activities in collaboration with the NSA.

1) **Support of the implementation of the *Deed of Commitment***. Geneva Call can organise workshops in the field with the commanders and/or the fighters in order to explain the different obligations under the *Deed of Commitment* and to train them for its implementation. Geneva Call has devised a brief « training manual » that is essentially made of illustrations and that sends out a very simple message to explain the landmine ban and its inherent obligations. The text that accompanies the illustrations is translated into the local dialects.

2) **Mine action**. Geneva Call is responsible for helping to promote and to establish activities in order to strive for a landmine ban in the territories controlled by a signatory NSA. These regions are often entirely forgotten by the international community and the population that live there receive little or no assistance. For Geneva Call the aim is to persuade signatory groups to undertake as many activities as possible themselves. These may include demining, stockpile destruction, assistance for the victims, programmes of mine risk education, etc. In this area, Geneva Call has often observed a certain ignorance of the practices that need to be established in order to ensure minimal safety standards. It sometimes becomes obvious that NSAs do not necessarily have the sufficient training and equipment in order to carry out these types of activities. In these cases, Geneva Call tries to find organisations or the means to train them to effectively carry out these activities. Finally, if the NSA does not have the capacity to fight against landmines, Geneva Call tries to find specialised organisations that can undertake programmes in those regions.

3) **Compliance monitoring**. The establishment and compliance to the *Deed of Commitment* must be carefully monitored. This work is essential for the activities of Geneva Call. First of all, because it is of the utmost importance that the NSA feels that it is not only accompanied in its efforts but also monitored and controlled. Secondly, the compliance to the *Deed of Commitment* is essential to the success and credibility of Geneva Call and for the benefits expected in the field to be effective. To ensure this monitoring, each signatory NSA must appoint a reference person who will act as a liaison for contacts and exchanges with Geneva Call. It is also required that each signatory provides a « compliance report », in which it must state the progress that has been made, the difficulties encountered, etc. This « compliance report » is comparable to the report asked to States in article 7 of the Mine Ban Treaty. Finally, Geneva Call collaborates closely with third parties, such as NGOs that are present in the community or UN agencies in the field.

4) **Verification missions**. In case of allegations of non-compliance to the *Deed of Commitment*, specifically that of landmine use, Geneva Call is at liberty to organise verification missions in the field in order to check, insofar as it is possible, the truth behind the allegations. Neutral and independent experts take part in these missions.

The list of achievements between 2000, the year of the launch of Geneva Call, and the end of 2007 is rather convincing. Thirty-five NSAs have signed the *Deed of Commitment* in Asia, the Middle East, Europe and Africa, and globally respect it well. Discussions are currently under way with approximately 25 other NSAs. In many regions under the control of NSAs, activities to prevent the use of landmines have been undertaken, with the destruction of several thousand stored landmines. Demining has been started and programs of mine risk education and victim assistance are being conducted. In some instances, the signing of the *Deed of Commitment* by certain NSAs has encouraged the concerned States to sign the Mine Ban Convention, if they hadn't already done so, because of the activities of NSAs in regions under their jurisdiction. Finally, the scepticism surrounding the first efforts of Geneva Call has gradually turned into a strong support by many States, since the complementarity of Geneva Call's work is recognised as being essential to a true and universal application of the Mine Ban Treaty.

However, this list of encouraging successes must not hide the fact that a great number of challenges and difficulties still lie ahead. Many NSAs still refuse to ban mines or to limit their use of them; some groups are riven by splits and internal fractionalisation, which forces Geneva Call to track down the various leaders and reopen a dialogue with each one of them. Access to regions controlled by NSAs is often difficult and sometimes dangerous. It may also be obstructed by the concerned State that refuses to let an NGO in to meet and negotiate with its enemy. Finally the monitoring of compliance to obligations remains a major challenge.

Geneva Call also feels that the experience gained calls for analysis and assessment activities. It is with this last aspect in mind that Geneva Call has just published a report concerning its seven years of activity (*Geneva Call Progress Report 2000-2007*). This analysis has brought to light several lessons learned that may help to improve the activities of Geneva Call. In particular, it has been made clear that the engagement work of NSAs must include:

- Taking the specificities of regional and local context into account.
- Being inventive in order to respond and adapt to specific and new situations.
- Maintaining a permanent dialogue, even when in disagreement, in order to establish a relationship based on trust with the NSAs.
- Ensuring the transparency of Geneva Call's activities with regard to the international community and the concerned State.
- Insisting on the new tool offered by the *Deed of Commitment* that has the advantage of proposing a "formal" aspect as well as a monitoring mechanism.
- Ensuring that this mechanism is the object of ownership and commitment at various levels within the group.
- Developing and constantly strengthening the process of implementation and monitoring.

Although the process developed by Geneva Call is the object of much interest as a mechanism capable of engaging NSAs, it also has to be mentioned that some States fear that it may offer recognition and legitimacy to the concerned NSA. It is important to mention the fact that supporting mine ban activities in a region controlled by NSAs is in no way a support to this NSA, nor is it a form of recognition or legitimacy that is offered to it, and it is certainly not a way of taking sides in a conflict. Article 3, which is common to the four Geneva Conventions, is extremely clear on this subject:

> *Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*
> *[…]*
>
> *(2) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. […] The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.*

Throughout the history of Geneva Call's work, never has a group used its signature to the *Deed of Commitment* as a tool to ask for greater recognition by the international community, or by the government against which it is fighting. On the other hand, support of activities that aim to ban the use of landmines in these regions will reduce the suffering of the local population and help build a world without landmines. Finally, it has been frequently observed that a dialogue on the issue of landmines and humanitarian agreements concerning this subject can contribute to strengthen the trust between the various parties to a conflict and thus serve as a confidence building measure.

The fact that the work is done by an NGO is also of importance. NGOs can and do play a specific role in engaging NSAs. In the case of Geneva Call, which is independent and politically neutral, this NGO is in a much better position than States to avoid accusations of "taking sides" or "meddling in the internal affairs of…"; they are also in a better position to approach and deal with NSAs.
However while engaging NSAs cannot be done by States, it also cannot be achieved without States. NGOs working in this sector must be fully able to count on the facilitation of the government concerned, or at least be assured that the government will not prevent their work.
The role of third parties (other States, UN agencies or the ICRC) is also crucial. Their input is necessary not only for the provision of financial support, but also with respect to the political

influence that these parties can bring to bear on the countries concerned.

## Non-state actors and other topics

The experience that Geneva Call has gained is born from and rests on the issue of AP mines. But, considering the amount of work that has been done and the contacts that have been established with over 60 groups throughout the world, new fields are opening up. The question now is whether Geneva Call can broaden its mandate to other domains. What are the difficulties, similarities and challenges inherent to each one of these fields?

### Small arms and light weapons

Unlike AP mines, small arms and light weapons are not governed by any international treaty. There is therefore no reference point on which negotiations with a NSA can be based. Furthermore, the fact that Geneva Call is not a disarmament organisation must be considered. A project developed in this field would therefore be aimed more at helping NSAs realise the impact that misuse of these weapons can have on civilians, as well as the importance of a proper management of the stocks as much for civilian security reasons as for the future in the case of a peace agreement and disarming procedures (the collection and destruction of weapons is made easier if there is a good knowledge of the stocks and their whereabouts, etc). Although many voices call for Geneva Call to work in the field of small arms and light weapons, which cause thousands of casualties, Geneva Call must bear in mind that training NSAs on the misuse of small arms for instance, albeit for humanitarian reasons, may be considered as military support and thus cause numerous political problems for the organisation.

### Cluster munitions

Currently, very few NSAs have and use cluster munitions, nor is there a treaty banning the use of this weapon. As with small arms and light weapons, it is difficult under these conditions, to ask NSAs to renounce using this weapon, as governments are still at liberty to use it. However, Geneva Call pays close attention to the establishment of a treaty and is ready to initiate a discussion with some NSAs concerning this question. The same applies to the issue of anti-vehicle mines.

**Child soldiers**

Geneva Call has just launched a new programme in this field. As with landmines, NSAs are the most numerous users of child soldiers and it is therefore with them one has to work if one wishes to eradicate this problem. Although the experience of Geneva Call will prove to be very useful in this new programme and the contacts established with NSAs throughout the world will enable it to start this project quickly, there are still many challenges ahead.

The similarity between the use of landmines and child soldiers does not go beyond the fact that both are essentially found with NSAs. The ban of the use of child soldiers is the object of treaties, protocols and other international decrees with various contents. It is, therefore, not possible to use a single and universal text such as the Mine Ban Treaty as a reference. Another fact that needs to be taken into account is that the use of the landmines is exclusively a military choice. As far as child soldiers are concerned, other parameters have to be considered: the choice of the child or of the teenager to join a group willingly, the presence of his parents in the group, exterior living conditions, etc. Finally, there is still a life after the ban. When an NSA has signed the Deed of Commitment against mines, these mines can be destroyed. Obviously, as far as child soldiers are concerned, it is when the NSA commits to banning the use of child soldiers and releasing them from service that the most important challenge begins: the reinsertion and reintegration into civilian life.

**Women combatants**

Throughout its contacts with NSAs, Geneva Call rapidly noticed that an important number of women made up the ranks of fighters in many of these groups. Geneva Call has developed a specific programme with and for these women, in order to increase their awareness of International Humanitarian Law and human rights and to try to turn them into advocates of these rights within the groups with which they fight. During meetings with women combatants there were many testimonies that confirmed the fact that as long as the armed conflict was active, women were submitted to very few inequalities compared to men. But they all agreed - and this is confirmed by current observations - that as soon as negotiations started for a ceasefire or peace talks, women were totally excluded from these processes by the men. Convinced of the importance of the role women have to play in peace negotiations and taking into account UN resolution 1325, which reaffirms “the important role of women in the prevention and resolution of conflicts and in peace-building” and stressing “the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision- making with regard to conflict prevention and resolution”, Geneva Call is going to continue its programme with women combatants and women associated with NSAs.

Geneva Call is also seeking a partner for a training programme to help prepare them for peace negotiations and good governance, in order to give them the capacity to play a role at the negotiation table and to impose themselves vis-à-vis the men who want to exclude them.

It is difficult to end this contribution about the engagement of NSAs without mentioning the issue of the "war on terror". Many NSAs have been included on terrorist lists (the US government, European Union, etc.). Although it is easy to understand the importance of the war on terror, it is nevertheless important to consider the fact that these lists tend to criminalize and to exclude these groups. Exclusion restricts moderates within a group and proscription criminalizes intermediaries who attempt to work with them. There is therefore an urgent need to review proscription and develop legislation and policies that maintain sanctions but allow the possibility for humanitarian dialogue. Geneva Call's experience with landmines demonstrates that there is an alternative way to denunciation, criminalization and military action when dealing with NSAs, even those labelled as "terrorists". This method is an inclusive approach, based on dialogue, persuasion and appropriation, and it can be effective in securing their compliance to humanitarian norms.

## QUESTION TIME

*Prof. Sandoz opens the session reflecting on the fact that humanitarian law is respected if it is more or less advantageous for each party, or if it is not too disadvantageous. Asymmetrical warfare is disadvantageous for the opposing forces which leads them to use terrorism or human shields that are a negation of humanitarian law. His question is: what next? Because it is a very pessimistic view on the future of humanitarian law.*

Prof. Schmitt considers the problem is the balance between military objectives and humanitarian considerations as it is mentioned in the 1868 Petersburg declaration. When we engage in warfare and when that balance is thrown off, then States are going to begin to not want to respect a body of law. You have somehow post-costs for violations. Obviously, enforcement of IHL is an answer but that is a time-warned answer and it is over used. He talked with some commanders in Iraq and said he was very interested in the use of human shields and the use of civilians operating from civilian locations. They thought it is interesting to see which groups employ these tactics. Initially, everyone employs these tactics. But now, as it seems likely that the Americans would one day leave Iraq, like the British are doing so, the groups are jacking for power so the Shiite and Sunni militia are fighting each other, seeking to avoid civilian casualties. Whereas initially those groups could care less about civilian casualties, now as power starts to be seen on their horizon, they are much more careful not to be seen indiscriminate in conducting their attacks against US forces. That is an example of how a political incentive can change behaviour towards better compliance with IHL. The adjustment of IHL downward is not the answer. The answer has to be in some other mechanism. He does not believe IHL is insufficient, but we are going through a period of adjustment where we need to figure out how to impose costs on the law violators.

*Prof. Sandoz asks if the governments really accept the list of groups Geneva Call is working with?*

Mrs Decrey Warner explains the issue of lists of terrorists is not clear and that it has an influence on their work. A number EU deputies asked to work with them and to put some groups on the list of terrorists. They didn't however give criteria for groups to be on the list or to be removed from it. The Mujaheddin won an appeal against the EU who considered them as terrorists. They could not defend themselves during the procedure and explain their position. What is the impact of these lists? Although the Columbian guerrilla is listed as a terrorist organisation, everybody is negotiating with the Columbian Revolutionary Armed Forces (FARC) to free Ingrid Bétancourt. On the other hand, the PKK is listed as a terrorist organisation

and nobody is allowed to talk to them. In Switzerland, leaders of these organisations can be invited, if they have a visa to come and if the Swiss authorities consider it is for humanitarian ends. Governments concerned also see an advantage: they cannot clear all areas of mines because they are under control of non-states armed groups. A majority of states agree with our work, since it is transparent. Nevertheless, some states do not want Geneva Call to have the ECOSOC status, because they consider they work too closely with organisations that have been terrorists.

*Prof. Hampson points out that a way has to be found to allow people to engage in lawful combat, without encouraging people to fight. She also raises the question whether this doesn't suggest, that there is a need to slow down technological progress, even if that were to undermine the development of the political military complex in the USA,? One needs to bear in mind the impact of dissemination on forces, which might be in your coalition today, but could be on the opposite side tomorrow. If at the end of the day this makes your position more difficult, then it is not progress.*

Prof. Schmitt answers that it is unlikely that anyone is going to convince the USA to slow down technical advances in weaponry; or to tell weapon developers they should stop, or convince Congress to punish those who don't. . However, we can be much more robust in our assessment of the system. We need to be very careful what the implications are with regard to the rules regarding the indiscriminate attack and the principle of proportionality in those circumstances. What are the parameters of the weapons: are they directional, how far outside the road do they go, do I run a risk, can I only use them outside an urban area or in an urban area? We need to be very thorough in assessing the consequences of the use of a weapon. The second step is to develop rules of engagement that ensure that we do not use it improperly. The other reason why he would hesitate to slow down technological process is that many of these systems have advanced humanitarian ends in an enormous way: precision munitions are the clearest example.

*Prof. Hampson asks if it would be possible to reproduce what Geneva Call has gained in the specific context of antipersonnel mines for IHL in general; referring to the Article 96 of Additional Protocol I that enables a group to commit itself to respect IHL. She states that the PKK sought to make an article 96 declaration, but that Switzerland never circulated it. With this, the question is raised whether the approach Geneva Call uses in relation to landmines, could also ensure more respect of IHL?*

Mrs Decrey Warner answers that when they created Geneva Call, the Statute mentioned antipersonnel landmines, torture, kidnapping and child soldiers, because they thought non-state

armed groups would use these the most. When these actors sign the Act of engagement, they consider it is the first step towards a wider respect of IHL. We cannot accept they sign the Geneva Call against landmines one day and put a bomb in a public market the day after. The first problem Mrs Decrey Warner sees would be the reaction of the ICRC if Geneva Call would say: we will engage non-state armed groups on IHL. The second issue would be scope of the monitoring and follow-up, which is already very heavy to assume even when the focus is restricted to mines.
About the article 96, Mrs Decrey Warner specifies that Geneva Call always underlines it. Nevertheless states often contest it, saying there is no armed conflict on its territory but just a fight against terrorists; so article 96 does not apply and Geneva Call has no right to negotiate with these actors. Geneva Call is currently talking with the Swiss government because they met many non-state armed groups, who made declarations and sent them to the Swiss government. Many of them have interesting codes of conduct, but Switzerland does not react because answering officially would give these actors a Statute and imply diplomatic problems. However, as it exists in the Geneva Conventions, we can not just not react. We cannot admit to focus on one norm of IHL and not on the others.

*Mrs Decrey Warner is asked what the international community did to reduce the number of child soldiers.*

Mrs Decrey Warner replies the international community initially looked into the issue of child soldiers within regular armies. The most difficult task was to convince States to renounce to use child soldiers. Then, the international community realised that child soldiers were mostly involved in non-state armed groups. Until now, the international community essentially used the principle of "naming and shaming" and included this violation in the Rome Statute of the ICC. UNICEF wanted to go further, but as an intergovernmental organization, it has to face some limits and cannot work officially with non-state armed groups. There were some successes; some children were released, but the most important issue stays rehabilitation. The failure rate is high and many children come back in the rank of armed groups because rehabilitation programmes do not have an efficient follow-up. Therefore, we have to face the causes: there is a social environment which drives children to join armed fight. Geneva Call will start to work on the issue and suggests working jointly with non-state armed groups and asking them how they see the rehabilitation of children they will release.

*Prof. Schmitt is asked a question about the rules of engagement; If civilians or children are in the same building than terrorists, if you kill terrorists, there are collateral damages. Do you still go and attack them? Is it against IHL?*

Prof. Schmitt answers that you may engage in a military operation knowing you will kill women and children, but that it can not be your objective. As long as you comply with the principle of proportionality and the requirements on precautions in attack, you can proceed. That is the reality. Now let us not confuse the law with rules of engagement (ROE). ROE are the instructions that a national commander authority gives to these forces in the field. And ROE are a combination of law as well as policy and operational concerns. ROE represent the confluence of those three factors. If we are going to conduct an operation and we are going to cause collateral damage or incidental injury, we assess what we are likely to do and what is the impact on the civilian population. Based upon the extent of that impact, we may take away the authority to conduct the operation from lower levels. If we are going to kill 12 people, then the decision level to approve the operation moves up, and higher and higher. This is an example, not of IHL limitation, but of a policy limitation and that will change given the nature of the operation. Therefore professor Schmidt stresses the need to distinguish between IHL, which is, according to him, rather permissive, and ROE, which often limit military operations well beyond IHL.

Answering Dr. Coupland commentaries, Prof. Schmitt refers to asymmetric warfare and points out that in particular situations, technological superiority might generate actions from the other side that might violate IHL. Nevertheless, the USA is continuing to develop the technology to increase their technological advantage. In fact, there are two asymmetries: the technological asymmetry on one side and the massive psychological potential on the other side. Despite the technological superiority, Dr. Coupland does not think you have won because of the massive psychological potential on the other side. You cannot win only with the military force. You need the psychological force. Finally, he raises the question whether the amount of research and resources going into decreasing the psychological potential on the side of the opponent, should not match the effort invested in increasing the physical potential on the own side.

Prof. Schmitt does not want to exclude the possibility that technology may offer answers. Most advanced weaponry has had positive humanitarian impact. He appreciates the psychological point raised by Dr. Coupland. Although moral remains fairly high in the American military, the situation is leading to increased frustration. When he talks to Commanders, all of them have been to Iraq, Afghanistan, or both, multiple times. That erodes the psychological situation and if perceived it will strengthen the enemy. That is just the nature of the game. As to the question whether you can win a war militarily, using high tech weaponry? His answer is clearly positive, stating that the USA can take on most countries and defeat them in a blink of an eye. The problem in winning a conflict lies in what comes afterwards. With regard to research in psychological asymmetry, many clinical research has been done, and he thinks it is a great idea. He talked about the “bully” syndrome, saying it is hard for a country like the USA, or Israel not to be perceived as bully, and for the other side not to have that psychological asymmetrical advantage.

# ARMS TRANSFER AND IHL: AN OVERVIEW

**Jacqueline Macalesher**
Saferworld

## Abstract

Lors des transferts internationaux d'armes, plusieurs juridictions nationales peuvent être compétentes, au regard de la nationalité de l'accusé ou des États où le transfert d'armes a été conclu, du pays où les armes ont été achetées, du pays où l'entreprise de couverture a été créée, du pays qui a importé les armes, du pays destinataire final des armes... Les autorités nationales déterminant elles-mêmes leur seuil de contrôle en matière de transferts d'armes, il existe de grandes disparités entre les États. Ajoutant à cela l'impact considérable des flux d'armes sur les vies humaines, il apparaît urgent d'adopter des normes internationales pour les contrôler.

À ce titre, le Comité permanent pour le Traité sur le commerce des armes (groupe d'ONG) a développé un certain nombre de principes universels, relatifs aux obligations internationales que les États doivent appliquer lorsqu'ils autorisent un transfert d'armes. Dans la pratique, ces obligations sont basées sur les limitations du droit international (normes limitant l'utilisation et le transfert d'armes, ou interdisant certains types d'armes), les limitations relatives à l'utilisation des armes (lorsqu'un État a connaissance que les armes seront utilisées en violation du droit international), et d'autres limitations liées à des normes émergentes (les transferts d'armes facilitant des attaques terroristes, affectant le développement durable ou incluant des pratiques de corruption).

Parallèlement, de nombreux progrès ont été réalisés ces dernières années, aux niveaux régional et multilatéral, afin de développer des critères communs pour la régulation des transferts d'armes. L'Amérique, l'Europe et l'Afrique sub-saharienne ont en particulier adopté des accords pour le contrôle des transferts d'armes, qui ont été mis en œuvre dans les législations nationales. Cependant, la majorité de ces accords sont politiques et un certain nombre d'États n'en sont pas parties (Chine, Inde ou Israël). Un mécanisme est actuellement en cours au sein des Nations Unies, qui ont adopté en octobre 2006 le principe d'un traité international juridiquement contraignant sur le commerce des armes. Il reste à concrétiser cette résolution et à négocier le futur traité.

First of all, I would like to welcome the opportunity to participate at this 8th Colloquium, and to thank the College of Europe and the ICRC, for organising and facilitating what has been so far, a really interesting discussion.

The organisers asked me if I could present a general overview of the concept of arms transfers based on States' legal obligations. This often tends to encompass fairly dry and technical principles, so I thought that it might be interesting to present a short case study which illustrates the global nature of arms transfers and highlights why international standards for transfer controls are an urgent necessity. I'll then go over some of the more legal and technical aspects of arms transfer controls, including the recent progress on securing an international Arms Trade Treaty.

In August 2000 a known arms trafficker by the name of Leonard Minin was arrested by Italian and Belgium police in a hotel room near Milan. When they arrested Leonard Minin, they found his hotel room awash with large amounts of cocaine, prostitutes, money, non-declared diamonds and about 1,500 documents which linked him to various oil, timber and arms deals. He was charged in 2001 with the illegal possession of un-declared diamonds and two separate counts of organising arms shipments to UN-embargoed Liberia. The alleged arms deals, and bearing in mind we're talking about only two shipments here, included: 181 tons of military equipment, which included over 10,000 AK-47 assault rifles, sniper guns, grenade launchers and related missiles, night vision equipment, and 9 million rounds of ammunition.

As we all know, the conflict in Liberia resulted in the deaths of hundreds of thousands of people. The conflict was characterized by serious violations of human rights against civilians which included summary executions, widespread use of child combatants, rape and sexual violence, internal and external displacement, looting and banditry. Hundreds of thousands of civilians were displaced by the fighting, and the country was left in economic ruins. So we're talking about pretty serious stuff here!

If we unpack just one of these arms shipments that Leonard Minin allegedly organised we can illustrate the global nature of the illicit arms trade. In this case, by using a front company, which was based in Gibraltar, Minin was able to purchase arms from a Ukrainian arms marketing company by using an end-user certificate from Burkina Faso. The arms were then transported from Ukraine to Burkina Faso by an aircraft operated by a UK company. Once the arms had landed in Burkina Faso, they were subsequently transhipped to Liberia in various flights made by Minin's own business jets. Payments for the deal were made through a Hungarian bank account, which was owned by a British Virgin Island registered company, which was also allegedly linked to Minin.

This case covers 9 different jurisdictions that may have some control over this arms deal. This included: Italy, where Minin arranged and brokered the arms deal; Ukraine where the arms were brought and exported from; Gibraltar where Minin had set up his front company to operate from; Burkina Faso who had imported the arms shipment and issued the end-user certificate; Liberia who was the final end-user and under a UN embargo; the UK, Hungary and the British Virgin Islands who all provided related ancillary services which were peripheral to the deal; and finally, Minin himself was an Israeli national, who may have held some jurisdiction over Minin's actions.

However, as Minin was arrested in Italy, this fell under Italian legislation, as opposed to some of the other countries involved. Now you may think that Italy, being a member of the European Union, which has a very strong regional transfer controls agreement in place (as my fellow panellist Margit Bruck-Friedrich will discuss in her presentation), that a conviction would be secured, especially as we are talking about a water-tight case here. However, in 2002, the Italian court system declared that Minin could not be charged with any form of international arms trafficking. While Minin had been arranging these deals from Italy, because the arms in question had not touched Italian soil, the court found that it lacked jurisdiction. In effect, there was a loophole in Italian legislation in that it did not extend full extra-territorial controls to those engaged in arms brokering activities from Italy. This was later affirmed in an Appeals case in 2004. And aside from the possession of those non-declared diamonds, whereby he was fined 40,000 Euros, Minin was eventually able to walk free and leave Italy without any conviction of the illicit trafficking of small arms to embargoed Liberia.

As this case illustrates, without tough international standards and guidelines in place, it is up to the national authorities to determine how comprehensive their national transfer control regulations should be. So had Minin brokering these deals out of a country who did have extra-territorial controls in place, for example, the UK, the US or Finland, Minin would have faced a fairly long stretch in jail as well as hefty fines. In Italy however, he gets away scott free! So, as you can see, without tough international standards for transfer controls, arms embargoes and other international sanctions will continue to be broken by those who know which countries to operate out of.

However, international transfer controls are not just about preventing arms from being transferred to an embargoed state. There are a number of other legal obligations which Member States should respect when authorising a transfer.

The irresponsible flow of arms clearly has an enormous impact on human life. While arms may not be the cause of war, uncontrolled arms flows frequently fuel, exacerbate and prolong them.

Easy access to arms severely complicates post-conflict environments. It can contribute to regional instability, undermine sustainable development, destroy livelihoods, and internally displaced people. Violent conflict tends to lead to gross violations of human rights and international humanitarian law.

So, for these reasons, restraint and responsibility in arms transfers is absolutely fundamental. States must be responsible for the authorisation of all arms transfers that are relevant to their jurisdiction. This includes not only the export of military equipment, but also the import, transit and transhipment and brokering of arms, as well as intangible transfers such as technology and know-how and transferring the means of production.

A large group of governments and non-governmental organisations have recognised that if we are to make any real progress in controlling international arms transfers, and in tackling the illicit trade and misuse of weapons, this can only be achieved on the basis of internationally agreed and legally-binding criteria.

With this in mind, and drawing upon the fact that there is already a whole raft of international legal obligations that are relevant to international arms transfers, a group of NGOs called the Arms Trade Treaty Steering Committee have developed a set of "Global Principles" which brings together States' existing obligations in respect to international arms transfers. These principles broadly set out those international obligations, which Member States must apply when authorising an arms transfer. In practice these obligations are based on:

- express limitations under international law;
- limitations which reflect the likely use of the equipment; and
- other limitations based on emerging norms.

Firstly, there are key international obligations in place which provide an express limitation on the use and transfer of weapons, either because of their intended end-use or because of the particular *type* of weapon. The clearest example of an express limitation is the imposition by the UN Security Council of arms embargoes on states and armed groups. Such sanctions impose specific obligations on all Member States not to transfer arms in those cases.

Another express limitation is the prohibition or the restriction of certain types of weapons, such as anti-personnel landmines and biological weapons, as well as other weapons that are of a nature to cause superfluous injury or unnecessary suffering, and the prohibition on weapons that are incapable of distinguishing between combatants and civilians. If an international instrument or treaty prohibits or restricts a use of a certain type of weapon, this implies a prohibition on the transfer of such a weapon.

The second group of limitations which must be applied to transfer controls flow from the likely use of arms in particular circumstances. The responsibility of a state in such cases flows from its obligation, under international law, to not knowingly aid or assist in the commission of an unlawful act[1]. Where a state has knowledge that weapons would be or would be likely to be used in breach of some fundamental principles of international law, the responsibility of the authorising state is to prohibit the proposed transfer. For example, where a state has knowledge that a transfer of weapons would be, or would be likely to be used, in the commission of genocide or crimes against humanity, or in the commission of serious violations of humanitarian law or human rights law, the transferring state in question would itself commit an unlawful act, and be in violation of its international obligations if it authorised the transfer in question.

Finally, the third set of factors, which Member States should also take into account, are based on political commitments and emerging norms, rather than hard law. These factors include:

- the recipient country's record of compliance with their commitments in the field of non-proliferation and disarmament;
- whether there is a risk that the proposed arms transfers is likely to be used for or to facilitate terrorist attacks or in the commission of violent or organised crime;
- if the proposed arms transfer would adversely affect sustainable development; or
- if the transfer involves corrupt practices.

Over the past decade, a significant amount has been achieved at the regional and the multilateral level to develop these common standards and criteria for the regulation of arms transfers on the basis of international law. In particular, the Americas, Europe and Sub-Saharan Africa have adopted a number of comprehensive arms transfer control agreements which have subsequently been implemented into national transfer control regimes. The conclusion is that there is a plethora of regional and multilateral agreements in place to control the transfer of arms, which reflects the growing realisation that the problem of arms proliferation can only be addressed through collaboration among States. However, despite this progress, significant gaps and weaknesses remain.

Firstly, there is a lack of commonality in approach. Many agreements fail to fully reflect the obligations that States have under international law.

Secondly, the majority of these agreements are politically, rather than legally, binding and often lack enforcement and information exchange mechanisms.

And thirdly, despite this progress at the regional and multilateral level, there are a significant number

1 Art 16, UN Articles on Responsibility of States for Internationally Wrongful Acts.

of States who are not even party to any transfer control agreement. For example, China, India and Israel are some of the biggest arms exporters in the world, and they are not a party to any of these agreements. Furthermore, there are whole regions in the world that are lacking in controls; these include the Middle East and Asia. Therefore a global framework for arms transfer control is a pressing priority.

So with this in mind, over the last few years, NGOs and governments have been calling for an international legally-binding Arms Trade Treaty. Movement on an Arms Trade Treaty, or ATT, has recently gathered serious momentum. Three years ago, when we raised the ATT with governments, it seemed the best we could hope for was to get a polite hearing and to be quickly forgotten. But then in October 2006, 153 Member States of the UN overwhelming voted in favour of Resolution which set out a formal UN process to take this ATT initiative forward.

The UN Resolution set out two very distinct procedures to formulating clear proposals for an Arms Trade Treaty. Firstly, at the beginning of this year, the Secretary-General was tasked to request the views of Member States on the feasibility, scope and draft parameters for an ATT. Submissions from Member States was unprecedented, and one hundred Member States have now submitted their views, which we think is five times more than has ever been the case when similar requests have been made in the past.[2] The vast majority of these submissions have been very supportive, and the Secretary General has presented his report, basically a compilation of these submissions, to the General Assembly during its 2007 First Committee session (which is underway as we speak).

The resolution also instructed the Secretary General to establish a group of governmental experts (or GGE) to explore the same set of issues (feasibility, scope and draft parameters) for an ATT. The GGE commences its work in February 2008 and will report to the UN General Assembly in October 2008. Like the submissions process, interest in the GGE has been unprecedented. Over 60 states have been clamouring for one of 28 spots available. This overwhelming interest in and support for an ATT is indicative of the importance that this treaty brings to non-proliferation and the protection of international peace and security and the principles underpinning human rights.

This is a crucial time for global efforts to prevent irresponsible transfers of arms. Only a global Treaty will put an end to the current piecemeal approach of national and regional arms control and provide all states with the strong common international standards to ensure a responsible arms trade. The implications for implementing a global treaty to control arms transfers does not just affect those in the business of transferring arms internationally, it affects all those across the globe who have been affected by the wide proliferation of arms and armed violence, and the devastating effect it has on human life!

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2 National submissions are available on the UN Office for Disarmament Affairs website: http://disarmament.un.org/cab/ATT/Views_Member_States.html

# ARMS TRANSFER CRITERIA BASED ON INTERNATIONAL HUMANITARIAN LAW AND THEIR PRACTICAL APPLICATION

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## Abstract

Lorsqu'un État transfère des armes ou des équipements militaires, il fournit à l'État bénéficiaire les moyens de s'engager dans un conflit armé. Le droit international humanitaire (DIH), qui régit l'utilisation d'armes dans un conflit armé et protège les victimes de guerre, est donc particulièrement pertinent au regard du processus de décision des transferts d'armes.

Les États ont des obligations au regard du DIH, qui sont directement applicables aux transferts d'armes. En effet, certains traités mentionnent explicitement l'interdiction ou la limitation des transferts d'armes classiques (Protocole II et IV à la Convention de 1980 sur les armes classiques, Traité d'Ottawa) et imposent ainsi des restrictions aux États parties. Par ailleurs, le DIH interdit l'utilisation d'armes qui, par leur nature, causent des maux superflus ou sont indiscriminées. Ce sont des normes universellement acceptées et contraignantes pour tous les États.

Les États qui produisent et exportent des armes doivent s'assurer que les armes transférées ne sont pas utilisées en violation du DIH. À ce titre, un nombre croissant d'instruments régionaux portant sur le transfert d'armes contient des critères basés sur le DIH. Certains États ont également incorporé des critères de DIH explicites dans leur législation nationale (Allemagne, Autriche, Belgique, Finlande, Grande-Bretagne et Suisse).

Si certains critères (respecter un embargo du Conseil de Sécurité des Nations Unies ou ne pas transférer une arme prohibée) sont facilement applicables, il est parfois difficile de déterminer l'utilisation possible des armes. Afin d'aider les autorités nationales autorisant les transferts d'armes, le CICR a publié un guide pratique pour l'application des critères basés sur le droit humanitaire. Le guide reprend les principales questions qui devraient être considérées lorsque l'on applique de tels critères et propose des indicateurs concrets qui facilitent la détermination du risque pour ces armes d'être utilisées en violation du DIH. Les indicateurs se divisent en trois catégories : le respect actuel et passé du DIH par le bénéficiaire du transfert ; l'engagement du bénéficiaire dans le domaine du droit humanitaire ; et les capacités du bénéficiaire à s'assurer que les armes transférées sont utilisés dans le respect du DIH.

**International humanitarian law obligations relevant to conventional arms transfers**

When a State transfers military weapons or equipment, it is providing the recipient with the means to engage in armed conflict. International humanitarian law, which governs the use of weapons in armed conflict and protects victims of war, is therefore a particularly relevant consideration in arms transfer decision-making.

States have a number of obligations under international humanitarian law that are directly applicable to arms transfers. In this presentation, I will focus only on obligations pertaining to conventional arms.

First, there are certain explicit prohibitions or limitations on conventional arms transfers contained in internationtal humanitarian law, which arise from specific treaty obligations. States Parties to these treaties are prohibited from transferring - or have to exercise restraint when transferring - particular categories of conventional weapons. These include for example a prohibition on the transfer of:

- Certain types of landmines under Amended Protocol II to the 1980 Convention on Certain Conventional Weapons;
- Blinding laser weapons under Protocol IV to the 1980 Convention on Certain Conventional Weapons;
- Anti-personnel mines under the 1997 Convention on the prohibition of anti-personnel mines.

Second, among the fundamental rules of international humanitarian law is the prohibition on the use of weapons that are of a nature to cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate. These are universally accepted norms, which bind all States. The use of specific weapons has been prohibited on the basis of these principles (e.g. expanding and exploding bullets). Even when these treaties do not specifically prohibit the transfer of such weapons, allowing the transfer of prohibited weapons would be difficult to reconcile with States' duty to ensure respect for humanitarian law. The same argument would apply to the transfer of weapons that - even if they are not regulated by a specific convention - would be considered prohibited based on these fundamental rules.

While these prohibitions and limitations on transfers are important, in practice, the transfer of prohibited weapons is a problem of fairly limited scope. The fact is that most arms transfers concern conventional weapons that are not in any way restricted or prohibited under international humanitarian law. Inadequate controls on such transfers have much more far-reaching

humanitarian consequences; these are the weapons most commonly used to commit violations of international humanitarian law in armed conflicts around the world with civilians often being their primary victims.

Even when transferring weapons that by their design are considered lawful, States should nevertheless consider whether the weapons they transfer are likely to also be used in a lawful manner.

Although international law allows States to acquire arms for their security, under Article 1 common to the 1949 Geneva Conventions and their Additional Protocol I, all States also have a solemn obligation to "respect and ensure respect" for humanitarian law. Not only do States have to respect the law, but they also have a responsibility to "ensure respect" by others. This is generally interpreted as conferring a responsibility on third-party States not involved in an armed conflict to refrain from encouraging a party to an armed conflict to violate international humanitarian law, to not take action that would assist in such violations, and to take appropriate steps to cause such violations to cease.[3]

Because military weapons are transferred with the purpose of enabling the recipient to engage in an armed conflict, such transfers should therefore be considered in light of States obligation to ensure respect for humanitarian law.

States that produce and export arms can be considered particularly influential in «ensuring respect» for international humanitarian law owing to their ability to provide or withhold the means by which violations may be committed. They should therefore exercise particular caution to ensure that the weapons transferred are not used to commit serious violations of international humanitarian law.

The ICRC considers that to fully reflect States' obligations under international humanitarian law, any national, regional or global standards on arms transfers should include requirements to:

- assess the recipient's likely respect for humanitarian law, and
- not authorize the transfer of weapons if they are likely to be used for serious violations of this law.

States party to the Geneva Conventions affirmed their responsibility in this regard at the 28th

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3 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, report prepared by the ICRC for the 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003, pp. 48-51.
Available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/conf28

International Conference of the Red Cross and Red Crescent in December 2003. In the Agenda for Humanitarian Action adopted by the Conference, States party to the Geneva Conventions undertook to «make respect for international humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed» and were encouraged to incorporate such criteria in national laws and policies, as well as regional and global norms.[4]

A key focus for the ICRC's work in recent years with regard to unregulated arms availability has been to promote the establishment of arms transfer criteria based on humanitarian law in national, regional and global arms transfer instruments.

**International humanitarian law criteria in existing arms transfer instruments**

We are pleased to say that there have been some very positive developments in this respect in recent years - most of this progress at the regional level. An increasing number of regional arms transfer instruments now contain arms transfer criteria based on humanitarian law. These include the following instruments:

- European Union, *Code of Conduct on Arms Exports* (1998);[5]
- Organization for Security and Co-operation in Europe, *Document on Small Arms and Light Weapons* (2000);
- Wassenaar Arrangement, *Best Practice Guidelines for Exports of Small Arms and Light Weapons* (2002);
- Organization of American States, *Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition* (2003);
- *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons,* (2005);
- Central American Integration System, *Code of conduct of the States of Central America on the transfer of arms, munitions, explosives and related materiel* (2005);
- Economic Community of West African States, *Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials* (2006);

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4 Agenda for Humanitarian Action, Final Goal 2.3 (http://www.icrc.org/Web/Eng/siteeng0.nsf/html/conf28)

5 The Code of Conduct adopted in 1998 lists the record of the buyer country with regard to international humanitarian law as a factor to be taken into account in arms export decisions. This criterion has been significantly strengthened during a review of the EU Code finalized by the EU Working Party on Conventional Arms Exports (COARM) in June 2005. The revised Code contains a requirement to deny an export license when there is a clear risk that the exported equipment might be used to commit serious international humanitarian law violations. This is similar to the wording of humanitarian law criteria included in other regional arms transfer documents. During the review, it was also agreed that the Code would be transformed into a "common position", which would make it binding on Member States. However, this draft *Common Position Defining Common Rules Governing the Control of Exports of Military Technology and Equipment* has not yet been formally adopted by the Council.

There are also some States that have incorporated explicit humanitarian law criteria into their national laws and regulations. These include Austria, Finland, Belgium, Germany, Switzerland and the United Kingdom. Yet, as far as we know there are still only a handful of States that have taken this step.

It is interesting to note that arms transfer criteria related to human rights and the risk of internal repression are much more commonly found in national regulations than criteria related to international humanitarian law—despite the large number of States that have adopted criteria based on international humanitarian law through regional arms transfer instruments.

To some extent, this is probably due to a common misperception; namely, that it is unnecessary to introduce a separate humanitarian law criterion in the national regulation if it already includes a human rights criterion, since the reference to human rights is believed to implicitly cover humanitarian law as well. While a requirement to consider the risk of human rights violations would cover some acts that are also defined as violations of international humanitarian law, a number of serious violations of humanitarian law would fall outside such a provision. This would among others include violations related to the conduct of hostilities, which are particularly relevant to the use of weapons.

**How can arms transfer criteria based on humanitarian law be applied in practice?**

Now that a large number of States have committed themselves to assessing whether the weapons they transfer are likely to be used for violations of international humanitarian law or whether there is a serious risk that they will be used for this purpose[6], it is important to consider the next obvious question:  How can such criteria be applied in practice?

The application of some arms transfer criteria will be quite straightforward, such as a requirement not to violate UN Security Council embargoes or not to allow the transfer of a prohibited weapon. However, determining the « likely use » of weapons can be far more complex.

With the increasing number of criteria and factors that arms transfer licensing officials have to consider, their task is becoming more complex and we cannot expect national licensing authorities to be experts in all these areas.
To assist national arms-transfer licensing authorities and other government officials involved in arms transfer decision-making, the ICRC recently published a Practical Guide for the ap-

6 The formulations used in different humanitarian law criteria vary, but the threshold for denying a transfer is usually related to whether it is "likely to be used" or whether there is a "clear risk" of it being used to commit serious violations of this law.

plication of arms transfer criteria based on humanitarian law.[7] This Guide addresses key questions that the ICRC believes should be considered when applying such criteria and it proposes a number of concrete indicators that can help to assess the risk of weapons being used to violate humanitarian law.

I will not have time to present this Guide in detail here, but I will briefly go through the list of possible indicators identified in the Guide.

The indicators proposed can be divided into three broad categories that, in our view, need to be considered when conducting this kind of risk assessment:

- First, the recipient's **past and present record of respect for international humanitarian law.**
- Second, and in particular if a recipient has not recently been involved in an armed conflict, the **recipient's intentions should be considered**. While intentions are difficult to measure, one area that can potentially shed some light on these is the recipient's formal commitments in the area of humanitarian law.
- Finally, it is not enough to just examine the recipient's willingness to comply with the law. It is equally important to assess the **recipient's capacity to ensure that the arms or military equipment transferred are used in accordance with international humanitarian law.**

It must be underlined that a comprehensive assessment of the risk that transferred weapons will be used to violate humanitarian law will have to take into account factors that go beyond the recipient's likely respect for its humanitarian law obligations. This may include considerations related to the security situation in the recipient country, the control that the recipient exercises over its weapons stocks and the risk of diversion to unauthorized end-users.

7 The full text of the Guide is available at:
http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_arms_availability

Within the three broad categories mentioned above, the ICRC has proposed 9 specific indicators to assess the risk that transferred arms or military equipment will be used in the commission of serious violations of international humanitarian law:

- Whether a recipient which is, or has been, engaged in an armed conflict, has committed serious violations of international humanitarian law;
- Whether a recipient which is, or has been, engaged in an armed conflict has taken all feasible measures to prevent violations of international humanitarian law or cause them to cease, including by punishing those responsible;
- Whether the recipient has made a formal commitment to apply the rules of international humanitarian law and taken appropriate measures for their implementation;
- Whether the recipient country has in place the legal, judicial and administrative measures necessary for the repression of serious violations of international humanitarian law;
- Whether the recipient disseminates international humanitarian law, in particular to the armed forces and other arms bearers, and has integrated international humanitarian law into its military doctrine, manuals and instructions;
- Whether the recipient has taken steps to prevent the recruitment of children into the armed forces or armed groups and their participation in hostilities;
- Whether accountable authority structures exist with the capacity and will to ensure respect for international humanitarian law;
- Whether the arms or military equipment requested are commensurate with the operational requirements and capacities of the stated end-user;
- Whether the recipient maintains strict and effective control over its arms and military equipment and their further transfer.

In the Guide, each indicator is accompanied by explanatory notes containing a set of questions that should be considered in relation to each indicator.

For the purposes of this presentation, I will only highlight three key questions that should be considered when applying international humanitarian law criteria.

**The first question relates to the recipient's record of respect for humanitarian law and what the time frame should be for such assessments: Should only very recent conflicts be considered or can violations that have been committed long ago still be relevant?**

We would argue that there should be no set time frame. The central question is whether circumstances have changed or not since the violations occurred.

Evidence of recent violations would normally indicate a clear risk, except where the situation has evolved significantly. Relevant developments to consider might include a change of government or political system, measures that have been taken to stop violations etc. If, on the other hand, no meaningful change in circumstances have occurred, violations committed long ago might still be relevant.

Evidence of past violations or compliance is therefore not by itself a reliable guide to likely future conduct, but must be assessed in light of other developments.

**A second important question is whether we are only referring to States or also to other entities, when we talk about considering a recipient's respect for international humanitarian law?**

In the view of the ICRC, an assessment of the risk that transferred weapons will be used to commit violations of humanitarian law should be conducted regardless of whether the recipient is a State or a non-state entity. The latter could include non-State entities authorized to import weapons on State's behalf and it could include non-State entities such as private military companies or even non-State armed groups. While some States and regional organizations have committed themselves to supplying arms only governments (either directly or through licensed entities), many states have not made such commitments.

The ICRC does not take a position for or against the provision of weapons to non-State armed groups and we know that this is a controversial area with divergent opinions among States. However, the advantage of having arms transfer criteria in place is that all actors will be assessed against the same standards. For example, as non-State armed groups are also bound by humanitarian law - if any transfers are undertaken to such entities - the risk of contributing to humanitarian law violations should be seriously considered. In practice, this may exclude transfers to a number of non-State armed groups, in the same way as it may exclude transfers to a number of State recipients.

**The third question is perhaps the most difficult to answer - but also the most important: At what point is there a «likely» or a «clear» risk of an arms transfer being used to commit violations? What should be the threshold for denying a transfer on this basis?**

It is clear that isolated incidents of violations do not have to be indicative of a recipient's likely respect for international humanitarian law and may not justify the denial of an arms transfer. Similarly, allegations from one source that violations have occurred should not necessarily be relied on, unless other reliable sources also confirm these findings.

However, any discernible and well-documented pattern of violations or failure by the recipient to take appropriate steps to prevent or put an end to violations should be a basis for serious concern.

In cases of doubt, States should seek further clarifications from the recipient State or from other sources. If doubt persists after these steps have been taken, we believe there should be a presumption against authorizing a transfer. This would be consistent with States' obligation to ensure respect for international humanitarian law. As mentioned earlier, arms-transferring States have a concrete means of influence at their disposal to ensure respect for international humanitarian law, namely the denial of such transfers. This means that they also have a particular responsibility and they should exercise caution in order to ensure that the weapons they transfer are not used to commit serious violations of this law.

**Conclusion**

The Practical Guide is intended to be resource for States that already have arms transfer criteria based on humanitarian law in place through national or regional instruments, as well as others that are considering including such an element in their national regulations. We also hope it will contribute to the on-going discussions on a global arms trade treaty and the establishment of such criteria in that context.

By proposing a set of indicators to assess the risk of arms being used for humanitarian law violations, the ICRC is not claiming that such an assessment can be made foolproof. There will always be an element of subjectivity in such evaluations, as well as elements that sometimes cannot be controlled or reasonably foreseen.

However, we believe that by developing guidelines for arms transfer licensing authorities - which contain a check-list of factors that should be considered as well as relevant sources that should be consulted before authorizing a transfer - you can ensure that such processes are conducted in a more systematic, rigorous and objective manner.

Such guidelines would not only be useful to facilitate assessments under humanitarian law criteria, but should also be developed for other arms transfer criteria (e.g. assessing the risk of human rights violations, the risk of contributing to conflict or regional instability etc.). This approach could also help ensure greater consistency among States in the application of common arms transfer criteria contained in instruments adopted at the regional or global level.[8]

8 This is an approach already taken by the European Union, which has developed best practices for interpretation of the eight criteria in the EU Code of Conduct on Arms Exports, see: http://register.consilium.europa.eu/pdf/en/07/st10/st10684-re01.en07.pdf

# THE EU CODE OF CONDUCT ON ARMS EXPORTS

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## Abstract

L'adoption par l'Union européenne en 1998 d'un Code de conduite sur les exportations d'armes est le fruit de longues négociations et de l'identification d'un certain nombre de critères communs résultant de la comparaison des politiques nationales en la matière. Le COARM (groupe de travail du Conseil de l'UE) soutient les États membres dans la mise en œuvre du Code.

Le Code de conduite est structuré en trois parties. Le Préambule souligne la détermination du Conseil de l'UE à mettre en place des normes communes élevées et la volonté de renforcer la coopération, la confiance et l'échange d'informations entre les États membres. Huit critères préalables à toute attribution de licence d'exportation d'armes figurent ensuite dans le Code, parmi lesquels : le respect des droits de l'homme dans le pays de destination finale (2) ; la situation internationale du pays de destination finale (3) ; la préservation de la paix, de la stabilité et de la sécurité (4) ; la sécurité nationale des États membres (ainsi que des États alliés ou amis) (5) ; le comportement du pays acheteur (attitude vis-à-vis du terrorisme, respect du droit international) (6)… Enfin, les provisions en vigueur permettent l'application du Code. Les plus importantes sont les provisions 3 (notification de refus et mécanisme de consultation) et 8 (rapport européen consolidé, qui regroupe des données statistiques, les activités du COARM et analyse les politiques nationales). Ces deux concepts, associés au 8ème critère (compatibilité des exportations d'armes avec les capacités techniques et économiques du pays destinataire), constituent les trois piliers principaux pour la mise en œuvre du Code de conduite.

Ce Code de conduite ne constitue pas un abandon de la souveraineté étatique : quelque soit l'issue des consultations, la décision de transfert ou de refus d'un transfert d'un produit d'équipement militaire restera à la discrétion nationale de chaque État membre. Par ailleurs, au regard de la provision 11 du Code, les États tiers intéressés sont encouragés à s'aligner officiellement sur les critères et principes du Code et à fournir des informations pratiques sur sa mise en œuvre.

Une première révision du Code a été adoptée en 2005 au niveau technique. Celle-ci doit maintenant être entérinée par une position commune du Conseil de l'UE juridiquement contraignante. Le code révisé devrait étendre le critère 2 (respect des droits de l'homme dans les pays de destination finale) pour donner plus d'importance au droit international humanitaire. Le DIH est cependant déjà en partie considéré dans le contexte des processus d'évaluation des critères 2, 3, 4, 6 et 7.

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**Introduction**

In previous interventions, speakers touched upon International Humanitarian Law considerations and responsibilities particularly with regard to the production of certain means of warfare and to their use or possible misuse throughout past decades.

The focus of this presentation is on ways to regulate or rather to control the export of means of warfare covering and accompanying the path "from the producer/dealer in one country to the consumer/end-user in another". More specifically it will focus on an instrument developed in the framework of the Common Foreign and Security Policy: the European Union Code of Conduct on Arms Exports.

Other than in any other area of trade where competences clearly and undisputedly rest with the Community, Art 296[1] TEC allows a Member State to derogate from Internal Market rules and to "take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material".

As a consequence, the export of military items has always been subject to national licensing schemes in all Member States which – despite coordination and harmonisation efforts - still diverge widely in terms of procedures, scope and authorities involved.

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1 TEC article 296 :
The provisions of this Treaty shall not preclude the application of the following rules:
(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes […]

**Historic outline**

Already in June 1991, against the background of geo-political and economic changes and developments of global impact, such as the First Gulf War, the end of the Cold War and growing tensions in south-eastern Europe, EU Member States agreed upon a Declaration on Non-Proliferation and Arms Exports, annexed to the Presidency Conclusions at the Luxembourg Summit. Therein, the European Council expressed its alarm over the stockpiling of conventional weapons in certain regions of the world and expressed its satisfaction over the identification of a number of common criteria resulting from the comparison of national policies on arms exports. On the same occasion, the Council expressed the hope that a common approach leading to a harmonisation of national policies could be made possible on the basis of these criteria and emphasised the particular importance it attached to transparency in conventional arms transfers, "calling on all states to support this initiative and others which aim to prevent the uncontrolled spread of weapons and military technologies".

In 1995 the Council Working Party COARM was formed with a mandate to provide for information and consultation on matters of arms export policy, paying particular attention to the implementation of the common criteria and to work to increase transparency by national procedures, etc. Despite the belief that far-reaching international action was needed immediately to promote restraint and transparency in the transfers of conventional weapons and of technologies for military use and the identification of originally seven criteria - extended to eight criteria at the Lisbon Summit in June 1992 – it took some more years until – on 8 June 1998 – the EU Code of Conduct on Arms Exports could be adopted.

Agreeing on the Code as a politically binding instrument constituted a major success in the European Union's development of a common approach to arms exports as an important element of the Common Foreign and Security Policy, a major step towards understanding and harmonising national systems and, at the same time, a major expression of growing mutual trust and confidence in a very sensitive area – an area where legal, political and economic interests do not always go hand in hand. All Member States have agreed to apply the Code of Conduct when assessing applications to export items listed in the agreed EU Common Military List[2].

2 In accordance with Operative Provision 5 of the Code, on 13 June 2000 the Council adopted the Common list of equipment covered by the Code of Conduct together with Declaration 2000/C/191/1. The common list of military equipment has the status of a political commitment in the framework of CFSP. Having an evolutionary character, the list is updated on a regular basis and published in its most recent version on the Council's website.

**Structure and content**

Building on the Common Criteria for arms exports of 1991 and 1992, the Code of Conduct[3], being the most comprehensive international arms export control regime, is structured into three parts: preamble, criteria and operative provisions.

The preamble sets the tone by expressing the determination of the Council to set high common standards to be regarded as the minimum for the management of and restraint in conventional arms transfers. It outlines the main principles of the Code, emphasising the objectives of reinforcing cooperation, promoting convergence and strengthening the exchange of information among Member States.

The eight criteria against which each and every export licence application has to be assessed constitute - as export guidelines - the core of the system.
While for further details and exact wording the website of the Council Secretariat[4] should be consulted, the following provides a short summary of the Criteria:
Criterion 1: international commitments of Member States
Criterion 2: respect of human rights in the country of final destination
Criterion 3: international situation in the country of final destination
Criterion 4: preservation of regional peace, security and stability
Criterion 5: national security of Member States (as well as of friends and allies)
Criterion 6: behaviour of the buyer country (in particular its attitude to terrorism, the nature of its alliances and respect for international law)
Criterion 7: risk of diversion within the buyer country or of re-export under undesirable conditions
Criterion 8: compatibility of arms exports with the technical and economic capacity of the recipient country

The operative provisions – as the third part - provide both the basis and practical guidance with regard to the application of the Code. Most prominently among them are operative provision 3, setting up the denial notification and consultation mechanism, and operative provision 8, introducing the element of national reports and of a consolidated EU report. These two concepts – together with the eight criteria - constitute the three core pillars for the implementation of the Code.

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3 http://consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf

4 http://consilium.europa.eu/cms3_fo/showPage.asp?id=408&lang=EN&mode=g

**Implementation**

As stated before, all Member States have agreed to apply the Code of Conduct when assessing – on a case-by-case basis - applications for the export of items listed in the agreed EU Common Military List. In addition, in accordance with operative provision 6 of the Code, the Code is also to be applied to dual-use goods, where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country.

In order to help Member States apply the Code, intended for use primarily by export licensing officials, COARM has drawn up regular updates of the so-called User's Guide[5]. The User's Guide does not replace the Code in any way but is a living technical document easily adaptable to trends and developments "in the market" that summarises agreed guidance, with the most important chapters covering licensing practices, criteria guidance ("best practices") and transparency.

Conducting an in-depth assessment on a case-by-case basis is a very complex and demanding exercise – usually involving a number of ministries. The export of military items being subject to national licensing schemes (27 by now) makes it, however, impossible to pinpoint one or the other entity as the "typical" EU licensing authority. Despite that lack of uniform procedures or licensing authorities, foreign ministries with their country desks, international law departments and last but not least their network of missions abroad usually play an important role in the risk analysis based on the criteria of the Code.

With the Code setting up the first denial notification and consultation mechanism ever applied by any group of states to their conventional arms exports, Member States of the EU truly entered into pioneer work in a very sensitive area full of confidentiality concerns - for security, political or economic reasons. Taking into account the extremely complex character of arms transfers and all sensitivities involved, sharing of information by entering into consultations was (and still is) an incredible sign of mutual confidence and trust – yet not of an abandonment of sovereign rights. Whatever the outcome of consultations may be, the decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State.

While the denial notifications and consultations take place in a confidential manner (using the communications network of the EU Member States called COREU), accountability and transparency are striven for through the annual publication of consolidated reports.

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5 http://register.consilium.europa.eu/pdf/en/07/st10/st10684-re01.en07.pdf?bcsi_scan_A02EC498B8AD0663=0&bcsi_scan_filename=st10684-re01.en07.pdf

Over the years the consolidated EU report (i.e. "annual report") has established itself as an extremely useful source of reference in the area of arms exports control. With the technical aspects and the statistical data in the foreground, the underlying political message of growing political will for transparency and cooperation as well as of growing confidence should not be underestimated. The report has always consisted of a narrative part, summarising developments and activities for the periods from one adoption to the following and providing an excellent overview of COARM's activities and the annexes of statistical data, where the most significant developments and improvements – both from the quantitative and the qualitative perspective – took place. Based on data provided by Member States, the report grew from 4 pages (for the year 1998) to more than 300 pages for the year 2005. Separate tables now show exports to destinations under embargo, details of Member States' exports to UN-mandated or international missions, provide the total number of consultations for each destination, give references to national legislation implementing the Common Position on Arms Brokering and present information on COARM-related outreach activities. Figures in the main table are broken down not only by recipient country (region and worldwide) on the number and value of licenses granted and the value of actual exports, but also - where possible - per EU Common Military List category. Even if fully accurate and fully comparable statistical data is a goal yet to be achieved (and actively worked on) – and not all Member States are in a position to provide figures for the number and value of licences granted and the value of actual exports, broken down by each military list category – already the present data material is extremely useful for licensing officers in their daily work. Despite the time-lag between the reporting period and the date of publication of the annual report (another issue intensively worked upon by Member States), the listings provide for an in-depth analysis of national policies and concrete export trends – contributing enormously to an informed decision making process.

While substantial progress has been achieved over the last years towards the overall goal of a coherent, consistent and credible arms export control policy of the EU, many challenges still remain.

**Outlook**

Internationally, the EU has been a strong supporter of the Arms Trade Treaty-initiative from the very beginning and has played an important role in "carrying" the initiative from civil society into the United Nations. EU Member States remain committed to that matter and will actively and constructively (some even as members) follow the work of the Governmental Group of Experts, taking up its work in early 2008.

Regionally, and in line with operative provision 11 of the Code, calling for the active encouragement of others to subscribe to the principles of the Code, a strong focus has been and will

continue to be on outreach. Interested third countries are not only encouraged to align themselves officially with the criteria and principles, but are also provided with information and practical guidance regarding the implementation of the Code. Seminars take place on a regular basis – moving from general discussions on developing the relevant legal and administrative frameworks to very detailed interactive workshops with licensing officers. Outreach, however, also means increased interaction with civil society.

Within the EU - apart from constantly working on further improvements in the Code's implementation and on the identification and possible closure of existing loopholes and shortcomings - a strong focus will remain on the final conclusion of the reform of the Code of Conduct. Discussions at technical level for the first review of the Code since its adoption in 1998 were concluded in 2005. To be adopted in the format of a legally binding Council Common Position as soon as political consensus among Member States is reached, the revised Code will include several new elements which will deepen and widen its scope of application – such as the extension of controls to brokering, transit and intangible transfers of technology and the expansion of Criterion 2 to give more prominence to the concept of International Humanitarian Law.

**The Code of Conduct and International Humanitarian Law (IHL)**

It is true that until adoption of the revised Code there is no specific criterion in the Code exclusively devoted to IHL – a fact EU Member States have not only been criticised for by civil society representatives, but also have been working on to remedy. However, this does not mean that IHL is not considered when export licence applications are assessed. Not only is there specific reference to the buyer country's compliance with its international commitments under international humanitarian law applicable to international and non-international conflicts in Criterion 6 (b), but also IHL aspects and/or concerns automatically find their way into the assessment process in the context of Criterion 2, 3, 4 and 7. In this respect, it cannot be overemphasised that usually decisions to deny licence applications are based on a mix of criteria.

**Conclusion**

The EU Code of Conduct may not be a perfect system but combining the three powerful elements – the eight criteria, the denial notification and consultation mechanism and the publication of annual reports – it has established itself as an extremely comprehensive and useful instrument in the area of export controls. Fully aware of their responsibilities in this area of growing importance, EU Member States will continue to strive for strong and efficient export controls – with open eyes and ears to emerging trends and challenges.

*Lt. Col. Stewart asks for information about the extraterritorial controls in place.*

Mrs Macalesher answers that, if you arrange a deal in your own country, national legislation will apply. But if you transfer arms through third countries and it is going to an embargoed country, then you need extraterritorial controls in place, because this is a universal violation of international law. Most of the countries do not have any of these controls in place, including the UK. According to her, the only country that has full extraterritorial controls would be the USA. Therefore, it does not matter if you are a US citizen, if you are brokering a deal from anywhere in the world, you could be called under the US legislation. It is one of the problems we are trying to address during the ATT process.

Mr Czuczai adds that the EU has a common position of the Council on arms brokering, and there is a definition and a common position based on article 15 of the EU treaty, which binds the Member States, which means they have to implement it. It implies they have national legislation in place and then it can be combined with implementing legislation concerning the European arrest warrant, which is a framework decision of the Council. Therefore, the implementation depends on whether you implemented the common position and the European arrest warrant framework decision properly.

*Y. Sandoz first says that the panel was very optimistic about what is done. According to what he heard, it remains to the discretion of Member States, to decide if criteria are observed. Although you may have a certain respect in the EU, it is different in other countries. Maybe the ICRC could be questioned on the fact that they are fulfilled or not, because it is on the field. However, it would certainly be delicate for the ICRC to give a green light to a transfer of weapons. So once again, it will probably be to the discretion of States. How do you see a certain monitoring on the seriousness with which those criteria will be observed?*

Mrs Brück-Friedrich answers that the consultations about the observance of criteria are mandatory. However, the final decision to execute the transfer amounts to each Member State, whether or not it shares the consulted other Member States' views. Although it is not at the discretion of a Member State to apply the criteria or not because that is a political binding instrument. With regard to monitoring, Mrs Brück-Friedrich thinks the annual report does play an important role, even with delay, but we can see who shipped which weapons to which destination. That is not very detailed but in addition to that, you have the COARM working group. So there is no kind of legal monitoring mechanism in place. But usually information sources

are very good, it might not be necessarily a COREU, but you might have just phone calls, for example. She thinks there is quite some pressure in observing the criteria.

Mrs Macalesher adds a perspective from an NGO about the monitoring of the EU code, saying we have fairly advanced civil society networking in the EU that works on these issues. EU NGOs are in a good position and can exert pressure on governments.

Mrs Waszink adds a comment, saying that there is no reason to be too optimistic when you look at the enormous amount of arms transfers that do end up in destinations where they should not be. They mostly imply IHL and human rights violations, and the huge problem is that there are very low and conflicting regulations in place in many countries and they do not all give a very high standard. The good example is the area of arms brokering: only about 40 States in the world have national legislation in place that gives them a chance to control this type of activity. That is many more than what we had only a few years ago thanks to the EU common position on arms brokering, which led many European States to adopt legislation in this area. But in most of the regions, there is almost no law in place at all. You have the UN process on small arms for instance which is trying to deal with this question, but because it is a political document, it provides many options for States for types of controls, which could be put in place. In practice and to some extent, they can choose what they would like to do and they no longer comply with the requirements.
The issue of monitoring will certainly be a top one. Mrs Waszink thinks it is easier to do it at the regional level because there is probably more confidence amongst States. If there is an arms trade treaty (ATT) at the international level, it will probably become much more a challenge. According to her, NGOs are doing a good job in a sense of highlighting EU possible transfers that do take place and do not respect criteria and principles. Data are also affecting over time, but it is a long process.

*Prof. Schmitt asks if Mrs Waszink or Prof. Sandoz could elaborate on Article 1 common to the 1949 Geneva Conventions and their Additional Protocol I and the obligation to "respect and ensure respect of IHL", and how it is linked to arms transfers.*

Mrs Waszink answers that, in general, this responsibility to ensure respect is interpreted as you should not encourage a party to violate IHL and you should not take actions that would assist in such violations (as arms transfers for instance). She thinks the EU Guidelines on how the EU can help to ensure respect of IHL is interesting and the EU Code of Conduct is mentioned as one of the tools available to the EU. Besides, States did very clearly acknowledge this responsibility at the last International Conference of the Red Cross and Red Crescent (November 2003), as being relevant for arms transfers. We have also seen that 2/3 of the States that have

submitted their views on the ATT highlight the obligation to ensure or the responsibility to look at how weapons are used and to look if the recipients likely respect IHL. There is a growing recognition among States that it is relevant.

Prof. Sandoz adds that you have many instances now where States have accepted the fact that there is a collective obligation, a collective responsibility, to ensure respect of IHL. The question is how far it goes. It is a legal obligation because it is in a treaty. Nevertheless, it is an obligation without ties, without sanctions. It is not a war crime in the list of the Rome Statute. The ICRC has used it in many instances, sometimes in a confidential way, with some States which could influence other States. We cannot exaggerate in using it. But in the case of States sending weapons to other States violating massively IHL, we would not hesitate to use that argument.

*Prof. Hampson asks how Saferworld and all the organisations engaged in the process of the ATT are going to draft the treaty. We have to take the implementation seriously. This means identifying everything that is required of a State (what it has to do and what things done by others it has to supervise). If you have identified all those things, she would suggest that what you then need is an international mechanism not for monitoring the States compliance with the substantive obligations but an international means of monitoring whether a State has created the right domestic law to evaluate the implementation and then whether it uses it in practice. How does Saferworld expect to ensure that States can really have the means to see if they control the acts of their nationals, of national registered companies, including banks?*

Mrs Macalesher answers that it will be a struggle to get an ATT. The golden rule of the NGOs is to include references to IHL and human rights. Otherwise, there is no point to have a treaty. The first challenge with the group of governmental experts (GGE) is to get them to agree to discuss the text with these two underlined principles. It is a first step before we can get to monitoring and compliance issues. Looking at the make-up of the GGE, they just found that 8 of the 28 States do not really want a treaty: Algeria, Egypt, China, India, Pakistan, Russia, Cuba and the USA, if they decide to take a seat but for now they are not even engaged in the process. If we manage to pursue the process beyond the GGE into a treaty, we will need a lot of meaningful dialogue with those kinds of states. It is true that there is no point to have a treaty if we cannot implement it. There is important outreach work to do, going to the new neighbouring States of the EU, bringing them on board the EU Code of Conduct and making them have their own national controls in place. The treaty should also mention the supplying of facilities for assistance and cooperation in order to help countries who would like to improve their national legislation on transfer controls and who would not have the means and the capacities.

Finally, Prof. Hampson says arms transfers/controls would be a useful area where IHL could make common cause with human rights law. We are used to the idea that if you send a person to a country where he will be tortured, then the State that would be doing the sending is responsible. Similarly, that could be an argument that, if you send the means of inflicting unlawful harm to a State that then proceeds to inflict that harm, that applies existing human rights law and that ought to be prohibited.

# Session 3: New weapons

Chair person: Dr. Heike Spieker, German Red Cross - Head of International Law Department

**The Obligation to conduct Legal Reviews (Article 36 of Additional Protocol I)**
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# "THE OBLIGATION TO CONDUCT LEGAL REVIEWS"

**Stéphane Kolanowski**
CICR Bruxelles

## Abstract

Acording to the Article 36 of Additional Protocol I to the Geneva Conventions, States parties have the obligation to determine whether the employment of new weapons and new means of warfare would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to them. This rule is supposed to apply only to States parties, but it seems that any State has an interest to respect this obligation.

It is important to determine what is meant by "new weapons, new means and methods of warfare". Therefore, it is essential to examine if, on the one hand the use of a weapon would be in itself unlawful, and on the other hand, if the use of a weapon that would be a priori lawful, could under some circumstances, become unlawful. In this case, we should not prohibit the weapon itself, but restrict the methods and manners to use it. Thanks to the Commentaries of the Protocol and the definition given by States that have a review mechanism, it is possible to discern the material scope of application of Article 36. It should include all types of weapons, lethal or not as well as the different use of these weapons in application of relevant military rules. In fact it includes any weapon that a State plans to acquire for the first time, even if it is not new in a technical sense; any existing weapon which is modified in a way that distort its functioning, even if it has already been subject to a legal review; and finally, an existing weapon, even if it succeeded in its legal review, when a State is bound to a new treaty that may have an incidence on the legality of the weapon.

The review of the legality of a new weapon has to be done with regard to dispositions of Protocol I and other rules of international law applicable to the State concerned. Relevant rules include general and specific rules of IHL. General rules are customary and apply to any weapons, means or methods of warfare: prohibition to use weapons, which can cause superfluous injury, which are by nature indiscriminate, or which can cause long-term damage to the environment. Specific rules prohibit the use of certain weapons or impose restrictions to their methods of use. This can be checked in treaties which prohibit or regulate the use of certain arms and munitions (mines, biological or chemical weapons…) and in customary law, which is applicable to all States, even if they are not party to a treaty (prohibition of the use of poison, blinding laser weapons…).

Finally, in evaluating the legality of a new weapon, means or a method of warfare, a State shall examine characteristics of means of fighting and the foreseeable use of the weapon. To this end, States should adopt a pluridisciplinary approach and take into account a broad range of factors, including technical, military, medical and environmental factors.

Ainsi qu'on l'a vu dans la première partie de ce colloque, le droit des combattants de choisir leurs moyens et méthodes de guerre n'est pas illimité. Ce principe de base du droit international humanitaire se retrouve inscrit à l'article 22 du Règlement de La Haye de 1907 concernant les lois et coutumes de la guerre sur terre, ainsi qu'à l'article 35, paragraphe 1 du 1er Protocole additionnel de 1977.

Le corollaire évident de cette règle est la détermination des limites portées au choix des moyens et des méthodes de guerre. Ces limites peuvent être d'ordre général ou spécifique. Parmi les règles à caractère général, on relèvera par exemple l'interdiction d'utiliser des moyens de combat qui ne permettent pas de distinguer ce qui est un objectif militaire de ce qui ne l'est pas, ou encore les armes de nature à causer des maux superflus. D'autres règles contiennent des interdictions ou des limitations spécifiques, telles que les règles concernant notamment les armes biologiques, les armes chimiques, incendiaires, les armes à laser aveuglant et les mines terrestres.

Il va de soi que si certaines interdictions ou limitations sont posées au choix des moyens et des méthodes de guerre, il est sage de déterminer si le développement ou l'acquisition d'une nouvelle arme ou d'une nouvelle méthode ne serait pas en contradiction avec ses propres obligations juridiques. L'examen de la conformité au droit des nouvelles armes et de nouvelles méthodes de combat n'est pas un concept récent, et se trouve déjà énoncé dans la Déclaration de Saint-Pétersbourg de 1868. Le principe de la nécessité de procéder à cet examen de la légalité de nouvelles armes et de nouveaux moyens de guerre a été repris et précisé dans le Protocole I de 1977, en son article 36. Cet article se lit comme suit:

> *"Dans l'étude, la mise au point, l'acquisition ou l'adoption d'une nouvelle arme, de nouveaux moyens ou d'une nouvelle méthode de guerre, une Haute Partie contractante à l'obligation de déterminer si l'emploi en serait interdit, dans certaines circonstances ou en toutes circonstances, par les dispositions du présent Protocole ou par toute autre règle du droit international applicable à cette Haute Partie contractante."*

Même si, en vertu du principe de l'effet relatif des traités, cette règle ne vaudrait que pour les États partie au Protocole additionnel I de 1977 (167 Etats partie en date du colloque), il est raisonnable de considérer que tout État, qu'il ait ou non ratifié ce texte, a un intérêt direct à le mettre en œuvre, tant il est vrai qu'il est préférable d'examiner, avant la mise au point, l'acquisition ou la modification d'un moyen ou d'une méthode de guerre si ce moyen ou cette méthode pourront effectivement être utilisés en conformité avec les obligations internationales de l'État concerné. La pratique confirme par ailleurs ces considérations, ainsi que l'indique l'exemple de la Suède qui dès 1974 (3 ans avant l'adoption du Protocole additionnel I) a mis en place un mécanisme formel d'examen des armes, ou encore l'exemple des États-unis qui ont fait de même, également en 1974, et continuent à le faire, alors qu'ils ne sont, à ce jour, pas encore partie aux Protocoles de 1977.

L'article 36 ne précise pas de quelle manière un État doit procéder à la détermination de la licéité des armes, moyens et méthodes de guerre, et nous n'examinerons pas cet aspect procédural dans le cadre de ce colloque. Pour ce point, il est utile de se référer au Guide sur la mise en œuvre de l'article 36 qui, sur la base de pratiques des États, donnent des pistes sur les aspects fonctionnels du mécanisme d'examen; guide publié par le CICR en janvier 2006. Nous nous concentrerons aujourd'hui sur le contenu de l'article 36, c'est-à-dire sur son champ d'application matériel.

## 1. Examen des "nouvelles armes, nouveaux moyens et nouvelles méthodes de guerre".

Il importe de cerner davantage ce que l'article 36 recouvre par la mention "nouvelles armes, nouveaux moyens et nouvelles méthodes". A cet égard, les commentaires des Protocoles et les définitions élaborées par les États ayant un mécanisme d'examen de la licéité des nouvelles armes nous apportent des précisions.

Les Commentaires du Protocole relèvent en effet que l'article 36 couvre tant "les armes au sens large, que la façon de les utiliser". Il est en effet essentiel d'examiner si, d'une part l'usage d'une arme serait en lui-même illégal, et d'autre part si l'usage d'une arme a priori légale pourrait, sous certaines conditions devenir illégal. Il ne s'agirait alors non pas d'interdire l'arme en tant que telle, mais d'en interdire certaines méthodes, certaines manières de s'en servir. Ainsi, l'examen de la licéité d'une arme ne devra pas prendre uniquement en considération sa conception ou le but recherché, mais également la manière dont on peut attendre qu'elle soit utilisée sur le champ de bataille. C'est là le sens de l'article 36 lorsqu'il précise que l'État concerné a "l'obligation de déterminer si l'emploi [de l'arme] en serait interdit, dans certaines circonstances ou en toutes circonstances". Il est entendu, comme le précisent les Commen-

taires du Protocole additionnel I que l'État doit déterminer "si l'emploi normal ou projeté d'une arme serait interdit dans certains cas ou en toutes circonstances". L'examen de la légalité d'une nouvelle arme ne doit évidemment pas prendre en compte les possibles emplois abusifs de l'arme en question, l'illégalité ne provenant à ce moment ni de l'arme ni de la méthode normale de s'en servir, mais d'un comportement inadéquat de l'utilisateur.

Des Commentaires du Protocole et de la définition que les États ayant un mécanisme d'examen ont donné aux termes "nouvelle arme, nouveaux moyens et nouvelles méthodes" l'on peut dégager certains contours du champ d'application matériel de l'article 36. Celui-ci devrait inclure:

- les armes de tous types, qu'elles soient destinées à un usage antipersonnel ou antimatériel, "létales", "non-létales" ou "moins létales", de même que les systèmes d'armes;
- les différentes manières dont ces armes doivent être utilisées en application des règles militaires pertinentes;
- toutes les armes dont l'acquisition est prévue aussi bien par la recherche et le développement que par l'achat d'armes "prêtes à servir";
- toute arme que l'État prévoit d'acquérir pour la première fois, sans que cette arme soit nécessairement nouvelle au sens technique;
- toute arme existante qui est modifiée d'une manière qui altère son fonctionnement, même si celle-ci a déjà fait l'objet d'un examen avant modification;
- une arme existante, même ayant déjà subi avec succès un examen de sa légalité, lorsqu'un État se lie à un nouveau traité international qui est susceptible d'avoir une incidence sur la licéité de l'arme.

L'article 36 demande donc d'étudier la licéité de toute arme et de tout système d'arme, c'est-à-dire l'arme elle-même et les composantes nécessaires à son fonctionnement, de manière contextuelle et évolutive. On ne peut en effet dissocier le moyen de la méthode ni de l'évolution de l'arme en elle-même, des autres avancées technologiques, et du développement du cadre juridique.

## 2. Règles à considérer dans la mise en œuvre de l'article 36.

L'article 36 indique que l'État concerné doit examiner la licéité de toute nouvelle arme, nouveaux moyens et nouvelles méthodes de guerre au regard des dispositions du Protocole I et de toute autre règle de droit international applicable à cet État. Les règles pertinentes incluent les règles générales du DIH s'appliquant à toutes les armes, à tous les moyens et méthodes de guerre, ainsi que les règles particulières du DIH et du droit international interdisant l'emploi

de certaines armes et moyens de guerre spécifiques ou imposant des restrictions à leurs méthodes d'utilisation. Les sources principales du droit international telles qu'énoncées à l'article 38 du Statut de la Cour international de Justice devront donc être prises en compte, à savoir les traités, mais également la coutume et la jurisprudence.

Il s'agira en premier lieu de vérifier si, dans l'arsenal des traités auxquels l'État est partie, et dans le droit coutumier, l'emploi de l'arme considérée est soumis à certaines restrictions ou frappé d'interdiction. Un nombre important de traités interdisent ou règlementent l'usage de certaines armes et munitions (gaz, mines, armes biologiques ou chimiques, ...) et le droit a été très prolifique dans ses réponses aux évolutions technologiques. Il est intéressant de relever à cet égard que le Statut de la Cour pénale internationale reprend dans la définition des crimes de guerre (article 8, par. 2, al. b) le fait d'avoir recours à certaines armes telles que le poison, les gaz asphyxiants toxiques ou similaires, ou encore des balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain.

De l'étude sur le droit international humanitaire coutumier, coordonnée par le CICR, il ressort qu'un certain nombre de limitations ou d'interdictions de l'usage de moyens et de méthodes de guerre sont de nature coutumière, et par là applicables à tout État, qu'il ait ou non ratifié un traité particulier. Au nombre de ces règles coutumières nous pouvons mentionner l'interdiction d'utiliser des poisons, des armes chimiques, biologiques, des agents de lutte antiémeute comme arme de guerre, des balles qui s'épanouissent, s'aplatissent ou explosent dans le corps humain, des armes qui produiraient des éclats non localisables au rayon X, des armes à laser aveuglantes, ou encore des pièges sous certaines conditions. Par ailleurs des précautions particulières sont exigées dans l'usage de mines terrestres ou d'armes incendiaires.

En dehors de ces règles spécifiques, des interdictions ou des restrictions d'ordre général doivent ensuite être prises en compte dans l'évaluation de la licéité de la nouvelle arme ou du nouveau moyen de guerre, de même que de leurs méthodes d'emploi normal ou projeté. Ces règles générales encadrant la conduite des hostilités se trouvent principalement, mais pas uniquement, dans le Protocole I de 1977 et dans le droit coutumier. Il faut relever qu'un certain nombre de règles générales sont principalement dépendantes du contexte et que leur application est généralement déterminée sur le terrain, par les Commandants militaires appuyés par leurs Conseillers juridiques tel que prévu à l'article 82 du Protocole I. Ces règles n'en sont pas moins pertinentes lorsqu'il s'agit d'évaluer la licéité d'une arme nouvelle avant qu'elle ait été utilisée sur le champ de bataille dans la mesure où les caractéristiques techniques, l'emploi prévu et les effets prévisibles de l'arme peuvent permettre à l'autorité évaluatrice de déterminer si l'arme peut être utilisée de manière conforme au droit applicable dans certaines situations prévisibles, éventuellement assorti de conditions, restrictions ou précautions particulières.

Dans ce cas, si un État devait décider d'approuver une arme sous conditions, restrictions ou précautions particulières dans l'usage de l'arme et de sa méthode d'utilisation considérée, ces mêmes conditions, restrictions ou précautions particulières doivent être incorporées dans les règles d'engagement ou les procédures d'opération associées à l'arme en question.

Parmi ces règles générales, relevons les principes élémentaires d'interdiction d'employer des armes, des projectiles et des matières ainsi que des méthodes de guerre de nature à causer des maux superflus (art. 35, par. 2 du Protocole I) ou encore des armes qui, par nature, ne pourraient distinguer entre un objectif militaire et des personnes civiles ou des biens à caractère civil (art. 51, par 4, al. b du Protocole I). Ces deux dernières règles sont par ailleurs reprises dans le statut de la Cour pénale internationale, assorties de conditions (art. 8, par. 2, al. b, xx du statut). La règle de la proportionnalité interdit, de même, les attaques dont on peut attendre qu'elles "causent incidemment des pertes en vies humaines dans la population civile, des blessures aux personnes civiles, des dommages aux biens de caractère civil, ou une combinaison de ces pertes et dommages qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu (art. 51, par. 5 al. b du Protocole I). Sont également interdits, les méthodes et les moyens de combat qui sont conçus pour causer, ou dont on peut s'attendre qu'ils causeront, des dommages étendus, durables et graves à l'environnement naturel (art. 35, par. 3 et art. 55 du Protocole I), ceux dont les effets ne peuvent être limités (art. 51. par. 4 al. c du Protocole I), ou encore les bombardements qui traitent comme un objectif militaire unique un certains nombre d'objectifs militaires nettement espacés et distincts situé dans une ville, un village ou tout autre zone contenant une concentration analogue de personnes civiles ou de biens à caractère civil (art. 51, par. 5, al. a du Protocole I).

Sans surprise, toutes ces règles de caractère général se révèlent être de nature coutumière. En effet, l'étude du droit international humanitaire coutumier a conclu, à la lumière de la pratique des États, qu'il y avait à l'égard de ces règles générales une pratique constante et établie, avec un sentiment que se conformer à ces règles était obligatoire (*opinio juris*).

Enfin, l'usage d'une arme peut être interdit ou restreint sur base des principes de l'humanité et des exigences de la conscience publique. Cette clause, connue sous le nom de son inspirateur, le Professeur Feodor de Martens, jurisconsulte du Tsar Nicolas II, a été inscrite dans le préambule de la Convention (II) de La Haye de 1899, dans celui de la Convention (IV) de La Haye de 1907, ainsi que dans le deuxième paragraphe de l'article premier du Protocole I de 1977 qui se lit comme suit:

*"Dans les cas non prévus par le présent Protocole ou par d'autres accords internationaux, les personnes civiles et les combattants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique".*

Cette clause, qui d'après la Cour internationale de Justice dans son *Avis sur la Licéité de la menace ou de l'emploi d'armes nucléaires* (1996), représente "l'expression du droit coutumier existant" synthétise l'essence même du droit international humanitaire qui est de conserver un peu d'humanité dans ces situations troublées et, pour citer la même Cour internationale de Justice, se révèle "être un moyen efficace pour faire face à l'évolution rapide des techniques militaires".

En toute logique, mais il est utile de le relever, les États ayant un mécanisme d'examen de la licéité des nouvelles armes, moyens et méthodes de guerre, ne se contentent pas d'évaluer leur conformité au droit existant au jour de l'évaluation, mais prennent en considération les probables développements futurs du droit.

Cette liste de règles et de principes à prendre en compte dans une procédure d'examen peut paraître longue et restrictive, mais il est bien normal de s'assurer que le développement ou l'acquisition d'un bien quelconque ou l'adoption d'un certain comportement en relation avec ce bien ne se fasse pas en contradiction avec les obligations auxquelles on a soi-même souscrit ou celles qui dérivent de l'évolution du droit coutumier.

## 3. Données empiriques à prendre en compte lors de l'examen.

Dans l'évaluation de la licéité de la nouvelle arme, des nouveaux moyens ou de nouvelles méthodes de guerre, l'État concerné devra examiner tant la conception que les caractéristiques des moyens de combats, ainsi que la manière prévisible avec laquelle l'arme serait utilisée. Il va de soi que les effets d'une arme résulteront à la fois de sa conception et de la manière dont elle sera utilisée.

Il conviendra d'adopter une approche pluridisciplinaire, couvrant une large gamme de facteurs techniques, militaires, médicaux ou encore environnementaux. Cette approche pluridisciplinaire, impliquant des experts de diverses disciplines, a par ailleurs été recommandée par la XXVIIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge (2003).

Une description technique complète de l'arme, ainsi que de l'utilisation pour laquelle l'arme a été conçue ou prévue, y compris les types de cibles visées (anti-personnel, anti-matériel, zone déterminée, etc.) devra être fournie. Les moyens par lesquels l'arme provoque des destructions, des dommages ou des blessures devront être examinés. L'autorité d'examen devra se pencher sur les performances techniques de l'arme évaluée, performances qui revêtent une importance toute particulière lorsqu'il s'agit de déterminer si l'utilisation d'une arme est de nature à frapper indistinctement. Cela comprend notamment le degré de précision et de fiabilité de l'arme et de ses munitions, la zone couverte (degré de dispersion), la possibilité de limiter les effets de l'arme dans le temps et dans l'espace (mécanisme de neutralisation ou d'autodestruction par exemple).

Les effets sur la santé d'une utilisation normale de l'arme devront être rigoureusement étudiés. Quel type et quelle taille de blessures peuvent être occasionnées par une utilisation prévisible de l'arme? Quel pourrait être le taux probable de mortalité sur le champ de bataille, ou plus tard en milieu hospitalier? Existe-t-il un risque prévisible d'altération à long terme ou permanente de l'état psychologique ou physiologique des victimes? L'arme peut-elle causer des blessures anatomiques ou une infirmité anatomique, ou encore une défiguration, résultant spécifiquement de la conception de l'arme ? Autant de questions qui seront prises en compte en s'assurant que toutes les données scientifiques pertinentes ont été rassemblées.

La XXVIIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge a encouragé les États "à examiner avec une attention particulière toutes les armes nouvelles ainsi que les nouveaux moyens ou méthodes de guerre dont les effets sur la santé sont peu connus du personnel médical". Toutes ces préoccupations liées à la santé permettront d'évaluer si l'utilisation d'une arme déterminée est conforme à l'interdiction de causer des maux superflus ou des souffrances inutiles. Une telle évaluation requiert de mettre en balance d'une part l'impact sur la santé et d'autre part le but militaire attendu ou l'avantage militaire prévu de la nouvelle arme.

Enfin, la préservation de l'environnement compte au nombre des préoccupations pertinentes dans le cadre de l'examen de la licéité des nouvelles armes. Il s'agira de s'assurer que des études scientifiques adéquates sur les effets sur l'environnement naturel aient été menées. De considérer l'étendue et le type de dommage causé directement ou indirectement à l'environnement naturel, ainsi que d'étudier la durée nécessaire pour "corriger" les dommages pour autant que cela soit pratiquement et économiquement possible. Bien entendu, l'impact direct ou indirect sur la population civile des dommages liés à l'environnement devra aussi être scrupuleusement étudié. Par ailleurs, il faudra déterminer si l'arme a été spécifiquement conçue pour détruire ou provoquer des dommages à l'environnement naturel ou pour causer une modification de l'environnement. La conformité de l'arme avec le Protocole I (art. 35, par. 3) et la Conven-

tion sur l'interdiction d'utiliser des techniques de modification de l'environnement à des fins militaires ou toutes autres fins hostiles (1976) devra être examinée.

Relevons enfin que l'étude sur le droit international humanitaire coutumier a révélé que "l'absence de certitude scientifique quant aux effets sur l'environnement de certaines opérations militaires n'exonère pas une partie au conflit de son devoir de prendre" toutes les précautions possibles "en vue d'éviter, et en tout cas de réduire au minimum, les dommages qui pourraient être causés incidemment à l'environnement" (règle 44). Cette règle est d'autant plus importante qu'il n'existe pas de définition agréée ni de "l'environnement" ni du "dommage à l'environnement". Il est par ailleurs certain que le niveau d'exigence quant à la préservation de l'environnement a beaucoup évolué, tant il est vrai que les normes écologiques de 1949, de 1977, et de 2007 sont fondamentalement différentes, et que cette évolution doit être prise en compte également lorsque l'on parle d'armes existantes.

## Conclusion

L'examen de la licéité d'une arme nouvelle, de moyens nouveaux, de méthodes de guerre nouvelles, ou de la combinaison de moyens et de méthodes ne doit pas être vue comme une obligation "supplémentaire" incombant aux États. L'article 36 du Protocole additionnel I de 1977 donne obligation aux États de procéder à cet examen, mais cette obligation ne découle-t-elle pas déjà du fait que les États se soient engagés à respecter (et à faire respecter) le droit? L'article 36 ne cherche pas à restreindre l'utilisation de certaines armes ou de certains moyens de guerre, mais vise plutôt à inciter les États à vérifier que leurs projets de développement ou d'acquisition de moyens et de méthodes de combat sont conformes à leurs obligations. En effet, si l'usage de certaines armes et de certaines méthodes est illicite, cela ne serait pas en vertu de l'article 36, mais bien d'autres normes juridiques auxquelles l'État concerné aurait souscrit. Cet État a donc tout intérêt à le réaliser avant le développement ou l'acquisition d'armes et de méthodes auxquelles il ne pourrait de toute façon pas avoir recours.

Une mise en œuvre efficace de l'article 36, prenant en compte les caractéristiques de l'arme ou de la méthode, ses performances, son impact sur la santé et l'environnement par une approche multidisciplinaire, et, de préférence - bien que l'article 36 ne l'exige pas - une coopération, un échange d'information entre États, permettrait aux États de veiller à ce que leurs forces armées ne violent pas le droit, en utilisant les armes prescrites selon les méthodes prescrites. A cet égard, le faible nombre d'États ayant adopté un mécanisme d'examen type "article 36" laisse songeur…

# "INCAPACITATING CHEMICAL WEAPONS"

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## Abstract

Les "armes chimiques incapacitantes" sont des produits chimiques, dont l'utilisation en tant qu'arme permet un taux de mortalité relativement bas. Elles sont aussi appelées "armes biochimiques" ou "armes chimiques non mortelles". La différence entre un médicament et du poison se distingue en terme de quantité. Jusqu'à présent, il n'a pas été prouvé que la quantité peut être régulée en fonction de certains facteurs accentuant la vulnérabilité de victimes potentielles (âge avancé, poids léger, problèmes de santé préexistants), afin de ne pas entraîner la mort. Aucun agent pharmaceutique existant, lorsqu'il est utilisé comme une arme incapacitante, ne peut garantir un taux de mortalité plus faible que lorsque d'autres armes sont utilisées. Il est donc nécessaire de considérer objectivement les avantages et inconvénients des armes chimiques incapacitantes avant leur déploiement.

Plusieurs questions restent en outre préoccupantes en termes de droit international humanitaire (DIH). Le combattant est-il capable de reconnaître quand un combattant ennemi est incapacité ? En effet, lorsqu'un combattant est blessé, malade ou a l'intention de rendre les armes, il est protégé par le DIH. La question est donc de savoir si le combattant ennemi incapacité peut être considéré comme blessé ou malade, car il n'y a aucun signe extérieur de blessure, ou s'il a l'intention de se rendre, car il sera incapable de montrer le signe d'une telle intention. Le déploiement des armes chimiques incapacitantes est une question qui soulève donc de sérieuses considérations en termes de DIH, non seulement à cause de l'interdiction de l'utilisation d'armes chimiques, mais également parce que la difficulté à établir si un combattant est hors de combat pourrait générer une certaine confusion à propos de la protection juridique de cette nouvelle catégorie de personne vulnérable.

Par ailleurs, les partisans de ces armes proposent qu'elles soient utilisées par des soldats quand l'ennemi se trouve au sein de la population civile ou même, lorsque cela s'avère nécessaire, directement contre des civils. Ceci contredit deux principes essentiels du DIH : les civils doivent être épargnés des attaques délibérées et l'interdiction des attaques qui ne distinguent

pas les objectifs militaires des civils. Se pose également la question de savoir si l'utilisation d'une arme chimique incapacitante serait en conformité avec la règle des droits de l'homme sur l'utilisation légitime et proportionnée de la force.

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The starting point for this discussion is that when weapons are used, they have an impact on health; this is a function of their design.[1] However, weapons can only make this impact on the human body by one or more of a limited number of mechanisms. These are: physical force (penetrating or crushing by impact of blunt objects, projectiles, explosive blast or laceration); changing body chemistry (poison or the deliberate spread of disease); changing body temperature (burning or freezing); or by electromagnetic energy or irradiation (lasers or nuclear irradiation).

Most societies accept that within them, designated actors are permitted to carry weapons for defence or law enforcement. The idea that careful regulation of these capacities for armed violence is necessary for humans' continued successful collaboration and existence is both intuitive and widely accepted. This acceptance, however, extends only to weapons which injure by physical force. Poisoning has always been viewed as abhorrent in warfare and has never been seen as compatible with the idea of reasonable use of force. In other words, there is something fundamental in human psychology, culture and even morality which has generated a general abhorrence of the use of poison. The 1925 Geneva Protocol, the 1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (CWC) are recent codification of this taboo in formal international law (the BWC and the CWC extend the prohibition from use to the development, production, stockpiling and transfer of these weapons). This taboo and the legal regimes which have flowed from it are pertinent to any debate about any weapon which exerts its effect by changing body chemistry.

"Incapacitating chemical weapons" is one of the terms used for chemicals, the use of which as weapons carries a purported low lethality. They are also referred to as "calmatives," "biochemical weapons" or "non-lethal chemical weapons". Many potential agents are already developed for or employed in medical practice for anaesthetic or analgesic purposes. There has even been a call for the pharmaceutical industry to review drugs which have been developed but not marketed because of strong side effects; these side effects could, according to proponents, merit review of the agent in question for use as a weapon.[2] The use of such agents as weapons is

1 Coupland RM. The effect of weapons on health. Lancet 1996 vol 347 pp. 450-451. See also: World Medical Association 48th General Assembly, Statement: Weapons and their Relation to Life and Health 1996.

2 Lakoski JM, Murray WB, Kenny JM. The advantages and limitations of calmatives for use as a non-lethal technique. College of Medicine Applied Research Laboratory of The Pennsylvania State University 2000.

foreseen by proponents for the full spectrum of tactical situations including both police and military activities: that is, from law enforcement to hostage release to international armed conflict. The promotion of the concept of "incapacitating chemical weapons" continues even though most lawyers would argue that because they would fulfil the definition of "toxic chemical," their use in armed conflict would violate the CWC.[3] For the purposes of this article, "incapacitating chemical weapons" does not include "riot control agents" as defined in the CWC.[4]

On 23 October 2002, over 800 people were taken hostage in a Moscow theatre by a group of armed men and women. After two and a half days, the crisis ended when Russian security forces pumped a "fentanyl-based substance" into the theatre through the air conditioning system before entering the building. Approximately 130 hostages and all the hostage-takers died.[5] This event brought the subject of "incapacitating chemical weapons" and indeed all "non-lethal" weapons to the fore.[6]

A number of other pharmaceutical agents have been assessed as having potential for use as "incapacitating chemical weapons". The whole subject has been examined closely by the British Medical Association. In a report entitled "The Use of Drugs as Weapons," the BMA concludes that according to fundamental principles of pharmacology and toxicology, "*the use of drugs as weapons is simply not feasible without generating a significant mortality among the target population*" and that the "*agent whereby people could be incapacitated without risk of*

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3 In the CWC, in article 2.1. 'Chemical weapons' means the following, together or separately:
(a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
(b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
(c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b). In article 2.2. 'Toxic chemical' means: Any chemical which, through its chemical action on life processes, can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere. Article 2.9.d of the CWC gives as one of the "purposes not prohibited by the Convention as "law enforcement and domestic riot control purposes."

4 Riot Control Agent (as defined in Article 2.7 of the 1993 CWC): Any chemical not listed in a Schedule [of the CWC], which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

5 In medical practice, fentanyl is used primarily as an analgesic in both injection and inhalational form. Other related compounds such as remifentanyl, carfentanyl and sufentanyl have been used in veterinary practice for large animal anaesthesia but only by injection. See: Coupland RM. Incapacitating chemical weapons: a year after the Moscow theatre siege. Lancet 2003, Vol 362, p.1346.

6 Fidler DP (2005) The meaning of Moscow: 'Non-lethal' weapons and international law in the early 21st century. *International Review of the Red Cross* **859**: 525-52.

*death in a tactical situation does not exist.*" The report also warns against "*the involvement of healthcare professionals in planning and executing an attack using a drug as a weapon*" especially in relation to calculating the dose the target population might receive and how this dose might be delivered. [7]

In relation to "incapacitating chemical weapons," there is a series of questions which must be answered before they are deployed. These are:

- What will the real lethality be when used?
- What is the speed of onset of incapacitation?
- What are the short, medium and long-term effects?
- How long will the effects last?
- Will the effects be recognisable by health professionals?
- Will the effects be treatable?
- Will the effects be recognisable by the users, e.g. soldiers?

The complexity of assessing the utility of "incapacitating chemical weapons" together with the risks and uncertainties can be demonstrated by considering the first and last of the above questions. Demonstrating the complexity and then unraveling it are logical prerequisites for any legal assessment.

No weapon, whatever its design, carries a zero risk of mortality among the victims (the same could be said for "lethal" weapons; no existing weapon, when used in battle and as a function of its design causes a 100% mortality). The degree of lethality is a function of not only the design of a weapon but also how that weapon is used and the vulnerability of the victims.[8] It is critical to the tactical and legal discussion about this issue that, as a principle of pharmacology, the only difference between a drug and a poison is the dose. This means the effects of an "incapacitating chemical weapon" will also depend on its means of delivery together with the environment in which it is delivered. Furthermore, delivering a rapidly effective dose from a tactical perspective means some people will inevitably receive a dangerous if not lethal dose. There is no equivalent of this phenomenon with respect to weapons which injure by physical force. There exists little information about how the dose might be regulated in a tactical situation. There is no evidence that the dose can be regulated to the degree necessary to ensure it is consistently "non-lethal" in such situations especially given the variation in

7 Nathanson V. (ed.) The Use of Drugs as Weapons: the Concerns and Responsibilities of Healthcare Professionals. London: British Medical Association 2007.

8 Coupland R, Meddings D. Mortality associated with the use of weapons in armed conflict, wartime atrocities and civilian mass shootings: literature review. British Medical Journal 1999 vol. 319, pp.407-410.

vulnerability of potential victims brought by extremes of age, small body mass or pre-existing health problems. Therefore, the findings of the BMA report and the outcome of the Moscow theatre siege would together support the observation that no existing pharmaceutical agent, when used as an incapacitating weapon, would consistently result in a lower lethality than when other weapons are used.

The health-related, tactical and legal issues multiply in complexity if one asks whether a soldier will be able to recognize when an opponent is "incapacitated." This question is the core concern of the ICRC in this area because once combatants become wounded or sick or intend to surrender, they are protected under international humanitarian law. A useful approach is to consider what would happen if the perfect "incapacitating chemical weapon" really existed: that is, an agent which could be deployed without risk of any permanent effect and which can incapacitate its victim by simply eliminating all movement of the body for, approximately 30 minutes from the instant of attack. Putting aside the debate of whether, in armed conflict this would (and it would) constitute use of a chemical weapon, this nonetheless throws up other critical questions pertinent to IHL. Imagine a soldier entering an area in which enemy combatants have been incapacitated; they are standing or lying still with their weapons at hand and with their eyes fixed on the sky. There is limited visibility. How will the attacking soldier, when rushing into attack, know his or her enemy has been incapacitated? The most likely scenario is that the soldier will shoot because he or she is trained to do so reflexively in battle. Being incapacitated could simply serve to increase the vulnerability to attack by conventional weapons. In other words, even the most "effective" and safest "incapacitating chemical" weapons could cause increased mortality because of increased vulnerability. This is not such an unrealistic projection. It is likely that, as a result of any "non-lethal" weapons being used on the battlefield, the battlefield could become more lethal. There are no references to date pertaining to the formidable, if not insurmountable, challenge in terms of training.

An absolute prerequisite for protection under IHL of combatants who are hors de combat is soldiers' ability to recognise when enemy soldiers are wounded, sick or laying down their weapons. But is the incapacitated enemy soldier wounded or sick? There would be no obvious sign of injury; he or she would not be bleeding from a gaping wound. The "sickness" would be difficult to recognise. Does the incapacitated soldier intend to surrender? He or she will be unable to show signs of such an intention to anyone approaching. Therefore, the deployment of "incapacitating chemical weapons" on the battlefield is a question which requires serious consideration in terms of IHL; not only because of the prohibition on use of chemical weapons but also because first, it would not be clear if a combatant was hors de combat; and second, it could generate confusion about the legal protection of this new category of vulnerable person. Another major concern is that the proponents of these weapons propose they be used

by soldiers when the enemy is integrated in the civilian population or even when necessary directly against civilians. Does this not risk undermining two other fundamentals of IHL: that civilians shall be spared from deliberate attack and attacks which do not distinguish between military objectives and civilians are prohibited?

States have an obligation under Article 36 of 1977 Additional Protocol I to the 1949 Geneva Conventions to undertake a review of the legality of any "new weapon, means or method of warfare." There is also the unanswered question of whether use of an "incapacitating chemical weapon" for law enforcement would comply with the human rights rules on the legitimate and proportionate use of force. Therefore, a baseline question for any lawyer undertaking a legal review of an "incapacitating chemical weapon" for use in any context is this: even if the weapon in question is not prohibited and is labelled "non-lethal," have I really thought through *all* the implications of its deployment?

In his "Art of War," written 2000 years ago, Sun Tzu said "those who are not thoroughly aware of the disadvantages in the use of arms cannot be thoroughly aware of the advantages in the use of arms." This paper is a call for objective consideration of both the advantages and the disadvantages of "incapacitating chemical weapons" before they are developed and deployed.

Prof. Hampson expresses her concerns about the way in which weapons reviews are conducted in practice and that, most of the time, a review is not conducted at all. The problem is that the requirement only exists in Protocol I and not in Protocol II. She is also concerned about the test of the weapons that could be done on human persons, especially on children and elderly people.
Commenting on Dr. Coupland's presentation, she says that human rights law could usefully consolidate his approach. Indeed, there is existing case law on the scope of a State's obligations to protect the right to life. For instance, the European Court of Human Rights ruled in a case that there was a breach of the Convention because the gendarmes should have known or thought that the persons in front of them required to be examined medically, even though in fact the medical evidence showed that medics could not do anything for 24 hours, and they just have had to watch because there was a head injury. The point was that, in those circumstances, failing to take the person to a hospital was a violation of the Convention.

Mr Kolanowski thinks it is probably a very good advice to have a legal review even if it is not an obligation for the States. The US case is a good example: they are not party to Protocol I, unfortunately, but they do have a legal review, which is good. It means also that you can do some legal review in a scope that is not encompassed by Protocol I, for example, for non-international armed conflicts or police forces.
Concerning the testing, he highlights the need to have this multidisciplinary approach and to have all the people who might have something to say (legal advisers, technicians, physicians, doctors) around the table. Some of the questions might be answered before weapons are tested. Lots of precautions still have to be taken while discussing and assessing the weapons or the methods.

Dr. Coupland says despite the fact that some lawyers argue that non-lethal chemical weapons might be used for law enforcement, he did not see the question adequately addressed. Is the use of such an agent for law enforcement compatible with the notion of reasonable use of force? Because everything that was written about the reasonable use of force assumed it would be physical force in one way or another. He thinks there is a huge body of research that has to be done there, if States decide to go down this line at the review of the Chemical Weapons Convention. Dr. Coupland also points out the work of the British Medical Association (BMA) on the use of drugs as weapons. Some agents might interfere with cognition, memory, behaviour, fertility... And it can influence the behaviour of a combatant on the field. He cites the example of the "gay bomb" controversy, a kind of perfume that you spray on a person and

which makes him/her irresistibly attractive to any other person. It could have a serious impact if it is diffused on the battlefield.

Prof. Schmitt mentions there was no example, during the last twenty years, of Article 36 legal review by a State that is not a party to the Protocol and which resulted in shutting down a weapon. Generally, the legal reviews always tend to read the same way: this weapon is not indiscriminate by nature and the normal use of the weapon would not violate IHL. The reason is, beyond humanitarian reasons, that it is just not economically feasible to go through the expensive process of developing weapons and to have a legal review leading to a ban of the concerned weapon.

Prof. Sandoz comments upon the fact that the earlier the review is done, the more it is efficient. It is at the beginning of research that you can engage a thought. When a weapon is developed by spending a lot of money and investments, it is more difficult to say it is unlawful. He also mentions the example of the United States where some research was stopped, seeing that it would imply something unlawful, because of Article 36.

Dr. Coupland adds that, generally, people working in the industry have simply no idea of the existence of international law. Therefore, it is possible these developments go quite far in industry before the government is even aware.

Mr Kolanowski says that, as Article 36 exists, people should think before starting to develop and research, that there might be a review afterwards, so they should better do something compatible with the law. If you do not have any legal review mechanism, then he thinks that developers and researchers will be much more imaginative in a way.

Prof. Hampson does not think that this solution meets the needs because when developing the aircraft that will hold a quantity of fluid, there is not yet an intention to use it in armed conflicts. According to her, we need something outside IHL, but similar to Article 36, where there would be a requirement that any weapon developed in your jurisdiction or anything that could be used as a weapon that is developed in one's jurisdiction should be reviewed. Now, States only have to review what they are giving to their armed forces. So, a priori, manufacturers are not subject to review.

*Prof. Hampson asks if the medical profession could do something about the development of "incapacitating weapons".*

Dr Coupland answers that according to the BMA and the World Medical Association, basically, doctors should not be involved in weapons development. Some authors similarly asked to the pharmaceutical industries to review and shelve the drugs which did not pass technical trials because of the side effects, which might be useful when used as a weapon.

# "THE USE OF NOVEL WEAPONS BY ARMED FORCES DURING PEACEKEEPING OR PEACE ENFORCEMENT OPERATIONS"

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## Abstract

Dans les opérations de paix qui se déroulent dans des contextes de conflits armés internationaux où seul le DIH s'applique, il n'y a pas de considérations particulières en matière d'armes et de méthodes et moyens pour faire la guerre. Lorsque le DIH s'applique, conjointement avec le droit international des droits de l'homme (DIDH), c'est au cas par cas que l'on définit comment les règles des deux régimes interagissent. Cela soulève cependant certaines questions, tel que l'applicabilité extraterritoriale des droits de l'homme et la responsabilité des États participant aux opérations de paix.

Au regard du DIDH, l'utilisation de la force, en particulier à des fins létales, est plus limitée que sous le DIH, bien que dans les cas d'applications conjointes, le DIH peut être la lex specialis, particulièrement dans les conflits armés internationaux. Le droit à la vie est protégé par la CEDH et le PIDCP. A ce titre, les armes, les moyens et méthodes de contrainte dont l'utilisation viole automatiquement cette obligation ne doivent pas être utilisés. Il est par ailleurs interdit d'utiliser des armes qui ne peuvent être dirigées vers des objectifs spécifiques, et d'avoir recours à la torture ou à des traitements cruels, inhumains ou dégradants. On pourrait ainsi identifier une obligation des droits de l'homme d'équiper la police ou d'autres forces déployées contre les foules ou les émeutes avec des armes non létales. La Cour européenne des droits de l'homme estime qu'un juste milieu doit être trouvé entre le but poursuivi et les moyens employés pour y parvenir. Cette philosophie se retrouve dans les Principes fondamentaux des Nations Unies sur l'utilisation de la force et des armes à feu pour faire respecter le droit.

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L'Article 36 du Protocole Additionnel I aux Conventions de Genève oblige les États partie à adopter des procédures internes pour soumettre toute nouvelle arme, moyens ou méthodes de guerre qu'il souhaite introduire au sein de ses forces armées, à une révision juridique afin de s'assurer que les obligations du droit international relatives à leur utilisation (DIH ou DIDH) seraient respectées. En examinant la légalité ou l'illégalité de l'utilisation d'une arme particulière, l'autorité de révision examine non seulement le modèle de l'arme, mais également la méthode d'utilisation. Les autorités belges ont par exemple révisé les grenades à gaz lacrymogène et le spray au poivre, considérés comme illégaux.

En matière de DIH, les opérations de paix diffèrent très peu des autres opérations militaires en terme de moyens et méthodes de guerre. A l'inverse, l'applicabilité des droits de l'homme dans les opérations de paix, conjointement ou non avec le DIH, peut entraîner l'application de règles distinctes, pour la plupart restrictives, et notamment sur la force létale intentionnelle et le besoin d'équipements et d'armes permettant une réponse plus proportionnée. Il devient alors à ce stade parfois difficile pour les forces sur le terrain de savoir quand certaines armes peuvent être utilisées, notamment dans les cas où les droits de l'homme requièrent leur utilisation, mais où le DIH les interdit comme moyens pour faire la guerre.

## 1. Introduction

This contribution attempts to briefly sketch the legal framework for the use of new weapons, and indeed weapons more generally, by armed forces in peace operations. "Peace operations" is used as an overarching term that includes operations ranging from consensual peacekeeping in a permissive environment to peace enforcement in a hostile environment.[1]

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, any State Party to Additional Protocol I to the 1949 Geneva Conventions 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 that State Party* (Article 36 of this Protocol, emphasis added). This broad wording can be read as covering the introduction of new weapons (for the sake of convenience, we will use this expression as also covering new methods), irrespective of the kind of operations they will be used in, including peace operations.

1 This term includes UN peacekeeping operations, NATO 'non Article V' or 'crisis response operations' and the EU crisis management tasks (see Article 17(2) EU Treaty). It is also used in a broad sense in the Brahimi report (UN Doc. A/55/305-S/2000/809, 17 August 2000, §§ 10 et seq.).

Before a State decides to equip some of its military personnel with certain new weapons, it should therefore be sure that the (normal or expected) use of these weapons is not prohibited or restricted. If such use would go against that State's national law, or against its international law obligations, it should not equip its military personnel with these weapons, or it should impose such restrictions as national and/or international law requires.

## 2. Applicable International Law

The use of weapons, means or methods of warfare can be prohibited or restricted by rules of international law, including especially international humanitarian law (IHL) and international human rights law (HRL). The legal framework for peace operations is complex and will vary from case to case, including as regards the applicability of, and interaction between, IHL and HRL. It is clear that where IHL applies, the legal regime is quite different from a consensual post-conflict peacekeeping operation not amounting to participation in an armed conflict to which IHL does not apply. As a specific example, one can mention the rules on crowd and riot control agents (see infra).

### 2.1. International Humanitarian Law

In peace operations that are only subject to IHL, there is no particular consideration that sets them apart in respect of weapons and means and methods of combat, although where such operations qualify as non-international armed conflicts (as is the case of ISAF) questions over what weapons are prohibited in such conflicts will also be relevant.[2] In contrast, in peace operations to which HRL applies, whether or not in combination with IHL, this may entail different restrictions. The focus of this contribution will be on those differences.

While the applicability of IHL to peace operations is well researched, it is not free from controversy. Three general remarks may suffice on this point for the purpose of this paper. First, IHL may apply to a peace operation, even one mandated by the UN Security Council (UNSC) (subject to some derogations, see below), but does not always apply to such operations. It is therefore submitted that the *UN Secretary-General Bulletin on Observance by United Nations forces of international humanitarian law*[3] is correct in endorsing the applicability of (certain rules of) IHL to UN forces "*when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement*", but that it errs in stating that "*accordingly*" these rules also apply "*in peacekeeping operations when the*

2 As stated in the Tadic decision of the ICTY in relation to prohibited means and methods of warfare, "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife" (2 October 1995, § 119). See also the extension of the CCW to non international armed conflicts but note the lack of a war crimes provision on weapons in non international armed conflicts in the ICC Statute.

3 UN Doc. ST/SGB/1999/13, 6 August 1999.

*use of force is permitted in self-defence*". Second, while the UNSC may authorise a derogation from IHL, except for rules which have a *ius cogens* character,[4] it is unlikely to authorise a derogation from the rules on the means and methods of warfare and has not done so, so far. Third, where IHL applies concurrently with human rights law,[5] it must be considered on a case-by-case basis how the rules of both regimes interact.[6] We would argue that it cannot be determined in a general manner, neither according to the kind of conflict, nor according to the specific right, which rules prevail, For example, in occupations IHL may be *lex specialis* for combat operations against remaining pockets of resistance, whereas HRL may be *lex specialis* in crowd and riot control.

## 2.2. International Human Rights Law

### 2.2.1. Applicability

To what extent are military forces acting in foreign countries in peace operations subject to the obligations of international human rights law? This question has been and remains debated. In addition to the relationship with IHL briefly discussed above, the debate primarily concerns the extraterritorial applicability of human rights. In addition, in the context of peace operations conducted by international organisations, the question of attribution and responsibility arises: are the participating States and/or the organisation responsible? We can only offer some short key reflections here.

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4 It is generally acknowledged that by virtue of Articles 103 and 25 UN Charter, the UNSC may derogate from treaties. The ICJ considered in its Order of 14 April 1992 in the Lockerbie cases (Libya v. UK & Libya v. US), respectively at § 39 and § 42, that the obligations under these provisions extended prima facie to the obligations under Resolution 748 (1992) and that this Resolution prevailed prima facie over the Montreal Convention. It is also mostly held that the Security Council may derogate from customary international law (e.g. R. Bernhardt, 'Article 103', in B. Simma (ed.), The Charter of the United Nations. A Commentary, OUP, 2002 (2nd ed.), 1298-1299). However, neither rule applies to ius cogens; see the separate opinion of Judge Lauterpacht to the ICJ's Order in Application of the Convention on the Prevention and Punishment of the Crime of Genocide of 13 September 1993, §§ 99-104 and Court of First Instance (ECJ), Cases T-306/01, Yusuf, §§ 277-282, and T-315/01, Kadi, §§ 226-231.

5 It is submitted that human rights also apply in situations of armed conflict or occupation, albeit subject to certain derogations and restrictions and only to the extent that the relevant human rights instruments apply (extraterritorially – *see infra*). However, this issue is not developed in detail in this contribution.

6 Compare e.g. ICJ, advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996 (§ 25) and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004 (§§ 104-106); IAComHR, *Juan Carlos Abella v. Argentina*, 18 November 1997, §§ 157-171; HRC, General Comment 31 (21 April 2004), § 11; article 15(2) ECHR (which permits exceptions to the right to life "*resulting from lawful acts of war*", which logically refers to the LOAC) and ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia* and *Isayeva v. Russia*, both 24 February 2005.

First, as to extraterritoriality, despite opposition from a few States (e.g. the USA), there seems to be increasing recognition, notably in international jurisprudence, that human rights apply extraterritorially in cases of overall control over territory or over persons. The situation with regard to lesser forms of control is unclear at present. However, it is submitted that the better view is that in such cases a gradual application of those human rights affected by a more limited exercise of jurisdiction would be appropriate, despite its rejection by the European Court of Human Rights (ECtHR) in Bankovic.[7] In contrast, the Human Rights Committee (HRC) has accepted such a gradual approach.[8]

Second, this applicability should take into account the particular circumstances of peace operations, including any effect of UNSC mandates, the relationship with IHL (including in occupations the principle of respect for local law subject to limited exceptions) and any derogation. In respect of the latter, it is submitted that, despite the views to the contrary by many scholars, derogations may be invoked extraterritorially with regard to threats to the life of the host nation. As the European Commission for Human Rights stated: "Turkish armed forces in Cyprus brought any other persons or forces there 'within the jurisdiction' of Turkey, in the sense of Article 1 ... *'to the extent that they exercise control over such forces or property' ... It follows that, to the same extent, Turkey was [...] competent ratione loci for any measures of derogation under Article 15*".[9]

Third, there may be a caveat with regard to regional human rights instruments that may to some extent contain elements that are not universally shared (e.g. the difficulty of applying the European Convention on Human Rights (ECHR) in Afghanistan). However, this could be taken into account by a gradual approach also as to the extent of the rights applicable extraterritorially.

Fourth, as to the issue of responsibility, there seem to be divergent views between the HRC, which appears to regard sending States as responsible,[10] and the ECtHR, which has very recently adopted a ruling in the *Behrami & Saramati* cases that largely exempts the participating States. The latter decision merits some comments here.

On 31 May 2007, the Grand Chamber of the ECtHR declared as inadmissible the applications brought in the joined cases *Behrami and Behrami* v. France (No. 71412/01) and *Saramati v.*

7 *Vlastimir and Borka Bankovic´ and Others v. Belgium, and others*, 12 December 2001.

8 *Ibrahim Gueye et al. v. France*, No. 196/1985, 6 April 1989, § 9.4: "*the authors are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights*".

9 *Cyprus v. Turkey*, 4 *E.H.R.R.* 1982, pp. 482-582 § 525.

10 General Comment 31, *supra* note 6, § 10.

*France, Germany and Norway* (No. 78166/01), both concerning conduct of personnel of States Parties in the international presence in Kosovo (in *Behrami and Behrami* an alleged failure to take positive measures to protect life, namely to mark and/or defuse un-detonated cluster bombs, and in *Saramati* the detention of a person pursuant to a detention order by the KFOR Commander between 13 July 2001 and 26 January 2002). The Court considered that the question raised by the cases was, less whether the States concerned exercised extraterritorial jurisdiction in Kosovo but, far more centrally, whether the ECtHR was competent to examine under the ECHR those States' contribution to the civil and security presence exercising control of Kosovo (§§ 69-72). It considered that issuing detention orders fell within the security mandate of KFOR and the supervision of de-mining within the mandate of UNMIK and that the impugned actions could, in principle, be attributed to the UN because both acted under a delegated UN Security Council (UNSC) Chapter VII mandate (§§ 212-143). The Court then held that it was not competent to review the acts of the States in question carried out on behalf of the UN, interpreting the Convention in the light of other international law applicable between its Contracting Parties, especially the UN Charter. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter were fundamental to the UN's mission to secure international peace and security 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 Parties which were covered by UNSC Resolutions and occurred prior to or in the course of such missions, to the scrutiny of the Court. That reasoning equally applied to voluntary acts of the States concerned such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops: such acts might not be obligations flowing from UN membership but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and by the UN of its imperative peace and security aim (§§ 144-152). The Court distinguished the present cases from its earlier *Bosphorus* judgment[11] in that the impugned conduct of KFOR and UNMIK could not be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities and claimed there was a fundamental distinction between the international organisation/international cooperation at issue in the *Bosphorus* case and those at issue in the present cases (§§ 145 and 150-151).

However, the attribution of KFOR conduct to the UN seems questionable given that such attribution is generally held to require effective control and that such control is highly questionable in this case.[12] Also, the Court's apparent broad relinquishing of jurisdiction over any State act related to the UN's (Chapter VII) peace and security functions also seems to be at variance

11 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005.

12 See F. Naert, 'ECtHR Dismisses Kosovo Mission Cases', *ISMLLW Newsletter* 2007/2, http://home.scarlet.be/~ismllw/publication/bulletin_info.htm, pp. 10-12.

with the more limited leeway accepted by the EU's Court of Justice in some of its cases concerning the implementation of UN sanctions.13 While some of the Court's broad arguments do not seem very convincing, its conclusion in respect of the specific conduct at issue may well be justified in that it occurred pursuant to a Chapter VII UNSC mandate and may indeed be considered as an exercise of international jurisdiction (arguably by NATO for KFOR and by the UN for UNMIK) over persons/territory that was not transferred by States Parties who previously exercised such jurisdiction. In any event, while the judgment gives States considerable latitude in peace operations, it should not be an excuse for ignoring human rights to the detriment of the rule of law which such missions usually aim to promote.

### 2.2.2. Relevant Rules and Implications

Under the provisions of human rights law, the use of force, in particular deadly force, is more limited than under IHL, although in cases of concurrent application, IHL may be the *lex specialis*, especially as regards combat actions in international armed conflicts (see also supra). In non-international armed conflicts, where the notion of combatants is not defined, this has been called into question following the ECtHR's *Isayeva* judgments, although these are arguably not conclusive given that Russia relied on neither a derogation nor IHL. In particular, any use of force needs to be necessary, minimal and proportionate[14] for limited purposes and intentional lethal force is essentially limited to the protection of other lives. For example, Article 2 (right to life) ECHR reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court [...].
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a. in defence of any person from unlawful violence;
   b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 15 ECHR adds death resulting from lawful acts of war. Article 6.1 of the 1966 International Covenant on Civil and Political Rights is less precise in its terms and merely states that "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*".

Weapons, means or methods of constraint, the use of which automatically violates this obligation, shall therefore not be used. Furthermore it is forbidden to use weapons, means or

13 I.e. for obligations only, see Case T-228/02, *Organisation des Modjahedines du people d'Iran*, 12 December 2006.

14 *Isayeva, Yusupova and Bazayeva v. Russia,* 24 February 2005, §§ 195-200.

methods of constraint, which cannot be directed at specific objectives[15] and to use torture and cruel, degrading or inhumane treatment, so that weapons or methods the use of which automatically implies such treatment are also outlawed. Thus, the weapons restrictions under human rights law are in part similar to those under IHL but in part also more stringent.

One can also identify a human rights law obligation to equip police or other forces deployed against crowds and riots with non-lethal weapons. When dealing with civilians, non-lethal weapons make a gradual response possible and without them an execution of the mission could lead to a violation of human rights law. For example, in *Gülec vs Turkey* the ECtHR stated:

- a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water canon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because … at the material time disorder could have been expected.[16]

The same philosophy underlay the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:[17]

- Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.
- The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

Thus the use of alternative, less lethal means than firearms is supported and may even be required by human rights law. Nevertheless, on 3 July 2007, the UN Police Chief in Kosovo,

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15 *Isayeva v. Russia*, 24 February 2005, § 191: "*The massive use of indiscriminate weapons … cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents*".

16 27 July 1998, § 71.

17 Havana, 27 August - 7 September 1990.

Mr. Monk, banned the use of rubber bullets by any police unit in Kosovo, adding that Member States who contribute officers are also being consulted about outlawing their use in all other peacekeeping operations.[18] The measure follows two deaths resulting from the use of such bullets in crowd and riot control in clashes that occurred in Pristina on 10 February 2007. This reaction may be questioned and better guidance on the use of this weapon, also recommended in the report, seems a more appropriate response.

## 3. Relevant Examples from Belgium's Legal Reviews

According to a number of legal opinions, the obligation contained in Article 36 of Additional Protocol I implies that a State Party to the Protocol must adopt internal procedures to submit any new weapon, means or method of warfare that it wants to introduce within its armed forces, to a legal review, in order to make sure that international law obligations regarding their use shall always be identified in advance.[19] In determining the legality or illegality of the use of a particular weapon, the reviewing authority must examine not only the weapon's design (the "means" of warfare) but also how it is to be used (the "method" of warfare), bearing in mind that the weapon's effects will result from a combination of its design *and* the manner in which it is to be used.[20]

For Belgium, the Chief of Defence issued these internal procedures by General Order – J/836 of 18 July 2002. This General Order set up the "Committee for the legal review of new weapons", a multidisciplinary body presided over by a lawyer (from the Ministry of Defence's DG Legal Support & Mediation) and composed of experts in various domains (i.e. operational, defence policy, technical and medical). Whenever the Belgian Defence studies, develops, acquires or adopts a new weapon, means or method of warfare, the person in charge of the development of the programme has to submit this weapon, means or method as soon as possible and always before acquisition or adoption to the Committee for legal review. A few weapons which were reviewed by the Belgian Committee illustrate that both IHL and HRL considerations are taken into account:

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18 See UN press releases of 3 July 2007 and http://www.unmikonline.org/dpi/transcripts.nsf/0/084a83c8371e7febc125730d002a45e5/$file/transcript%20of%20press%20briefing%20by%20special%20prosecutor%20robert%20dean%20-%2002%20july%202007.pdf

19 See J. De Preux, *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, Nijhoff, 1986, p. 427; D.A. Loye, 'Non-lethal capabilities and international humanitarian law', in *Non-lethal Capabilities Facing Emerging Threats*, Fraunhofer-Institut für Chemische Technologie, 2003, pp. 3-7. See also A. Cassese, 'Means of Warfare: the Present and the Emerging Law', *R.B.D.I.* 1976, p. 158.

20 ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, 2007, p. 34.

### 3.1. Tear Gas Grenades (CS gas)

A tear gas grenade filled with CS gas is a non-lethal weapon that will emit CS gas to keep opponents at a distance or to drive them back. Tear gas grenades filled with CN gas, CR gas or DM gas, exist as well. In comparison with CS gas that is used in the normal and usual manner: it is harder to remove CN gas (though CS gas also requires a special decontamination); CN gas is more toxic; CR gas and DM gas can be deadly and CN gas, CR gas and DM gas are more harmful for human beings.

Today, most law enforcement detachments only use CS–type tear gas when controlling crowds and riots, because of its less harmful effects. It is a very common and generally accepted crowd and riot control means. In principle, the CS tear gas grenade does not cause permanent disablement. However, it should not be used in closed rooms. The Belgian Committee concluded that by virtue of Article I.5 of the Chemical Weapons Convention, the use of chemical riot control agents, such as CS gas grenades, is prohibited as a means of warfare and use of CS gas against the enemy would be illegal. However, the Committee found that the normal and expected use is not prohibited as a form of riot control, e.g. within the framework of a peacekeeping operation or even within the framework of a military occupation. The Committee stated that whenever executing such a mission, the use of force needs to be proportionate[21]. Making CS gas available to the military, could contribute to proportionate action when executing operations that are not conducted against the enemy.

### 3.2. Pepper Spray

Pepper spray is a non-lethal weapon, in the form of a canister that when used, releases OC gas (a derivative of cayenne pepper) and thereby incapacitates the opponent temporarily. In principle, pepper spray does not cause permanent disablement. It does not necessitate decontamination. Pepper spray is a common self-defence means. Due to its aggressive effect (in comparison with CS gas), it is less suitable for (proportional) riot control. The offensive use of pepper spray to control riots often appears to be seen as disproportionate and should therefore be avoided[22].

The Belgian Committee concluded that by virtue of the same Article I.5 of the Chemical Weapons Convention, the use of pepper spray is prohibited as a means of warfare. Use of OC gas against the enemy would be illegal. Basing itself on concerns cited in the UN Committee

21 The principle of proportionality (between the military advantage of an attack and the collateral damage) in an international armed conflict is not meant here. What is meant is the principle of proportionality that counts for any (other) use of force and that concerns the relation between the force used against the target and the importance of the mission or the behaviour of the target.

22 E.g. UN Press Release HR/4503, 24 November 2000 ("*Concern was cited over allegations of inappropriate use of pepper spray and force by police authorities to break up demonstrations and restore order*").

against Torture, the Belgian Committee suggested excluding the possibility of offensive use of pepper spray to break up demonstrations and restore order, for example, during a peacekeeping operation.

## 4. Non-lethal Weapons

In an international armed conflict, there is no legal obligation to use non-lethal weapons against enemy combatants. Combatants are authorised to eliminate (kill, wound or capture) enemy combatants with the lowest cost of personnel and equipment, as long as they comply with IHL. To kill or wound an enemy combatant in combat with a traditional firearm is, as such, not forbidden by IHL.

Nevertheless, for policy reasons decision-makers may even in situations of armed conflict prefer to resort to non-lethal capabilities rather than using lethal force against the enemy. Furthermore, in case of attack against a military objective, the IHL rule of proportionality may in some circumstances only be respected through the use of non-lethal weapons, e.g. when a civilian power plant is attacked because electricity is also used by the enemy. Since in an urban society, the lack of electricity greatly affects the civilian population, it is recommended to search for alternatives which affect the local population less but give similar results, such as temporary disturbance of the plant with non-lethal weapons.

In terms of legal obligations, making non-lethal weapons available to the military, could also contribute to proportionate action in operations which may be governed by international HRL (see above), in particular in non-combat tasks.

However, the wide range of new non-lethal weapons leads to debates. Many non-lethal weapons raise legal questions. For each of them, a rigorous legal review process with a multidisciplinary approach is necessary to come to a conclusion as to possible restrictions or prohibitions on their use in armed conflict and peacekeeping. For example, with respect to active denial systems based on microwave technology: what are the effects on human health in the short and long term? What is the influence of sweat, dirt, make up, glasses, alcohol, drugs, etc.? What happens if a paratrooper lands in the middle of a larger access denial zone? Is there a way to discriminate between innocent persons (e.g. children looking for their ball, lost deer hunters, etc.) and real intruders?

## 5. Conclusions and Final Reflections

From an IHL perspective, peace operations differ very little from other military operations with regard to the means and methods of warfare.

In contrast, the applicability of human rights in peace operations, whether or not concurrently with IHL, may entail a number of distinct rules. It seems that these are most reflected in strong restrictions on especially intentional lethal force and the requirement of equipment and weapons that permit a more proportionate response, in some cases even where such equipment or weapons would be contrary to IHL if used as a method of warfare, as is the case for riot control agents.

While it may not be too difficult to provide such equipment, as well as the accompanying training and instructions, it may be quite challenging to define in comprehensible terms for soldiers and commanders on the ground when it must or may not be used, notably in cases where HRL requires their use but IHL prohibits it as a means of warfare. For instance, how does one distinguish warfare from law and order tasks in an operation such as ISAF?

# "DIRECTED ENERGY WEAPONS"

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## Abstract

Des avancées techniques importantes ont fait apparaître une nouvelle catégories d'armes pouvant être utilisées lors de conflits armés, à des fins tactiques ou contre des personnes: les armes à énergie dirigée. Cette présentation étudie en détail trois exemples d'armes, actuellement développées aux Etats-Unis, et dont l'utilisation pourrait être problématique en matière de DIH.

*L'Advanced Tactical Laser* (nouvelle génération d'armes à laser tactiques) est un laser chimique à impulsion qui produit des ondes de choc et entraîne une incapacité des personnes. Il permet d'enflammer des textiles en un dixième de seconde, et de traverser 1mm de métal en une seconde. Utilisé à des fins militaires, ce système permet de mettre hors service les lignes de communications, les antennes radio et TV, les satellites, et même des véhicules particuliers. Le rayon de cette arme ne se propage cependant pas à travers le brouillard, les nuages ou la pluie. Cette arme est considérée comme létale. Utilisé lors de conflits armés, ce serait un nouveau moyen de faire la guerre, mais a priori pas interdit pour cause de maux superflus. Il permet en outre un tir plus ciblé que les moyens habituels de recours à la force à une distance de plusieurs kilomètres, tels que l'artillerie ou les bombes, et diminuerait ainsi les dommages collatéraux.

Le *Pulsed Energy Projectile* (projectile à énergie d'impulsion) utilise l'émission d'impulsions électromagnétiques générées par un laser qui, au contact de la cible, évaporent la surface et crée une petite quantité de plasma explosif. Il en résulte une onde de choc sonore qui assomme la cible, tandis que l'impulsion électromagnétique affecte les cellules nerveuses et cause une sensation de douleur intense. Lors de combats, ces armes pourront être utilisées contre des matériaux et des personnes, et assurer certaines fonctions de sécurité: contrôle de la foule, facilité de protection, opérations militaires autres que la guerre, opérations militaires en milieu urbain et application du droit. Cette arme est considérée comme létale. Si elle est utilisée lors de conflits armés, ce serait un nouveau moyen de faire la guerre. Dans le cas où la peau est touchée, on peut se demander si cela constitue des maux superflus.

L'*Active Denial System* (systèmes actifs d'interdiction d'accès) émet un faisceau d'ondes électromagnétiques vers un sujet. Quand les ondes touchent la peau, l'énergie des ondes se transforme en chaleur au contact des molécules d'eau de la peau, causant ainsi une sensation de brûlure douloureuse. Si cette arme est utilisée contre des combattants, c'est un nouveau moyen de faire la guerre, qui ne serait pas interdit pour cause de maux superflus. C'est une arme non létale s'il est possible d'empêcher techniquement que la température de la peau touchée ne dépasse pas 55-60°C).

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In this presentation, I will first tell you a little about the categories of directed energy weapons. Then I will discuss the three most prominent examples important today: Advanced Tactical Laser, Pulsed Energy Projectile and Active Denial System, all under development in the USA. I have studied these concepts in a research project that was funded by the German Foundation for Peace Research (DSF).[1]

## Categories

Concerning the categories of directed energy weapons, there is the possibility to use microwaves, lasers and principally also elementary particles. The first discussion about directed energy weapons was mostly for the use as ballistic-missile defence or space weapon. Many of you will remember the US Strategic Defence Initiative of the 1980s. Because of several limitations and problems of these kinds of weapons, none of them has really been deployed yet. There are still a few projects in particular in the US which spends by far the most money on military research and development in the world (2/3 of the world expenditure), mainly the Air-Borne

## Laser and the Space-Based Laser.

I shall not talk about those here because you are more interested in battle use or use in a peace context. I will also not speak much about high-power microwave weapons: they have been developed from electronic warfare, they are used against electronics, they may in the future be used against aircraft, maybe also against satellites and they are being discussed in particular in a non-lethal weapons context, maybe for law enforcement, to stop vehicles and small boats. Also in the works is a tactical laser weapon to be used against artillery rockets.

1 For more information and references see J. Altmann, Millimetre Waves, Lasers, Acoustics For Non-Lethal Weapons? Physics Analyses and Inferences, Osnabrück: Deutsche Stiftung Friedensforschung, to appear 2008.

You know of course that blinding laser weapons have been banned by the 1995 Protocol IV to the 1980 Convention. Even after the adoption of that Protocol, there is still some research and development going on for dazzling lasers that do not carry a danger of permanent blinding, which is not that easy.

I will look more into directed energy weapons for tactical use or against people; most of them are being developed under the rubric of so-called non-lethal weapons.

## Advanced Tactical Laser (ATL)

This is a chemical laser working with energy transfer from oxygen to iodine atoms. The wavelength is in the near infrared, at 1.3 micrometers, where there is an "atmospheric window" so there is no big absorption by the atmosphere. The weapon is to be carried by a transport aircraft, maybe later also by a land vehicle. The beam power has been increased over the years from something like 70 to about 300 kW. The claim is that there could be a 10 cm focus from many km, let us say 10 or even 15 km. The total fuel on board would be sufficient for about 100 seconds of total beam time and the system has grown to 20 tonnes of weight in a few modules. If one looks at the maximum intensity, if you focus 300 kW on such an area, it is about 100 times the power of a stove plate on about the same radius. If one wants to ignite textiles or wood, it takes around or less than a tenth of a second. And if one wants to melt through 1 mm of metal, it takes around or a little below one second.

The military functions of this system that have been mentioned are: disabling communication lines, radio and TV antennas, satellite dishes, radar dishes, breaking electrical power lines and transformers, disabling individual vehicles (maybe by attacking the tyres or setting the canvas coverings on fire, maybe even melting through engine components) and creating various forms of distractions by setting small fires.

Besides that, there is also the possible use as defence either on land against cruise missiles or on board of ships against sea-skimming missiles.
However, one has to note that the ATL beam would not propagate through fog, clouds or rain. There is also the problem that with strong air turbulence one cannot achieve a focus of 10 cm over 10 or more km.

In a scenario that has been brought forward by the producer, Boeing, there is a picture with a group of captives or hostages that are held by a military unit, accompanied by a column of military vehicles. The ATL aircraft pops up at 7 km distance behind a mountain ridge, takes a short look at the scene, goes down again to be protected and computes which are the targets

for attack. Then it pops up again and shoots for 0.2 or 0.5 seconds at each of these aimpoints: tyres, antennas, mortars, soldiers ... About 70 targets are attacked in a total of 40 s. Then, that is the suggestion, the operation is successful.

Of course, one can pose several questions to this scenario. Is it possible to actually avoid injury to the captives held there? If one explodes a tyre, a fuel tank or a munition, this can hit persons at 5 metres distance and kill or injure them. The beam can hit a different target than the intended one if there is inaccurate aiming or in case of fluctuations in the atmosphere or in the beam-directing mirror. And the operational questions are: what happens after this less than one-minute attack? The military unit may be surprised, having lost a few people and antennas, but would they just give up? If they are really bent on keeping the refugees under their control, they can take cover, they can use them as human shields, or they can just kill them as a reprisal. So in order to effectively do something against the military unit, probably physical presence and combat on the ground will be necessary anyway, with all the traditional dangers and risks to the hostages. The laser action from many km distance may add an additional layer of applying force selectively, but without real change of the situation.

My remarks on the ATL are: In some cases this weapon has been promoted as a non-lethal one. This is clearly not true. This is a lethal weapon. It is probably not adaptable for police-like operations. It has a limited number of shots, automatic targeting is required because of the very short time one needs for each individual target, one needs a clear line of sight, the propagation through haze and dust is limited and collateral damage is nevertheless possible at close distance to a target.

My conclusions on the ATL are; if this system would be used in armed conflict against combatants, it would indeed be a new means of warfare, but I do not see why it would be a priori prohibited because it would cause unnecessary suffering or superfluous injury. Heating people or burning people or materiel is generally accepted in war (see flamethrowers). Indeed, it might allow much more discriminate destruction than the usual means of applying force at a distance of several kilometres like artillery, guided missiles or bombs. There could be less collateral damage. This of course holds only if focused propagation through the atmosphere is possible and if the weapon is used appropriately. However, it has limited capabilities, it is heavy, it is expensive and will augment and not replace existing weapons. And – this is a side remark in this international humanitarian law context but nevertheless we have to keep it in mind – it could form a precedent for the introduction of high-energy laser weapons against ballistic missiles or satellites with the accompanying destabilisation. If several armed forces would command laser weapons like this, they could also attack each other on very short notice which would add further destabilisation.

## Pulsed Energy Projectile (PEP)

This is a less known project, which also uses a chemical laser, here working with deuterium fluoride (DF). It emits high-intensity pulses in the mid-infrared, around 3.8 micrometers wavelength. When the pulses impinge on matter, the uppermost layer is vaporized fast and the vapour heated further, producing plasma in the air where nearly all laser energy is absorbed. If the heating is strong enough, a shock wave develops, exerting a pressure pulse on the target which could act similar to an impact round, with an intended range of 1-2 km. The interactions with the target are ablation and mechanical impulse.
H. Moore from the Picatinny Arsenal, NJ, wrote that one pulse is not very strong but that "*pulse 'trains' can literally chew through target material*", without burning it. The intended range of this system would be one to two km. A DF laser was developed in the early 90's, achieving around 300 J pulse energy and 3,5 µs duration. For tests with higher energy, a CO2 laser (900 J, 33 µs) was used.

The PEP is intended to be applied in future combat systems against material and against personnel. It could be used as a blunt-trauma weapon or for suppression, whatever that means. The author himself stated that target effects can be tuned from less than lethal to lethal. The security-force functions that have been discussed here are area denial, crowd control, facility protection, suppression, military operations other than war, military operations on urban terrain and law enforcement.
I have done a little physics study of the blunt impact that would be produced by such a system and have compared it with the usual impact munitions by mechanical impulse. This impulse on a target subject from one pulse is not very impressive; to be comparable to an impact round one would need many pulses.

My remarks on the PEP are the following ones: It is clearly a lethal weapon. If bare skin is hit by many pulses, it is ablated to considerable depth and one has to expect ugly wounds. It would probably rather be used for combat than for law enforcement. And again, because it uses an (infrared) light beam, the propagation through haze or dust is limited.

My conclusions on the PEP are; if it is used in armed conflict against combatants, it would be a new means of warfare. If the battle dress is hit, it does not produce a very strong mechanical effect. But if skin is hit, the question whether this would constitute unnecessary suffering or superfluous injury is at least warranted to be looked at in more detail. Nevertheless, such a system would have limited capabilities, it would be heavy and expensive and again it would augment, not replace existing weapons. It would be more practical in a military sense, if the gas laser could be replaced by solid-state laser.

I should mention as a side remark that there is a new concept in research to emit very short pulses of lasers that then produce a pulsed electromagnetic field in the plasma in front of the body that directly stimulates the pain receptors in the skin or acts incapacitating on nerves and muscles. This fundamental research is being done in a few places in the United States, among others at the University of Florida and Old Dominion University in Virginia. This needs to be followed up and looked at more closely in a military-technology assessment.

## Active Denial System (ADS)

The idea of this weapon is to emit millimetre waves that have shorter wavelengths than microwaves but still not visible or infrared. The wavelength is 3.2 mm in this case where again the atmosphere is quite transparent. The ADS has been under research and development since 1994. It was secret until 2001; about 50 million US$ have been spent in the US until 2005. A first model 0 was constructed in a container, model 1 is battery-powered, mounted in a wheeled vehicle. A 2 m wide antenna produces a beam that stays at this width for many hundreds of metres, decrease of intensity (power per beam area) starts only at such a distance.

On the ADS, a considerable amount of information is available. There are even scientific publications on the effects of this type of radiation, coming from the Air Force Research Laboratory, Human Effects Directorate, Brooks Texas. The penetration depth of this wavelength in human skin is about 0,4 mm. It is the water in the skin that absorbs this energy very fast and very strongly. In the normal microwave oven, they use 12 cm wavelength, 40 times longer, penetrating several cm. The microwave does not heat only the skin of the chicken but the chicken in all its depth, the whole volume.

When skin is heated, the pain threshold is reached at about 10 °C increase (skin temperature 44 °C) and the maximum pain occurs at about 20 °C increase; further heating does not produce more pain, but increases burn injury. In the medical literature, one finds that if more than 20% of body surface has burns of second or third degree, this is a life-threatening condition and intensive care is needed.

There have been quite a few tests with human volunteers mostly from the US military: 600 exposed subjects and more than 10,000 exposures. The experience was that the test subjects could not stand the pain to the threshold of skin damage. Only a few were able to stand it, to get some reddening or very small blisters. However there was one case, at least known to the public, where one person got a second degree burn from an overdose and had to be hospitalized for two days.

In order to get good press, there was a media event on 24 January 2007 where the ADS was explained and demonstrated to journalists. The news release of that event from the Department of Defense said that "*the Active Denial System works by emitting a directed beam of millimetre wave energy, which creates an intolerable heating sensation on an adversary's skin, causing an instantaneous repel effect without causing injury*". This was echoed and reported in the press. The BBC for instance said "*the beam has a reach of up to 500 metres (550 yards), much further than existing non-lethal weapons like rubber bullets. It can penetrate clothes, suddenly heating up the skin of anyone in its path to 50°C*". Now the question is what does it make stop at 50 degrees? First, I would like to mention that several important specifications have not been published: the beam power, the beam widening, safety precautions against overdose and the rules of engagement. I have used a skin-heating model that has been published in the context of research for the ADS. It was validated with the first three seconds at the lowest intensity. My results show the increase of skin temperature versus time intensities from 1 to 8 W/cm2. With the maximum intensity which you can get from this system, around 8 W/cm2, crossing the pain maximum and going to the injurious regime occurs within less than a second.

There are software controls of the power and duration of that beam. But the operator can re-trigger which leads to the possibility of re-targeting the same person again, producing injurious temperatures. I should also mention that household aluminium foil can shield against this radiation (however, to retain vision, a very fine-grained mesh in front of the eyes would be needed). The plans are to deploy that system around 2010.

These are my remarks on the ADS: The fundamental aspects of the effects of this weapon are published in a scientific way. There has been some publicity of the weapon. The details of the system have not been disclosed, however. The question is, how would one guarantee that the temperature stays at 50°C and does not rise above 55 °C so that no burn injury occurs? Is it obvious for somebody hit by this non-visible beam where to escape? If there is a dense crowd, what may happen if the first row is just unable to withdraw?

My conclusions on the ADS are: If it is used against combatants, it is a new means of warfare, it is not a priori prohibited because of unnecessary suffering or superfluous injury. However, its use in armed conflict is improbable: it is a large and slow target; it needs line-of-sight propagation, so it has to expose itself. There is no easy cover; it is vulnerable to all kinds of light weapons. It would be non-lethal beyond any doubt only if technical limiters reliably prevent more than 55-60 °C skin temperature. The judgement on the morality and human-rights situation depends on the scenario: it makes a difference if somebody intrudes illegally into a nuclear-weapons storage site, if a small boat after warning continues towards a navy ship, or if one wants to repel demonstrators on a public road.

## General Conclusion

The Advanced Tactical Laser works by fast heating to burning or melting, it is a lethal weapon; the effect and range depend on the weather. The Pulsed Energy Projectile has little mechanical effect from one pulse but is a lethal weapon with many pulses; the effect and range also depend on the weather. The Active Denial System works by applying heat pain, it is mostly non-lethal.

Use of all three weapons can be problematic either under international humanitarian law or within the context of human rights. For two of the concepts, there is only very restricted information. So we need independent academic research (the results of my research on these systems will be published soon)1. In any case, attention of the human-rights community and of the International Committee of the Red Cross is more than warranted.

Answering a question related to the possibility to set limits in using direct energy weapons (DEW), Dr. Altmann says it would be technically difficult in the active denial system (ADS) case, but it might be possible, for instance, in cases where the operator could not reengage a specific subject before 15 seconds of cooling time. There is also the possibility of introducing computer controls, video cameras included, in order to create an indestructible record of events for later evaluation and possible discipline.

Prof. Schmitt comments that there is no obligation in the international law of armed conflicts not to kill the enemy. There is no legal obligation to keep non-lethal weapons non-lethal or less lethal weapons less lethal. We already have weapons that can be tuned or turned down. If we start with the premise that weapons can be used against combatants in such a way that will kill them, then the fact that it can be tuned or turned down renders it more acceptable than would otherwise be the case, because it gives you the choice and it allows you to implement Article 57 of the Protocol . He also adds it is possible to use lethal force consistent with human rights standards. Therefore, we have to be careful about the application of law there.

Prof. Hampson was concerned about the formulation used by Mr Naert, who said that everybody accepts that IHL applies in peace support operations, if the peace support forces are "engaged as combatants". She agrees that guidance is offered by the rules on targeting and proportionality. However, she asks if he really means that IHL applies de jure. Does that mean the opposing side, if they are organised forces or combatants, are entitled to the status of prisoner of war? She thinks there are problems in not qualifying the statement that IHL applies even in vigorous clashes in peace support operations.

Mr Naert thinks there are cases where peace forces are actually engaged as combatants and the law applies de jure. The question is then the qualification. Is it an international armed conflict? Is it a non-international armed conflict? Therefore, you arrive at the question of "do you have a combatant status?", not in terms of prisoner of war, but in terms of conduct of hostilities in a non-international armed conflict. He says this is a matter of debate, and it is linked to direct participation. There is a problem in applying conduct of hostilities rules in a non-international armed conflict, because we lack this definition of combatant. But, on the other hand, the fact that you apply many of these rules to some extent implies to him that there is something like a combatant status, at least in terms of conduct of hostilities, even in non-international armed conflicts.

On the relationship between IHL and human rights law (HRL), Prof. Hampson thought the way Mr Naert explained *lex specialis* is interesting, because he linked it to a rule and not a body of law. If one argues that IHL as a whole is the *lex specialis*, the problem is this is not what the ICJ said. If we are willing to allow that both regimes can apply simultaneously, then there cannot be a *lex specialis* regime. However, if we limit it to a specific rule and say we interpret the human rights rule in the light of the IHL rule, you avoid the problem. In that sense, she does not think *lex specialis* is the right way to explain what is going on.

Prof. Hampson also adds we needs to make sure we train soldiers in the use of law enforcement weapons and limitations that might apply, because it will not be part of their usual training. If the policemen are attempting to control a riot, using tear gas and possibly pepper spray, and they suddenly find themselves in a situation that escalates, then the answer is it is now an armed conflict. Therefore, they should not be using those weapons any more. So you actually need to train the police and to equip them with appropriate tools for the situation.

Mr Naert agrees it is not enough to just provide the weapons, but you also need to provide training. From a Belgian perspective, they have not really faced that problem, because they are not in an internal armed conflict on their own territory. In addition, if they send police contingents in peace operations, most of the time, it is a non-executive mandate, and they will therefore not directly have to employ force. However, if they would be in a situation like that, they should know the relevant IHL rules.

Prof. Hampson also reminds us that we must bear in mind that if HRL is applicable, then that means there is an obligation to investigate deaths that are suspicious. And that could have significant practical implications. There is a case in the English judiciary, involving the period in Iraq when there is no doubt that the UK was an occupant under international law. One death in the case was a death in detention. The others were deaths at checkpoints and during the search of houses. The English Courts have tried to apply the ECHR as interpreted by the ECtHR, and they said they could not because the case law is completely incoherent. According to her, a signal needs to be sent to the judges in the ECtHR, because they are out of line with the Inter-American Court of Human Rights, the ICJ and the Human Rights Committee. If you look at the Chechen operations, they only used HRL to analyse military operations when it was clearly a non-international armed conflict. And they are going to communicate sooner or later a conclusion, which will be at odds with international law and therefore at odds with what the ICJ said in its decision relative to the DRC. They found one act that is simultaneously a violation of Article 6 of the ECHR and of Additional Protocol I. It means that a human rights body must non-negotiably take account of IHL, which applies by virtue of the fact, and it doesn't matter what the State said.

Prof. Schmitt says that the operational concepts for the weapons were not consistent with what he thinks the weapons will normally be used for. If you take the example of the advanced tactical laser, the situation in which the weapon would be most valuable would be a situation where combatants are collocated with civilians: refugees, IDPs, civilians along the road... The dazzling laser is initially perceived as a preliminary defence weapon .

*Could the other weapons that Dr Altmann talked about, which are always discussed in the context of crowd control, also be used for force protection purposes? Could they have an autonomous activating system?*

Dr. Altmann answers that at least the active denial system is conceived for that purpose, but probably not for autonomous triggering because that is just too expensive. So, they would probably be used with people at the controls.

*Prof. Schmitt asks Mr Naert why he only focused on the European instruments and if he could talk about the conduct of operations with States that are not parties to instruments such as the ECHR. What sort of problems do they face? How do they address their troops? What are the rules of engagement? What happens if the coalition partner violates its obligations under the unique regional treaty regime?*

Mr Naert says that there are a number of States that opposed notably the extraterritorial application. He did not restrict himself entirely to the European Convention because the ICJ mentioned in its Advisory Opinion that the same applies to the ICCPR, as did the Human Rights Committee. On the content, he also referred to the UN basic principles, which is also a UN approach rather than a European approach. In fact, even in Europe and in the *Bankovic* case, States were ardently opposed to the extraterritorial application. But what he said was in international jurisprudence at least, there is a very clear tendency in this direction. On the application in coalitions, we need to respect our own obligations. We should not impose them on our coalition partners. But in some cases, for instance, the transfer of detainees, we may have obligations that we must also apply in relation to our coalition partners or to host States. It would not be appropriate for us to demand that every participating State comply with the full rules of the European Convention. But we might have a problem when our own obligations under that Convention, with relation to third States, might be affected.

Prof. Hampson adds the USA has ratified the ICCPR, and according to the ICJ, you take that with you when you operate extraterritorially. There is no US reservation saying it does not apply extraterritorially. So they are bound by HR law obligations, even if acting extraterritorially. The ICJ decision on the DRC made it clear: it is not an issue of whether or not the victim is

within the jurisdiction. It is a matter of international law operating outside the national territory, and IHL and HRL apply. You just have to get the US military used to it.

However, according to Prof. Schmitt, the ICJ decision is not binding on the USA.

Mr Naert adds that HRL applies, but it is subject to the correct relationships with IHL, UN mandates, etc.... If you correctly take these into account, you can have a regime that is applicable. With respect to how do you apply that to coalition partners, he thinks the main issue is transfer. If there has to be a transfer, you have to get guarantees that there will be appropriate treatment. This could be guaranteed by your coalition partners accepting those rules within that specific operation, without necessarily accepting them as a permanent legal obligation. Following the discussion on the ICJ statement, he read in one of the US Manual for Commanders a statement that, as a matter of policy, customary international law (and then HRL) would apply extraterritorially to US troops.

# CONCLUDING REMARKS

**Prof. Yves Sandoz**
Membre du Comité international de la Croix-Rouge

Monsieur le Recteur, Excellences, Mesdames, Messieurs, Chers amis,

Le domaine que l'on a traité au cours de ce colloque est à l'évidence particulièrement délicat puisque, comme on l'a rappelé à l'ouverture, les règles concernant les moyens et méthodes de guerre peuvent avoir un effet déterminant sur l'issue de celle-ci. Je me permets en clôturant ce colloque de vous faire part de quelques réflexions qu'il m'a inspiré, sans avoir d'ailleurs la prétention d'apporter une conclusion sur un sujet dont les présentations riches et variées, ainsi que les débats qui ont suivi, nous ont permis de mieux comprendre les contours, les enjeux et les perspectives mais qui a dévoilé des problèmes qui n'ont pas une solution simple et définitive: c'est la conjonction de beaucoup de facteurs, de beaucoup d'initiatives, de diplomatie et d'enthousiasme qui permettra des progrès. Il s'agit donc d'abord de comprendre ce qui se passe, d'y voir clair et, comme on l'a vu, une interaction entre les scientifiques, les médecins, les juristes et finalement, les politiciens, est indispensable pour que l'on puisse progresser.

Faut-il se réjouir ou craindre le développement de la science? Mais est-ce une véritable question, a-t-on vraiment le choix? Plus précisément alors, ne peut-on pas stopper la recherche militaire s'est notamment demandé Madame Françoise Hampson ? Je crains que ce ne soit là aussi, en tout cas à court terme, un vœu pieux. Et, Monsieur Michaël Schmitt nous l'a rappelé, la recherche militaire peut aussi avoir des aspects positifs. Indépendamment de tout jugement de valeur sur la guerre en Irak, on ne peut pas dénier le fait que l'on ne peut pas comparer le bombardement de Bagdad avec celui d'Hiroshima.

Et pourtant, il faut rester très vigilant, jusque dans le langage que l'on emploie, comme le Docteur Robin Coupland nous l'a dit au sujet de ce que l'on appelle les armes chimiques « non létales », euphémisme pour désigner des armes dont les effets sont loin d'être négligeables. L'on doit donc suivre ces développements avec la plus grande attention, même si, sur le plan plus général des armes chimiques, la Convention de 1993, dotée d'un imposant mécanisme de contrôle, est l'une des conventions les plus élaborées concernant l'interdiction d'armes. Certes, subsiste aussi l'exception tolérée pour les gaz lacrymogènes, dont l'emploi est interdit en temps de guerre mais pas comme moyen de lutte contre les émeutes en temps de paix. On

l'a relevé durant notre colloque mais il ne faut toutefois pas exagérer ce problème. L'apparente contradiction qui autoriserait en temps de paix l'utilisation de moyens interdits en temps de guerre provient du fait que l'arme reste relativement inoffensive si elle est employée en plein air, pour disperser des émeutes, alors qu'elle peut être mortelle suivant les usages qui en sont fait, notamment dans des abris fermés, hypothèse qui n'est pas exclue en temps de conflit armé. C'est donc bien la question des armes dites « non létales » sur laquelle doit se concentrer l'attention à ce stade pour comprendre, comme nous a aidé à le faire le Docteur Coupland, ce qui se cache vraiment derrière une expression qui tendrait à nous rassurer.

La recherche continue constamment de se développer et il était impressionnant d'entendre de la part du Docteur Jürgen Altmann ce qui se fait dans le domaine nouveau des « directed energy weapons ». Certes, comme on vient de le relever, cette recherche peut contribuer à la mise au point d'armes plus efficaces sans pour autant qu'elles soient plus meurtrières. Elle n'est donc pas forcément négative sur le plan humanitaire à court terme. Mais il s'agit de vérifier sans cesse si la ligne rouge est franchie et les nouvelles perspectives offertes par ces recherches augmentent constamment les risques de dérapages, en particulier si certaines armes tombent dans de mauvaises mains.

Il faut aussi souligner l'importance, pour qu'elle soit efficace, qu'une règle soit aussi simple et claire que possible. Or le droit est complexe puisqu'il n'interdit pas seulement des armes de manière absolue, mais seulement, pour certaines d'entre elles, dans des circonstances particulières, et qu'il interdit aussi des méthodes de guerre, comme l'a souligné Madame Françoise Hampson en nous rappelant les principes et règles essentiels dans ce domaine. Et l'on doit admettre que, sur un plan général, nous avons progressé ces dernières années vers la clarté. D'abord en réduisant considérablement la stupide différence, dans le domaine de la conduite des hostilités, des règles applicables dans les conflits armés internationaux et de celles qui sont applicables dans les conflits internes. La jurisprudence des tribunaux pénaux internationaux ad hoc, la révision de la Convention de 1980 et le statut de la Cour pénale internationale ont notamment contribué à cette évolution, confirmée par l'étude du droit international humanitaire coutumier publiée sous l'égide du CICR. Un autre pas dans cette direction est la dimension « désarmement » prise, notamment dans la Convention d'Oslo (Ottawa) sur les mines antipersonnel. Si l'on n'a pas le droit de posséder une arme, si on a l'obligation de la détruire, la question de son usage ne se pose même plus.

Mais comme l'a relevé l'Ambassadeur Caroline Millar, rien n'est jamais acquis. La Convention d'Oslo (Ottawa) prévoit la destruction des mines et une collaboration à cet égard, un certain contrôle également : or la Conférence de révision, nous a-t-elle indiqué, a démontré qu'il restait encore beaucoup à faire, notamment dans ces domaines.

Le souci de la simplicité et de la clarté doit être gardé à l'esprit dans les négociations qui sont ouvertes en ce qui concerne les munitions à dispersion, dont le Lieutenant-Colonel Darren Stewart nous a rappelé les perspectives opérationnelles et juridiques. Faut-il jouer la carte de la Convention de 1980? Faut-il au contraire s'engager dans un processus similaire à celui d'Ottawa? Faut-il s'engager parallèlement dans les deux négociations? Ou encore faut-il introduire un peu de l'esprit d'Ottawa dans le cadre de la Convention de 1980, en brisant dans ce cadre la règles du consensus et en poussant au vote sans trop de tergiversations quand les positions sont divergentes? L'exposé de Madame Gro Nystuen nous a permis de faire le point et de mieux comprendre l'état de la négociation.

Chaque solution a ses avantages mais aucune ne s'impose absolument et, comme c'est souvent le cas, il est toujours possible de voir des objections à chacune d'entre elles. Pour réussir un processus comme celui d'Ottawa, il faut plusieurs facteurs, telle la simplicité de la règle, un soutien populaire massif, une adhésion de certains cercles militaires et une masse critique suffisante d'États prêts à se lancer dans l'aventure. Ces critères sont-ils aujourd'hui réunis? La processus traditionnel lui, comme on l'a relevé, le plus souvent très lent, risque de ne donner que des résultats assez mitigés, même s'il a permis parfois des résultats non négligeables. Peut-on s'engager en parallèle dans les deux processus? Ce n'est pas impossible, mais il faut se souvenir que le processus d'Ottawa a été lancé après les résultats jugés insuffisants du premier. Il ne serait probablement pas très aisé pour des diplomates de discuter en parallèle du même sujet avec des instructions et des objectifs différents. Peut-on injecter « l'esprit d'Ottawa » dans les négociations entreprises dans le cadre de la Convention de 1980, notamment en brisant la pratique du consensus ? On peut l'envisager, mais on peut aussi craindre que si des grandes puissances militaires sont minorisées, elles ne quittent la négociation, transformant dès lors le processus et lui faisant perdre son avantage d'être universel.

On le voit, rien n'est facile. Mais il s'agit de ne pas laisser les oiseaux de mauvais augures empêcher l'envol de ceux qui veulent s'engager pour trouver une solution à ce problème. Les difficultés mentionnées ne doivent pas freiner mais stimuler l'ardeur de ceux qui souhaitent parvenir à des résultats concrets à court, moyen et long terme, en vue de trouver non seulement des solutions au problème de fond, mais aussi la meilleure voie pour y parvenir.

Notre colloque a souligné par ailleurs qu'il ne fallait pas, à côté de ces négociations internationales, négliger les efforts à entreprendre sur le plan national. L'obligation d'examiner la licéité d'une arme que l'on acquiert, prévue à l'article 36 du Protocole additionnel I de 1977, ou surtout, que l'on compte produire, doit être prise au sérieux, comme nous l'a rappelé Monsieur Stéphane Kolanowski. Le CICR a organisé des réunions pour examiner cette question avec des experts gouvernementaux, d'où il est ressorti que certains États avaient effectivement des

procédures assez précises. Mais les informations à ce sujet ne sont pas faciles à obtenir, car la recherche militaire est généralement entourée de secrets, et beaucoup d'États ne donnent aucune indication à ce sujet. Un échange de vues sur les procédures appliquées reste toutefois très utile. Cela d'autant plus qu'il est important d'agir en amont, soit dès la conception d'une nouvelle arme, car les États seront moins enclins à accepter de renoncer à une nouvelle arme pour incompatibilité avec des principes humanitaires s'ils ont déjà investi des sommes considérables dans son développement.

Peut-on les aider à faire cette analyse? On doit, en ce sens, saluer tous les efforts qui ont été entrepris pour ce faire, et notamment ceux entrepris par des médecins, dont le Docteur Robin Coupland ici présent. Confrontés à la réalité de terribles blessures de guerre, ces médecins, ensuite largement suivis par d'autres et par des associations médicales, ont cherché à déterminer des critères précis pour cerner la notion de « maux superflus », notion reprise dans le Protocole I de 1977 et sur la base de laquelle l'emploi d'une arme devrait être interdit. Ils l'ont fait dans le cadre d'un projet baptisé « SIrUS » (Superfluous Injury or Unnecessary Suffering), sur la base d'une analyse médicale et d'une typologie des blessures causées. De tels efforts sont évidemment à encourager.

C'est donc bien aussi au niveau de la mise en œuvre des règles qu'il faut s'engager et, outre le niveau national, le niveau régional est très important à cet égard, comme nous l'a notamment rappelé Monsieur Jeno Czuczai pour l'Union européenne ou Monsieur Frederik Naert en ce qui concerne l'utilisation de nouvelles armes dans le cadre d'opérations de maintien ou d'imposition de la paix. Les engagements pris dans de tels cadres ont à l'évidence une grande importance non seulement pour les pays directement concernés, mais aussi pour l'effet d'entraînement qu'ils peuvent avoir sur le plan universel.

La mise en œuvre n'est toutefois pas toujours chose facile, même en y mettant de la bonne volonté. Monsieur Michaël Schmitt nous a parlé en particulier des problèmes rencontrés dans les guerres « asymétriques », soit les guerres dans lesquelles les moyens des belligérants en présence sont totalement disproportionnés. On ne peut ignorer que le droit international humanitaire repose en réalité, outre sur les principes mentionnés traditionnellement, sur le fait qu'il est avantageux pour les deux parties à un conflit et que son respect est sans effet déterminant sur l'issue de la guerre. Or le problème de la guerre asymétrique est que le belligérant qui dispose de moyens beaucoup moins sophistiqués que son adversaire estime n'avoir pas d'autre choix pour contrer son adversaire que de commettre des actes contraires au droit international humanitaire, notamment en pratiquant le terrorisme au mépris du principe essentiel du respect des civils et de la distinction entre les personnes et biens civils d'une part, les objectifs militaires d'autre part.

En outre, comme il l'a été souligné, cette attitude tend à pousser aussi l'État disposant de moyens technologiques supérieurs dans des pratiques illicites. C'est la spirale négative du terrorisme et de la lutte contre le terrorisme. Il s'agit alors d'avoir une vision à long terme, de ne pas seulement se concentrer sur les gains militaires à court terme mais de comprendre que les questions morales et l'image que l'on peut donner prennent une importance primordiale dans le long terme, pour gagner la guerre au-delà des batailles.

Mais comment éviter d'entrer dans cette spirale négative ? On l'a dit lors de ce colloque, le droit international humanitaire ne peut pas être davantage adapté. Le compromis trouvé avec les Protocoles de 1977 en ce qui concerne l'utilisation de la guérilla comme méthode de guerre est la limite extrême de ce qu'il est possible d'envisager sans toucher à l'essence même de ce droit, soit la distinction qui doit être faite entre civils et militaires. Il ne saurait donc être question « d'adapter » ce droit au terrorisme. Que faire alors? Il serait présomptueux de prétendre donner péremptoirement des conseils à ce sujet. Mais l'aspect moral, si important dans la durée au-delà de la victoire des armes, devrait en tout cas inciter à une très grande retenue dans l'utilisation de la force. Même si l'on doit continuer de défendre l'idée que le droit international humanitaire doit s'appliquer indépendamment de la légitimité de la guerre, on ne peut ignorer qu'une intervention ayant une indiscutable légitimité, soit notamment l'approbation du Conseil de sécurité, donne moins de prétextes à violer le droit humanitaire et diminue le soutien populaire apporté à ceux qui s'opposent à une telle intervention.

Reste alors, bien sûr, le fait que le Conseil de Sécurité doit remplir son rôle, ce qu'il est malheureusement loin d'avoir toujours fait, quand on pense à son inaction coupable dans des situations aussi tragiques que celles du Cambodge à l'époque des Khmers rouges ou du génocide au Rwanda. Et tant que le Conseil de sécurité n'assumera pas pleinement ses responsabilités, le dilemme moral d'assister sans réagir à la violation massive des droits de l'homme ou d'agir contrairement à la lettre de la Charte risque de se poser à nouveau. Dilemme d'autant plus difficile que ceux qui prétendent agir au nom des droits de l'homme ont bien souvent des arrière-pensées moins pures qu'ils ne le prétendent et donnent de ce fait prise à des contestations d'autant plus grandes de la légitimité de leurs interventions.

Il faut donc d'abord et surtout rechercher à ce que le Conseil de sécurité assume pleinement ses responsabilités à l'égard des situations menaçant la paix internationale, étant entendu que les violations graves et massives des droits de l'homme sont comprises dans celles-ci. Cela sans exclure sa réforme si elle peut permettre d'améliorer son fonctionnement et de renforcer sa légitimité. Les membres permanents ont à cet égard une responsabilité particulière: le droit de veto n'est pas seulement un privilège, il implique aussi des devoirs.

Mais l'intervention militaire n'est qu'un moyen ultime qui a forcément des effets négatifs considérables. Il ne saurait donc, en tout état de cause, être envisagé que très exceptionnellement et il faut donc aussi développer d'autres stratégies de lutte contre les violations massives des droits de l'homme. En ce sens, on ne doit pas négliger le fait que la « société civile » n'est pas dépourvue de moyens, notamment au vu du développement des moyens techniques de communiquer, d'échanger des idées, de s'organiser. Il faut, dans ce cadre, faire preuve d'imagination, de dynamisme et de persévérance.

J'aimerais enfin terminer par une note optimiste. J'ai trouvé très encourageant et rafraîchissant d'entendre à ce colloque les présentations faites dans deux domaines qui posaient apparemment des défis quasi impossibles.

Je pense d'abord à celui du transfert d'armes. On sait à quel point la disponibilité d'armes dans des régions peu stables est un facteur aggravant, entraînant les populations dans une spirale de peur, de haine et de violence. Mais comment endiguer l'afflux d'armes dans ces régions, quand on sait qu'il s'agit d'armes dont la fabrication n'est pas interdite? Or on a senti de l'enthousiasme et une réelle volonté de relever malgré tout ce défi si complexe dans les interventions de Mesdames Margit Bruck-Friedrich, Jacqueline Macalesher et Camilla Waszink. Une volonté d'agir à travers des conventions internationales ou régionales; des codes de conduite; la détermination de critères; le « traçage » des armes pour suivre leur parcours; la responsabilisation des États de production, mais aussi de transit ; la dénonciation de l'hypocrisie...

Le second défi « impossible » qui a été relevé avec enthousiasme et, déjà, un succès non négligeable, est celui d'un dialogue sur des questions humanitaires avec les parties dissidentes à des conflits armés non internationaux. Certes, les règles essentielles du droit international humanitaire sont entrées dans le droit coutumier et lient donc à cet égard également les parties à des conflits armés non internationaux. Mais d'une part ce n'est pas encore vrai de toutes les règles; d'autre part il est essentiel de donner aux parties dissidentes à des conflits armés non internationaux l'occasion de « s'approprier » également ces règles, qui ont été élaborées sans elles.

Or si le CICR entretient des contacts bilatéraux avec de telles entités pour régler des questions humanitaires, l'idée de réunir celles-ci pour obtenir des engagements de leur part paraissait à beaucoup peu réaliste. Il est clair en tout cas que les États ne sont pas prêts à accueillir dans leurs assemblées des mouvements qu'ils affublent pour beaucoup, à tort ou à raison, du qualificatif de terroriste. Organiser une réunion de ces mouvements étaient donc un pari audacieux, d'autant plus que les critères de choix d'une telle invitation sont évidemment très délicats.

Ce pari a néanmoins été tenu, comme nous l'a expliqué Madame Elisabeth Reusse-Decrey, dans le cadre de « l'Appel de Genève », qui a réuni les parties non gouvernementales à de nombreux conflits armés non internationaux pour chercher à obtenir de leur part l'engagement de renoncer à utiliser les mines antipersonnel, sujet brûlant s'il en est. Ce premier pas devrait permettre de poursuivre le dialogue avec ces parties pour obtenir leur engagement sur d'autres questions humanitaires. Certes, cela reste difficile, notamment pour vérifier que les engagements pris soient réellement suivis d'effets, mais le succès de cette première étape est très encourageant.

Ce sont là les quelques réflexions qui m'ont été inspirées par les très riches débats de ce colloque, que je ne prétends bien sûr nullement avoir ici résumés. Les actes de ce colloque, toujours si soigneusement publiés, nous permettront d'en retrouver dans quelques mois toute la substance.

J'aimerais terminer en rappelant une fois encore que ces efforts entrepris pour restreindre et réglementer toujours davantage l'usage de certains moyens de guerre, pour mieux protéger les populations civiles et améliorer le respect des droits de l'homme, tous ces efforts si indispensables à court et moyen terme doivent néanmoins s'inscrire dans la perspective à long terme d'une paix universelle. Développer les droits de l'homme est la seule manière d'écarter toute justification à la guerre, un phénomène que notre planète ne sera bientôt tout simplement plus capable d'absorber. Mais le chemin reste long. Le dialogue riche, franc, imaginatif et constructif de ces deux jours nous encourage à le poursuivre avec un certain optimisme.

Que ceux qui ont préparé et permis ce dialogue en soient donc chaleureusement remerciés : nos interprètes pour leur constance et leur fidélité; les employés du Collège d'Europe et du CICR, pour avoir si judicieusement élaboré le programme et choisi les thèmes, d'une part, parfaitement assuré l'organisation pratique du Colloque, d'autre part ; Monsieur le Recteur du Collège d'Europe, pour son appui constant et son hospitalité chaleureuse; Madame la chef de Délégation du CICR à Bruxelles, nouvelle dans son poste, pour s'être immédiatement investie dans ce projet et lui avoir apporté son précieux soutien; tous les intervenants qui ont aimablement accepté de nous transmettre, de manière vivante et compréhensible, leurs connaissances et leurs expériences si diverses; et vous tous, enfin, dont l'attention constante et la participation active aux débats a été à la fois la clé et la preuve du succès de ce 8ème Colloque de Bruges, que je déclare clôt.

Merci à tous, bon retour et, je crois pouvoir le dire, à l'année prochaine!

# List of Participants



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# Current perspectives on regulating means of warfare

**8th Bruges Colloquium**
**18-19 October 2007**

*Simultaneous English/French translation will be provided*

*Traduction simultanée anglais/français*

## DAY 1: Thursday 18th October

09.00-09.30 Registration and Coffee

09.30-09.40 Welcome address by **Prof. Paul Demaret**, Rector of the College of Europe

09.40-09.45 Welcome address by **Françoise Krill**, Head of Delegation, ICRC Brussels

09.45-10.00 Opening address by **Prof. Yves Sandoz**, Member of the ICRC

10.00-10.30 Basic Rules of IHL Governing Weapons: **Prof. Françoise Hampson**, Essex University

10.30-10.50 Discussion

10.50-11.20 Coffee break

**Session One: Current and emerging norms**

Chair person: **Stéphane Kolanowski**, International Committee of the Red Cross

11.20-11.40 Anti-Personnel Mines under the Ottawa Convention – Successes and Challenges 10 years on: **Ambassador Caroline Millar**, Australian Permanent Mission to the United Nations (Geneva)

11.40-12.00 Explosive Remnants of War: Legal and Operational Perspectives: **Lt. Col. Darren Stewart**, NATO

12.00-12.20 Regulating Cluster Munitions? **Prof. Gro Nystuen**, Oslo University

12.20-13.00 Discussion

13.00-14.30 Sandwich lunch

**Session Two: Implementation challenges**

Chair person: **Dr Jeno Czuczai**, Legal Service of the General Secretariat of the Council of the EU and College of Europe

14.30-14.50 Proportionate and Discriminate Use of Weapons: Challenges for A Military Commander: **Prof. Michael Schmitt**, US Naval War College

14.50-15.10 Non-State Actors and Weapons: **Elisabeth Decrey-Warner**, Geneva Call

15.10-16.00 Discussion

16.00-16.30 Coffee break

16.30-18.00 Panel on Arms Transfers and IHL with as speakers: **Jacqueline Macalesher** (Saferworld), **Camilla Waszink** (ICRC Geneva), and **Margit Bruck-Friedrich** (Austrian Ministry of Foreign Affairs).

19.30-22.30 Dinner at the "Provinciaal Hof" (on registration)

## DAY 2: Friday 19th October

**Session Three: New weapons**

Chair person: **Dr Heike Spieker**, German Red Cross

09.00-09.30 The Obligation to conduct Legal Reviews (Article 36 of Additional Protocol I): **Stéphane Kolanowski**, ICRC Brussels

09.30-09.50 "Incapacitating" Chemical Weapons: **Dr Robin Coupland**, ICRC Geneva

09.50-10.10 Discussion

10.10-10.40 Coffee break

10.40-11.10 The Use of Novel Weapons by Armed Forces during peacekeeping or peace enforcement operations: **Frederik Naert**, Belgian Ministry of Defence and Katholieke Universiteit Leuven

11.10-11.30 Directed Energy Weapons: **Dr Jürgen Altmann**, Dortmund and Bochum Universities

11.30-12.30 General Discussion

**Concluding remarks**

12.30-13.00 Concluding remarks and closure by **Prof. Yves Sandoz**, Member of the ICRC

## *CURICULUM VITAE* DES ORATEURS
## SPEAKERS' *CURICULUM VITAE*

**Le Professeur Paul Demaret** est Docteur en droit et Licencié en sciences économiques de l'Université de Liège, où il a également obtenu un diplôme d'études spécialisées en droit économique. Il a ensuite poursuivi ses études aux États-Unis, et est titulaire d'un Master of Law de l'Université de Columbia et d'un Doctorat of Juridical Science de l'Université de Californie à Berkeley. Le Professeur Demaret a enseigné des matières juridiques ou économiques dans de nombreuses universités, notamment celles de Genève, Paris II, Pékin et Coimbra, ainsi qu'à l'Académie de Droit européen de Florence et au Colegio de Mexico. Il est actuellement Recteur du Collège d'Europe. De 1981 à 2003, le Professeur Demaret a été directeur du programme d'études juridiques au Collège d'Europe et directeur de l'Institut d'études juridiques européennes à l'Université de Liège. Il a été professeur de droit à l'Université de Liège de 1982 à 2006. Spécialiste des aspects juridiques et économiques de l'intégration européenne, le Professeur Demaret est l'auteur ou l'éditeur d'ouvrages et de nombreux articles sur ces questions. Son expertise en matière de commerce international a été sollicitée par diverses institutions, dont l'Organisation Mondiale du Commerce, où il a servi dans deux panels.

**Françoise Krill** has been Head of the ICRC Delegation to the EU and NATO since June 2007. She holds a law degree as well as a lawyer certificate (Brevet d'Avocat). She spent 4 years in the Swiss diplomatic service (from 1981 to 1984). Françoise has held numerous operational and legal positions at the ICRC, both in the field as in Chad, Lebanon, Peru and South Africa (delegations where she was Delegate, Deputy Head of Delegation and Head of Delegation) and at Headquarters where she was, among other posts, Legal Advisor, Head of unit for the legal advisors to the Operations, and Deputy Director of Operations. She has published many articles on humanitarian issues, mainly in the International Review of the Red Cross, especially on the protection of women, children and refugees during armed conflicts.

**Le Professeur Yves Sandoz** est Docteur en droit de l'Université de Neuchâtel. Délégué du Comité international de la Croix-Rouge (CICR) entre 1968 et 1973, il a effectué des missions sur le terrain, notamment au Nigéria, en Israël et dans les Territoires occupés, au Bangladesh et au Yémen. Attaché au siège du CICR de 1975 à 2000, il a occupé pendant 18 ans la fonction du Directeur du droit international et de la doctrine. Il a aussi été membre durant douze années de la Commission permanente de la Croix-Rouge et du Croissant-Rouge et Président de la Commission académique de l'Institut international de droit humanitaire de San Remo.

Ayant achevé son parcours professionnel au CICR, Yves Sandoz a été élu membre de l'Institution dès novembre 2002 et membre de l'Institut international des droits de l'Homme en 2003. Il est l'auteur d'une centaine de publications et enseigne aujourd'hui le droit international humanitaire aux Universités de Genève et Fribourg.

**Françoise Hampson** is a Professor in the Law Department and Human Rights Centre of the University of Essex, where she teaches, i.a., a postgraduate course on the law of armed conflict. She was an Academic Adviser for the Instructors' Materials, to accompany the ICRC Military Manual. She was on the Steering Committee for the ICRC's study on Customary Humanitarian Law and supervised the British State practice report and the consolidated report on persons in the power of the other side. She is currently on the ICJ's Commission of Inquiry into the conflict between Israel and Hizbullah. From 1998-2007, she was a member of the UN Sub-Commission on the Promotion and Protection of Human Rights, where her reports included accountability of international personnel in UN-endorsed peace support operations, reservations to human rights treaties and the relationship between IHL and human rights law. She has litigated many cases before the European Court of Human Rights, including cases arising in situations of conflict (e.g. Ergi, Akdeniz & others, Issa and others against Turkey and Bankovic and others against the 17 members of NATO party to the ECHR).

**Stéphane Kolanowski** holds a Law Degree and a Master in Laws (LL.M.) in Public International Law. He joined the ICRC Legal Division (Geneva) in 1997, where he worked on different issues, such as Human Rights, impunity and reparation, as well as on some arms related issues. In 1999, he participated in the build-up of the ICRC Delegation to the EU and NATO, a Delegation in which he is still working today as a Legal Adviser. He is responsible for following relevant legal developments in EU and NATO policies and operations and for promoting and disseminating International Humanitarian Law for several audiences. In 1999 he also initiated the cooperation with the College of Europe, leading to the organisation of the yearly Bruges Colloquium.

**Ambassador Caroline Millar** was appointed Australia's Ambassador for Disarmament and Ambassador and Permanent Representative to the United Nations in Geneva in May 2006. In the Department of Foreign Affairs and Trade in Canberra, Ms Millar served as First Assistant Secretary, International Organisations and Legal Division from November 2002 until December 2005. From July 2003 she was concurrently Ambassador for People Smuggling Issues. Her other positions in the Department in Canberra have included Assistant Secretary, Planning and Evaluation Branch (2001-02); Assistant Secretary, Trade Policy Issues and Industrials Branch

(2000); Director, Non-Proliferation Policy Section (1992-95); and Executive Officer, Indochina Section (1987-88). Ms Millar was also seconded to the Office of National Assessments as Americas Analyst (1991-92). Overseas, Ms Millar recently undertook a short-term assignment as Ambassador and Acting Permanent Representative to the United Nations in New York from February to April 2006. She previously served as Counsellor, Australian Mission to the United Nations in New York (1995-1998); First Secretary, Australian Embassy, Washington (1989-91); and Second Secretary, Australian Embassy, Hanoi (1985-87). A graduate of the University of Cambridge (BA Hons), Ms Millar joined the Department of Foreign Affairs and Trade in 1983.

**Lieutenant Colonel Darren Stewart** was commissioned into the Royal Regiment of Australian Artillery in 1988 before transferring to the Australian Army Legal Corps in 1991. As a Legal Officer in the Australian Army he fulfilled a number of staff appointments at Captain and Major level. He was the first legal adviser at the Australian HQ Special Operations when established in 1997. Transferring to the British Army in 1998, he served initially as the Army Legal Services training officer. He deployed to Kosovo in June 1999 for seven months as the legal adviser to the Commander of British Forces, for which he was awarded a UK Joint Commanders Commendation. A tour at the UK Permanent Joint HQ followed where Lt-Colonel Stewart saw further operational duty in Sierra Leone, the Balkans, the Middle East and Afghanistan acting as the legal adviser to Commanders of British Forces in each of these theatres. In March 2003 he was posted to SHAPE as the Assistant Legal Adviser (UK). A tour as the Commander Legal, HQ Northern Ireland then followed. In August 2006 he was posted to HQ Allied Rapid Reaction Corps and deployed to Afghanistan as the Chief Legal Adviser, HQ International Security Assistance Force for Afghanistan (ISAF), returning with HQ ARRC to Rheindahlen, Germany in February 2007. Lt-Colonel Stewart holds a Postgraduate Diploma in Legal Practice and Bachelors Degrees in Economics and Laws. He is a Barrister of the Supreme Courts of Queensland and New South Wales and the High Court of Australia. He is a Solicitor of the Supreme Court of England and Wales. He was made an OBE in the 2003 Queens Birthday Honours List.

**Gro Nystuen** is Dr. Juris Associate Professor of International Humanitarian Law at the University of Oslo. She worked in the Ministry for Foreign Affairs (MFA) from 1991 to 2005, except for the period 2000-2003 when she was on leave to write her doctoral thesis (on the Dayton Peace Agreement) at the Oslo Law Faculty. In the MFA, she worked in the Department for International Law; her last position in the Ministry was Deputy Director General, head of the Section for Human Rights and Democracy. In addition to public international law in general, she has worked in particular with human rights, international humanitarian law and arms issues, including the Mine Ban Convention. She was stationed at the Norwegian Permanent Mission to

the UN in Geneva (1994-95) and seconded to work as legal adviser at the Yugoslavia Conference (ICFY) for the UN Co-chair, Thorvald Stoltenberg (1995), and for the High Representative in Bosnia, Carl Bildt (1995-1997). She was appointed to chair the Council on Ethics for the Norwegian Government Pension Fund in 2004, and has from 2005 held this office in addition to her teaching position at the University of Oslo.

**Jeno Czuczai** is currently Principal Jurist of the Council Legal Service. He is responsible for general international law including international humanitarian law. He holds a Doctorate degree of Legal and Political studies from the ELTE University, Budapest (1991), and pursued postgraduate studies in the US, UK, Russia, Italy, Belgium, and Austria. He has been a registered Attorney at law in the Hungarian Bar since 2001. He started his carrier as Head of Unit at the Prime Minister's Office, Hungary (1991), and then was Director of the Hungarian Privatization Agencies (1991-1995). From 1995-2001, he was Legal Adviser at the Delegation of the European Commission in Hungary. From 2001 until 2006, he taught EU law in several Universities in Budapest. He was Vice-President of the European Law Academy, Hungary (1999-2006) and President of the Committee on International Relations of the Hungarian Law Society (1999-2003). He was cenzor on public international law in the State exam panel on civil service in the Prime Minister's Office, Budapest (1999-2006). He has been a visiting Professor at the College of Europe (Bruges and Natolin) since 1997. He was visiting lecturers/professors in several European countries. He has published widely, mainly on EU public and constitutional law and on law of EU external relations.

**Michael N. Schmitt** is the 2007-2009 Charles H. Stockton Professor of International Law at the United States Naval War College in Newport, Rhode Island. Prior to assuming the Chair, he was Professor of International Law at the George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany, where he directed the Program in Advanced Security Studies and the Senior Fellows Program. Professor Schmitt served in the United States Air Force for 20 years before joining the Marshall Center faculty. During his military career, he specialized in operational and international law and was senior legal adviser to multiple Air Force units, including units conducting combat operations over Northern Iraq. He has published extensively, in many countries and currently serves on editorial boards of several recognized legal reviews. A Professorial Fellow at Surrey University's Centre for International Law, in 2006 he was the Sir Ninian Stephens Visiting Scholar at Melbourne University.

**Elisabeth Decrey-Warner**, President and co-founder of Geneva Call, is a politician and human rights advocate. For over 25 years, she has worked with various NGOs on issues relating to refugees, torture and landmines. Her work was recognised in 2005 when she was nominated for Switzerland as one of the "1000 Women for the Nobel Peace Prize". Mrs Decrey-Warner was a member of the Parliament of the Republic and Canton of Geneva for 12 years before being elected as its President in 2000. She is currently a member of the Board of the Interdisciplinary Programme in Humanitarian Action of the University of Geneva, a member of the Board of the Graduate Institute of Development Studies in Geneva and of the advisory Board of the Geneva Centre for the Democratic Control of Armed Forces (DCAF).

**Jacqueline Macalesher** is a member of the small arms and transfer controls team at Saferworld, where she has been working since 2005. She completed her Masters in International Law, specialising in Middle Eastern studies from the University of East London in 2003. Upon completion of her LLM she worked for the Labour Middle East Council in London, working on issues relating to the Israeli-Palestinian conflict, and as a member of the Indonesia and Timor-Leste team at Amnesty International. Since working for Saferworld, Jacqueline has written comprehensively on arms transfer regulation and policy, in particular with regard to the UK and the EU.

**Camilla Waszink** is a policy adviser in the Arms Unit of the Legal Division of the International Committee of the Red Cross (ICRC). She joined the ICRC in 2002, where she has acted as a focal point for National Red Cross and Red Crescent Societies on issues related to weapons and international humanitarian law. She has also been responsible for the ICRC's work on arms transfers and small arms availability. Before that, she worked as a researcher for the Small Arms Survey in Geneva, the Bonn International Centre for Conversion in Germany and the Program on Security and Development at the Monterey Institute of International Studies in the United States. She has written extensively on the humanitarian consequences of unregulated arms availability, small arms and light weapons control, post-conflict disarmament and the role of weapons in peace processes. She holds an MA in international policy from the Monterey Institute of International Studies and a BA in political science and law from the University of Oslo.

**Margit Bruck-Friedrich** graduated from the Vienna Law School (Master of Law) and the Fletcher School of Law and Diplomacy (Master of Arts, International Relations). She joined the Austrian Foreign Service in August 1991, after having completed the in-service training year at court. After one year with the directorate of disarmament as a delegate to the IAEA, followed by

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**Jürgen Altmann** studied physics and wrote a doctoral dissertation on laser radar (University of Hamburg, Germany, 1980). Following research work in computer pattern recognition, he has, since 1985, studied scientific-technical problems of disarmament, first concerning high-energy laser weapons, then European ballistic-missile defence. In 1988 he founded the Bochum Verification Project (Ruhr-University Bochum, Germany) which does research into the potential of automatic sensor systems for co-operative verification of disarmament and peace agreements. Experiments and evaluations dealt with acoustic, seismic, and magnetic signals from tanks, trucks, and military aircraft. Prospective assessment of new military technologies and analysis of preventive arms-control measures form another focus of his work. One area is non-lethal weapons, with a major study of acoustic weapons. Another project done for the Office of Technology Assessment of the German Bundestag (TAB) looked at the interactions between civilian and military technologies in aviation research and development. In recent years, Mr Altmann has studied military uses of first microsystems technologies and then nanotechnology, with a view towards preventive arms control (both at the University of Dortmund, Germany). His latest project has analysed potential new, physics-based technologies for non-lethal weapons.